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I. Scope of This Report

This report discusses the group five issues that form part of the seven-state workshop process created in order to address Qwest's compliance with the Section 271 Checklist of the Telecommunications Act of 1996. The issues addressed in this report were originally to be included as part of other subject groupings. However, the greater than expected number of issues to be addressed required that they be treated in separate workshops. This report addresses the following issues:

- General Terms and Conditions (which affect a broad range of Section 271 Checklist Items)
- Section 272 Requirements
- Track A Requirements

Group five issues originally included consideration of the public interest standard of Section 271(d)(3)(c), which provides that the FCC shall not approve a BOC's application to provide in-region, InterLATA service unless "the requested authorization is consistent with the public interest, convenience, and necessity." There had been uncertainty about how, if at all, these workshops would consider the post-entry assurance plan aspects of the public interest standard.

This uncertainty arose from the fact that the Qwest Regional Oversight Committee (ROC) was conducting, contemporaneously with but separate from these workshops, a Qwest Post-Entry Performance Plan Collaborative (the PEPP Collaborative), whose goal was to provide a structured negotiation process for creating a plan that would created inducements sufficient to assure that local markets would remain open should Qwest receive authorization to provide in-region InterLATA. Twelve state public services commissions, including all seven of those participating in these workshops participated in the efforts of the PEPP Collaborative. The efforts of the collaborative, which were both substantial and commendable, produced a lengthy list of agreements on issues, as well as an identification of a number of remaining areas of disagreement among the collaborative participants. Those participants included representatives from the participating commissions, Qwest, a large number of CLECs, and other stakeholders from the participating states.

After a number of workshops and other exchanges of plans, proposals, and information, Qwest announced, in May of 2001, its belief that further workshops would not be warranted. There issued then a report summarizing the progress of the PEPP Collaborative. Thereafter, the seven state commissions participating in these workshops, joined by the commissions of Nebraska and Washington, decided that these workshops would constitute an appropriate forum for addressing specifically the differences remaining from the PEPP Collaborative process, and, more generally, the relationship between Qwest's Performance Assurance Plan (filed with each state after the end of the PEPP Collaborative) and the public interest standard.

We scheduled and have since held two weeks of hearings on these post-entry assurance plan issues. Briefing is completed and a report on the Performance Assurance Plan issues

is scheduled to be issued in October of 2001. A review of the record and the initial briefs makes it clear that Qwest's Performance Assurance Plan is central to the consideration of the Section 271(d)(3)(c) standard. It is difficult to conceive how a coherent treatment of the public interest, convenience, and necessity can be made without consideration of Performance Assurance Plan issues. Therefore, we have decided to defer the treatment of the remainder of the public interest issues (all of which have been addressed in testimony, comments, and briefs in the workshop sessions covering the group five issues) to the October report.

The testimony and comments on the remainder of the public interest issues have been comprehensive. Main and reply briefs have fully argued all of the relevant issues. Moreover, the comments, testimony, and briefs on the Performance Assurance Plan are similarly comprehensive and thorough. Therefore, there will be no need or opportunity for further submissions prior to the issuance of that October report.

II. Disputed Issues And Recommendation Summary

A. Issue Carried Over From First Report

1. Landowner Consent to Agreement Disclosure

The first report recommended that CLECs be required either to: (a) obtain landowner consent, or (b) provide Qwest with indemnification before Qwest would be required to provide CLECs with the right of way agreements under which Qwest facilities occupied third-party property. It was decided to revisit this issue in connection with general terms and conditions issues. AT&T presented no new evidence or argument that would call into question the propriety of the recommendation as a means for assigning to CLECs the costs and risks properly associated with Qwest's providing them a service that is required by the FCC.

B. General Terms and Conditions Issues Remaining in Dispute

1. Comparability of Terms for New Products or Services

AT&T sought an SGAT provision that would oblige Qwest to offer new products and services under terms and conditions substantially in accordance with those applicable to existing, similar ones. There are already adequate provisions for assuring that the terms and conditions under which offers any required products and services comply with federal statues, FCC requirements, and state commission requirements. Including such a provision would add unneeded and unhelpful uncertainty to those provisions.

2. Limiting Durations on Picked and Chosen Provisions

AT&T objected to the SGAT provision that would limit the duration of any offerings made available through provisions allowing a CLEC access to the terms and conditions of offerings from another interconnection agreement to the duration of the agreement from which a CLEC might pick or choose such offerings. The Qwest limitation is, however, reasonable as a means for avoiding the indefinite extension of offerings whose prices or other terms are no longer reflective of current costs or other applicable conditions.

3. Applying "Legitimately Related" Terms Under Pick and Choose

AT&T objected to what it considered to be Qwest's abuse of its right to apply legitimately related terms and conditions to offerings that CLECs may pick and choose from other interconnection agreements. After changes made by Qwest to respond to this argument, the SGAT adequately provides: (a) that Qwest has the burden to prove the required relationship, (b) that Qwest must provide a written explanation, and (c) means for promptly and effectively resolving disagreements. There was no showing of a patterned abuse that would call for measures beyond these.

4. Successive Opting Into Other Agreements

AT&T objected to Qwest's refusal to allow a CLEC to opt into an interconnection agreement that was itself created by another CLEC's opting into a different agreement. This refusal is inappropriate because it denies CLECs their established rights to opt into any other effective agreement. The SGAT should be changed to preclude such a refusal.

5. Conflicts Between the SGAT and Other Documents

AT&T wanted to restrict substantially the ability of subsequent tariff changes to supersede SGAT provisions. XO raised a concern about conflicts between the SGAT and other documents more generally, i.e., not limited to tariff/SGAT conflicts. The SGAT already contains provisions that are adequate to control the impact of tariff changes on the SGAT; those provisions allow, as they should, a state commission to permit tariff changes to override SGAT provisions where the commission deliberately seeks to do so. Qwest changed the SGAT sufficiently to address an XO concern; the SGAT now contains a sound rule for assuring that other documents do not expand or contract rights and obligations established by the SGAT. The failure to make a CLEC's determination of any dispute controlling until resolution of the dispute is appropriate. Qwest must undertake the activities necessary to provide services to CLECs; therefore, it should have provisional authority to decide what kinds of operational rules and requirements it must use to do so, subject to eventual determinations about the propriety of those rules and requirements.

6. Implementing Changes in Legal Requirements

AT&T objected to an SGAT provision that would allow Qwest to stop immediately the provision of any product or service after a change in law removed Qwest's obligation to provide it. AT&T noted that the instantaneous approach would favor Qwest because it is easier to stop suddenly the provision of something than it is to develop the capability to provide a product or service newly made obligatory. Qwest proposed suitable language for promoting a reasonable transition when either an old obligation would end or a new one would begin as a result of changes in legal requirements. The Qwest proposed language also appropriately allowed for truing up to any later dispute resolution involving the change in requirements. The SGAT would address the AT&T concern insofar as it had merit, should Qwest agree to incorporate its proposed SGAT Section 2.2 language.

7. Second-Party Liability Limitations

AT&T commented that Qwest's liability to CLECs for damages under the SGAT was too limited. Part of the disagreement related to how payments under the PAP will be treated; those disagreements will be discussed in the next report in these workshops. Some of AT&T's comments or arguments confused second-party (i.e., CLEC) liability with third-party (e.g., end-users or members of the public) liability, and were, therefore, not appropriate for consideration in the context of the SGAT's second-party liability provisions, which were at issue here. However, the SGAT did inappropriately exclude liability for damage to second-party tangible property, and should be changed to correct this deficiency. The remaining issues were whether gross negligence is a proper standard of liability and where liability for fraud by customers should lie. The exclusion of gross

negligence as a standard (i.e., requiring willful or intentional conduct), as Qwest proposed, is appropriate under the commercial circumstances here. With certain changes, AT&T's approach to dealing with the customer fraud issue should be incorporated into the SGAT.

8. Third-Party Indemnification

AT&T commented specifically that Qwest should bear responsibility for damages that CLECs pay their own end users as a result of poor Qwest performance and, more generally, that the SGAT's indemnity provisions should be broadened to more closely mirror those found in competitive commercial settings. AT&T also argued for the creation of incentives to make Qwest, as a monopolist, more apt to perform adequately in serving CLECs. The question of incentives will be addressed in connection with the Performance Assurance Plan; the issue here should be limited to responsibility for damages. Qwest's SGAT limitations are generally consistent with the available evidence of what might be expected in a competitive marketplace. However, the SGAT should be amended to provide that Qwest will indemnify CLECs (and vice versa) for bodily harm and damage to tangible property that results from Qwest's negligence or intentional or willful conduct.

9. Responsibility for Retail Service Quality Assessments Against CLECs

XO commented that Qwest should bear responsibility for assessments that state commissions levy against a CLEC for meeting retail performance standards, in cases where Qwest failed to provide the CLEC with related wholesale services that met SGAT standards. Such an immutable rule is neither necessary nor appropriate. CLECs may argue questions of third-party responsibility for their failure to meet retail standards in proceedings that set or enforce such standards. Commissions can then decide on the basis of a full record, as opposed to the presumption that would be effectively created by XO, whether and what assessments should be levied against a CLEC.

10. Intellectual Property

AT&T presented SGAT language that it said would resolve its concerns about the mutual obligations of SGAT parties to deal with intellectual property issues. The frozen SGAT contained language largely incorporating AT&T's proposal; however, the lack of briefing made it difficult to determine whether this issue had been resolved to all parties' satisfaction. Absent comments to the individual commissions on this report, it should be assumed that such agreement has been reached.

11. Continuing SGAT Validity After the Sale of Exchanges

AT&T proposed a series of provisions that would apply should Qwest seek to sell exchanges: transferring SGAT obligations to the exchange purchaser, providing CLECs with prior notice of the sale, facilitating CLEC discussions with the transferee, and waiving objections to commission authority to impose SGAT obligations on the transferee or CLEC participation in commission proceedings. Qwest agreed to provide notice and to facilitate discussions. AT&T's proposal to require Qwest to waive objections to commission authority or to CLEC participation in commission proceedings

are against public policy and the normal rules of construction applicable to statutes conferring authority on state agencies. The SGAT should be changed to provide a short period during which the SGAT will continue to apply while the commission exercises any existing power it may have to examine and condition the transfer of exchanges by Qwest.

12. Misuse of Competitive Information

AT&T cited one instance from Minnesota of an abuse of competitive information to support a requirement that Qwest be made to offer a comprehensive showing that Qwest retail marketing personnel have no access to CLEC confidential customer information. The issue AT&T raised is very serious, but its evidence falls far short of proving a failure to meet Section 271 requirements or of supporting an extensive remedial plan. However, the record does not contain substantial evidence of what Qwest does to: (a) minimize the possibility of, (b) discourage, (c) detect, and (d) punish inappropriate contact by its resources. Therefore, in order to provide an adequate baseline for determining that adequate measures are in place, Qwest should within 30 days provide each state commission with a description of its programmatic efforts in these four key steps in controlling the use of sensitive customer information.

13. Access of Qwest Personnel to Forecast Data

AT&T argued that Qwest did not adequately identify the persons to whom access to individual CLEC forecast information (recognized by the SGAT to be sensitive) could be made available. XO and AT&T both objected as well to Qwest's refusal to restrict access to aggregated CLEC forecast data. The SGAT would properly limit access to individual CLEC forecast data, if it were to include a recommended limitation on access to that data by Qwest legal representatives. The SGAT should be interpreted as not allowing access to aggregated data to any population broader than that entitled to receive individual data. Moreover, the SGAT should be changed to require Qwest to take precautionary steps in cases where it is ordered to provide CLEC forecast data by a state commission.

14. Change Management Process

The process that Qwest calls CICMP constitutes the change management process that Qwest offers to comply with FCC requirements. Qwest was making significant changes to this process while the workshops took place. Therefore, the record did not allow an assessment of Qwest's compliance with FCC requirements applicable to change management processes. No constructive recommendations for the state commissions or, in turn, the FCC about CICMP can thus be made.

15. Bona Fide Request Process

AT&T raised three discrimination concerns about the SGAT bona fide request (BFR) process: (a) Qwest failed to show that it required a similar internal process when its end users asked for non-tariffed services, (b) Qwest did not provide CLECs with sufficient notice of the existence of prior, similar BFRs, and (c) there were no objective standards for standardizing products and services made available under repeated BFR requests. First, AT&T failed to demonstrate that there is an actual retail analogue for the BFR

process that CLECs use. Second, Qwest was unduly reluctant to provide CLECs with help that would serve to disclose what other CLECs have asked for through BFRs. This reluctance is inappropriate; Qwest has an obligation to make available to others what it has made available to one. The SGAT needs to be changed to provide a practical method for disclosing the terms and conditions of access to its network that Qwest has made available through BFRs. Third, the question of repeat BFRs of a similar nature is not a common one; Qwest had only received 17 BFRs in the more two and one-half years leading up to the workshops. The new SGAT language this report recommends to resolve AT&T's concern should help significantly in cases where another CLEC has already been granted a BFR in similar circumstances. No more has been shown to be required.

16. Scope of Audit Provisions

AT&T wanted to remove the SGAT provision that limited audits to billing information. The SGAT should be expanded to allow audits addressing compliance with requirements to protect confidential information that one party supplies to another. However, broadening them to other areas of Qwest operations is not only unduly intrusive, it is not necessary. The PAP workshop has considered what inducements, such as monetary payments and root cause analyses, are necessary to assure proper performance by Qwest. Allowing what amount to "performance" audits on top of these measures, could give CLECs very broad (and unreciprocated) access to information about how and how well Qwest performs activities that may give it a competitive edge.

17. Scope of Special Request Process

The SGAT allows the so-called "SRP" to be used as an expedited way to get access to UNE combinations about which there is no technical feasibility concern. AT&T asked that it be expanded to apply to all non-standard offerings for which technical feasibility is not in question. AT&T's request is appropriate; nothing in the record would support the conclusion that the SRP is only applicable in the case of UNE combinations. However, SGAT Exhibit F, which addresses the SRP, already appears to allow it to be used for more than just UNE combination requests.

18. Parity of Individual Case Basis Process with Qwest Operations

AT&T made the same argument here that it did in the case of the BFR process; i.e., Qwest discriminated against CLECs because there was no similar process Qwest used when addressing similar requests from its own customers. As was true in the BFR case, so here did AT&T fail to demonstrate that there is a proper retail analogue, thus making its parity argument inapt.

C. Section 272 Separate Affiliate Requirements

The record demonstrates that Qwest has met the each of the separate affiliate requirements established by section 272 of the Telecommunications Act of 1996. The issues resolved in making this recommendation are discussed immediately below.

Separate Affiliate

1. Separation of Ownership

No participant questioned the evidence Qwest presented to show that the ownership of Qwest Communications Corporation (QCC), which is the affiliate designated to provide in-region, InterLATA service, is sufficiently separated from that of the BOC, which is Qwest Corporation (QC).

2. Prior Conduct

AT&T said that three prior instances, in which the FCC had found Qwest to be providing improperly services that constituted in-region, InterLATA services, demonstrated a substantial and predictive history of Qwest's non-compliance with Section 272 requirements. AT&T's examples do not show that Qwest either fails to understand the need for a separate affiliate. Therefore, there is no reason to predict from these examples that Qwest, after having established a separate subsidiary, will fail to operate it in accord with applicable requirements.

Books and Records

The record here gives rise to a substantial concern about the sufficiency of recent Qwest efforts to begin compliance with transaction-related requirements of section 272(b)(2). Therefore, Qwest should provide by November 15, 2001 the results of a third party examination to verify that those changes are now producing an accurate, complete, and timely recording in its books and records of all appropriate accounting and billing information associated with transactions between the BOC and the 272 affiliate. This examination should cover the months from April through August of 2001. This recommendation arose from comments and arguments made in six areas (discussed immediately below) related to the Section 272(b)(2) books and records requirements.

1. Generally Accepted Accounting Principles

AT&T conducted a review of the records of transactions between the BOC and the 272 affiliate. This examination produced a number of findings that Qwest failed to make timely records, accruals, and payments for a number of transactions. While Qwest was able to demonstrate that a number of AT&T's findings were invalid, some were not responded to and Qwest conceded that there were at least what it would term "isolated instances" and insignificant failures to bill or accrue relevant expenses on a timely basis. Much of Qwest's argument focused on how it accounted for transactions from and after the date of its designation of an entity as a Section 272 affiliate. This argument misses the mark; what is more interesting is whether Qwest's past conduct gives rise to concerns about its ability to keep books and records in accord with applicable requirements. Qwest made a showing that it has recently undertaken substantial efforts to assure that its keeps such books and records. There is not substantial evidence to demonstrate that those measures are yet fully effective.

2. Materiality

The discussion of the books and records issue here was not aided by arguments about the accounting profession's use of the term "materiality." The examination recommended here should apply the materiality standard, but limit it to the universe of transactions between the BOC and the 272 affiliate for the April-August 2000 time period.

3. Documentation

AT&T argued that Qwest's decision to stop posting to its web site the details of specific transactions with the Section 272 affiliate violated the FCC's public-notice requirements. However, AT&T overstated the requirement, which extends only to providing sufficient detail to permit a non-affiliated entity to make a business decision about whether to avail itself of the right to take under the same terms and conditions the same services being provided to the Section 272 affiliate. The kind of detail that AT&T sought is not necessary for this purpose. Moreover, the recommended examination would address whether the postings Qwest made during the period covered are sufficient and accurately reflective of the terms and conditions actually made available.

4. Internal Controls

AT&T said that the instances found in the examination described under the *Generally Accepted Accounting Principles* discussion above also showed a lack of sufficient internal controls. The recommended examination would test the adequacy of internal controls in the wake of the changes that Qwest says it has made recently.

5. Separate Charts of Accounts

AT&T said that it had difficulty in finally securing from Qwest charts of accounts for the BOC and 272 affiliates. AT&T did get the charts; thereafter it made no argument that it found any problem with them. Its argument that the difficulty in obtaining them, the source or duration of which was not explained, shows Qwest's lack of diligence in meeting the separate charts of accounts requirement, rests upon an inference that is not supported by the facts it presented.

6. Separate Accounting Software

AT&T said that it found no evidence of the use of separate accounting software by the BOC and the 272 affiliate. None is required; AT&T also acknowledged that the different Qwest entities have separate accounting codes to keep their records separate. There is no evidence to support a conclusion that the accounting of the affiliates is inadequately separated.

Separate Officers, Directors, and Employees

AT&T made a number of arguments, addressed below, that Qwest failed to meet the requirements applicable to the separation of officers, directors, and employees between the BOC and the 272 affiliate. The evidence, however, demonstrates that Qwest has complied with the applicable requirements.

1. Routine Employee Transfers

AT&T said that the "revolving door" atmosphere between Qwest affiliates has produced employee movements that subvert the purpose of the Section 272(b)(3) that the 272 affiliate have separate employees. First, the standard explicitly set forth is simultaneous employment, not transfers of employment from one affiliate to another. Second, the record comes nowhere near demonstrating a free and massive movement back and forth between the BOC and the 272 affiliate. Third, Qwest produced evidence of reasonable efforts, whose existence and sufficiency were not challenged, to protect the confidentiality of information upon the transfer of employment.

2. 100 Percent Usage of Another Affiliate's Employee's Time

AT&T argued that many individuals employed by the BOC, assigned all of their time to the 272 affiliate, thus subverting the purpose of Section 272(b)(3). Time-sharing per se is not pernicious; in fact, it is a central element of the allowable sharing of services among affiliates. However, long-term assignment of all an employee's time to an affiliate can raise concerns in some cases. Qwest has agreed to limit full-time assignments to no more than 4 of any 12-month period, which constitutes an adequate way to mitigate such concerns.

3. Award Program Participation

AT&T cited 272-affiliate employee participation in an award program available to BOC employees as evidence that Qwest had compromised the independent operation of the two entities. AT&T did not fully explain the nature of the award program. However, the evidence that AT&T did provide ran counter to AT&T's stated concern, which was that the program would induce an employee of one company to spend significant amounts of time in the service of an affiliate.

4. Comparing Payroll Registers

Qwest provided a recent comparison of BOC and 272 affiliate payroll registers; there was agreement that it showed no overlap. However, AT&T said that the failure of Qwest to have performed such comparisons previously meant that it could not verify non-overlap for earlier time periods. The evidence of record demonstrates no overlap, a commitment by Qwest to preclude overlap, and a reasonable basis for expecting future Qwest efforts to control overlap appropriate. No more is or should be required.

5. Separate Payroll Administration

AT&T argued that common payroll administration for the BOC and the 272 affiliate was inappropriate. This argument is unsound. The FCC, in recognition of the fact that companies such as Qwest (and AT&T for that matter) should be able to exploit economies of scale and scope, specifically allows common services, except in certain cases not relevant here.

6. Officer Overlap

AT&T raised concern about an employee who, after the merger, moved from being a 272-affiliate officer to becoming a director of the BOC. Qwest presented evidence sufficient to demonstrate that this employee was never in violation of the applicable requirements against simultaneous service for the BOC and the 272 affiliate. Moreover, no inference about inattention to the goals of separation can be properly drawn from the case of a single officer changing roles as a merger was being implemented.

Transaction Posting Completeness

1. Posting Billing Detail

AT&T objected to the decision Qwest recently made to stop posting transaction details to its web site. The transaction detail that AT&T sought is not necessary to allow an informed choice about whether to take services. Moreover, the purpose of posting is not to provide in a public forum every piece of information that may be necessary to establish parity of treatment.

Qwest does make monthly posting of transaction true up data, it allows the observation of transaction details after execution of a nondisclosure agreement, and the examination recommended above would verify that the posted information conforms to the actual terms and conditions under which an affiliate has been served. These factors support a conclusion that Qwest's transaction postings will be sufficiently complete and detailed.

2. Initiation of the Posting of QCC Transactions

There was a great deal of contradictory evidence and argument about when QCC (the currently designated Qwest in-region, InterLATA service provider) became the 272 affiliate. The evidence shows that Qwest accepts the obligation to post now and into the future and the recommended examination will test whether its recent posting has been sufficient. It serves no useful purpose to argue about past circumstances that clearly involved a transition that Qwest was making from one designated 272 affiliate to another.

3. Indefinite Service Completion Dates

A number of posted Qwest agreements have indefinite completion dates, which AT&T says is in violation of FCC requirements that a project whose terms and conditions are posted include a time length or an estimated completion date. This argument ignores the plain and common reality that service agreements often allow for continuation until cancellation notice is provided by one of the parties. There is no reason to conclude that the FCC intended to prohibit forms of agreement that are commonly used in commercial settings. AT&T has provided no evidence that, for services truly constituting a "project" or for services that do have definite end dates, Qwest has failed to post them. No more should be required.

4. Verifications

AT&T found a BOC verification of transaction certification that was signed by an officer of the designated 272 affiliate, not by an officer of the BOC, as required. This instance confirms the existence of difficulties in Qwest's treatment of 272 issues during its post-merger transition to a newly designated 272 affiliate. Those difficulties led to the April-August 2001 period examination recommended earlier. That examination's scope includes confirmation that a BOC officer has the requisite knowledge to make the required certifications and will do so. No further actions are required, nor, in the event that such confirmation is provided, should it be concluded that Qwest is unlikely to meet the requirements of section 272 in the future.

Non-Discrimination

AT&T used the same findings from its examination of Qwest's books and records (primarily those relating to the failure to make timely payments) to support an argument that Qwest cannot meet the non-discrimination test of section 272(c)(1). That issue would be included in the examination recommended earlier. AT&T also said that Qwest has not committed to a number of items that the FCC has said are important in assessing compliance with this statutory requirement. This position ignores a number of other occasions in prior workshops where issues of discrimination were considered and the specific and general commitments Qwest made in this workshop regarding the discrimination requirements of section 272(c) and (e). Together they provide a basis for concluding that there are adequate measures to assure that Qwest does not discriminate in favor of its 272 affiliate.

Compliance With FCC Accounting Principles

AT&T's argument that Qwest fails to comply with the section 272(c)(2) requirement to account for all transactions in accord with FCC approved accounting principles, arises from the same instances it cited to prove lack of compliance with Generally Accepted Accounting Principles and the lack of adequate internal controls. The earlier treatment of those issues and the recommendations related thereto are equally applicable to the argument made here.

D. Track A Requirements

Satisfaction of the Track A provisions of 47 U.S.C. § 271(c)(1)(A) requires answers to four questions:

- Whether there are binding agreements approved under section 252
- Whether Qwest is providing access and interconnection services to CLECs
- Whether CLECs are providing telephone exchange service to residential and business customers

- Whether those providers are offering service over their own facilities (including UNEs leased from Qwest) or predominantly over their own facilities in combination with resale services.

As is described more fully below, Qwest's evidence demonstrates that it meets all of the requirements of Track A in all seven of the participating states, with two exceptions:

- Qwest has not presented substantial, credible evidence that CLECs are serving residential end users in Idaho
- Qwest has not presented substantial, credible evidence that CLECs are serving residential end users in New Mexico

1. Existence of Binding, Approved Interconnection Agreements

Qwest presented evidence demonstrating the existence of over 400 interconnection agreements in the seven states totally, with no fewer than 39 agreements in any single state. There was some evidence that some of the carriers do not do business under these agreements at present, but no participant questioned the widespread existence of agreements meeting the applicable test.

2. Provision of Access and Interconnection to Competitors

Qwest presented evidence demonstrating that it is providing access and interconnection in each of the seven states, to at least six CLECs in each. Qwest's evidence showed that it was providing from 2,000 to over 100,000 unbundled loops to CLECs in each of the seven states. This evidence specifically demonstrates Qwest's compliance with this aspect of the Track A standard, and was unchallenged by any participant.

3. Existence of Competing Providers of Residential and Business Service

Qwest presented evidence that CLECs in fact were providing service in each of the seven states to residential and commercial customers. Qwest offered evidence quantifying the number of unbundled loops it has been providing to CLECs as evidence of the number of access lines served by CLECs. It supplemented that evidence by providing an estimate of CLEC access lines served through loops that bypass Qwest's loop plant entirely. It based that estimate on the amount of numbers it was porting. Qwest adjusted that estimate downward by cutting the ported numbers in half (to allow for customers who initially migrated to a CLEC, but who then discontinued service from that CLEC) and by adjusting for the unbundled loop numbers (to avoid double counting). Qwest made no effort at all to estimate the number of access lines CLECs were serving through numbers not ported from Qwest.

Qwest buttressed this quantitative evidence by presenting what it knew from its generally obtained knowledge and responses from data requests issued to CLECs participating in these workshops. This evidence provided qualitative indications of which CLECs were serving residential or business customers in each of the seven states.

AT&T made arguments that appeared to suggest some required level of CLEC market share, but it did not specify what that was. There is in fact no market share test, and the

numbers presented in Qwest's combined actual and estimated access line counts are sufficient to meet the test, provided that the numbers are adequately substantiated.

AT&T criticized Qwest's estimating method, but it is clearly more conservative than one already considered by the FCC in determining another BOC's satisfaction of this test. The Qwest method is unsophisticated, but it applied a reasonable assumption that there is a relationship between numbers ported and access lines, it used reasonably conservative assumptions to measure that relationship, and it also did not consider an entirely separate source of CLEC access line numbers (i.e., those served by bypass and without number porting). The Qwest method was sufficient to make a prima facie case; thus, the AT&T attack upon it, without the presentation of any contrary evidence or of any factual evidence to support its attack, was not persuasive.

There was, however, one aspect where Qwest's evidence was not persuasive. It used a particularly rough means for segregating its unbundled loop counts and access line estimates between residential and commercial service. That method will serve adequately as a way to apportion lines when there is other evidence that CLECs are serving residential customers. However, it is too rough to serve as independent proof that any residential customers at all are being served. Qwest's independent evidence of service to residential customers consisted of the qualitative evidence it presented. There was no specific evidence offered to show that any CLEC served residential customers in Idaho and New Mexico. There was evidence of residential service by CLECs in the other five states. Therefore, it can be concluded that Qwest has failed to show that CLECs are providing residential service in New Mexico and Idaho.

4. Existence of Facilities Based Competitors

Qwest's evidence supporting fulfillment of this aspect of the Track A standard was combined with its evidence regarding the immediately preceding one. There was no specific CLEC contest of compliance with this aspect. Qwest has provided evidence sufficient to support a conclusion that it meets the facilities-based competition standard, subject to the previously noted conclusion about service to residential customers in New Mexico and Idaho.

III. General Terms and Conditions

A. Background – General Terms and Conditions

Qwest's Statement of Generally Available Terms and Conditions (SGAT) is an offer for an agreement between Qwest and any requesting CLEC.[1] Section 5 of Qwest's SGAT contains the general terms and conditions governing the relationship between the CLEC and Qwest. While these general terms and conditions are not part of a checklist item under the Act, they "are an integral part of how Qwest purports to implement its specific checklist requirements identified in the SGAT sections…"[2] A review of general terms and conditions was not initially included in this multistate proceeding, but was added to the agenda later to when it became clear that this topic was important.

B. Issue Carried Over from First Report

1. Landowner Consent to Agreement Disclosure Issue

There was a request to revisit the proposed resolution of the third unresolved *Checklist Item 3: Access to Poles, Ducts, Conduits and Rights of Way* issue (*Access to Landowner Agreements*) from the March 18, 2001 *Paper Workshop Issues* report in these workshops. AT&T had asserted that CLECs must sometimes have access to the agreements that Qwest has with private landowners and building owners, in order to determine the scope of Qwest's ownership and control. The parties disagreed about whether landowners should have to give consent before Qwest may disclose to CLECs the agreements that give Qwest permission to occupy their property. The proposed resolution of that issue in the earlier report was to require the addition to the SGAT of a new Section 10.8.4.1.3.1, as follows:

> *Alternatively, in order to secure any agreement that has not been publicly recorded, a CLEC may provide a legally binding and satisfactory agreement to indemnify Qwest in the event of any legal action arising out of Qwest's provision of such agreement. In that event, the CLEC shall not be required to execute either the Consent to Disclosure form or the Consent Regarding Access Agreement form.*

Qwest's comments to the individual commissions on this report accepted this resolution. Qwest subsequently stated that it continued to support the report's resolution of this issue. AT&T recommended an alternate approach, which this report will now consider. AT&T commented on its proposal on June 20, 2001. It said that a separate indemnification provision for this purpose was not appropriate; the general SGAT section on indemnification should apply. AT&T commented that neither party was in a position to assure that there would be no "frivolous law suits" by landowners claiming

[1] Rebuttal Testimony of Larry Brotherson, p. 2.
[2] AT&T's Closing Brief on General Terms and Conditions, p.3

confidentiality with respect to their agreements to provide access to their property for Qwest facilities. Therefore, it would be inappropriate to place the entire burden on CLECs for bearing the costs of such litigation.

Proposed Issue Resolution: There are several problems with AT&T's argument. First, it shifts between two mutually inconsistent grounds: (a) that there are few or no occasions where landowners will have protected rights, thus suggesting that Qwest should bear the risks involved, and (b) that CLECs will face extensive competitive barriers if they have to bear the risk of defending these lawsuits that will virtually always be "frivolous," according to AT&T.

AT&T is probably correct in defending the first ground. If it is, then its argument that there will be a veritable flood of foolish litigation has no support in the record or in manifest common experience. However, let us assume that AT&T is correct in saying that the costs of these lawsuits could be large. We still face the problem of why that is a reason for saying that Qwest should bear those costs, lest we impose "chilling" and anti-competitive barriers on CLEC market entry. It will cost a negligent CLEC much more to pay for rebuilding a central office where the CLEC's negligence with respect to collocated facilities causes the office's destruction. To take another example, a collocation may cost a CLEC several hundred thousand dollars, or perhaps only a small fraction of that amount. How much the costs of that service are does not bear on the question of who should pay them. High cost collocations pose a substantially greater economic barrier than we are talking about here; yet there is no question there that CLECs should pay the costs that they cause Qwest to bear.

The material question to ask is not how much the costs are or what the risks entail, but who has caused the costs to be incurred or the risks to arise. The 'causer' should pay the costs and that principle does not at all depend on what the magnitude of the costs or risks may be. It is profoundly clear from AT&T's comments that it considers lawsuits to be a risk of doing business. There is no merit in placing them at the feet of Qwest. Those who want Qwest to provide the information should bear the risk. Two acceptable CLEC options for managing those risks have been provided: (a) get landowner releases, or (b) give Qwest relief if the CLEC finds the first option burdensome. In any competitive vendor/customer marketplace, it would be inconceivable to expect the vendor to bear uncompensated risks. Asking CLECs to find a way to bear and mitigate risks associated with a service (the provision of information that Qwest is unquestionably required to offer them) perfectly mirrors what would be expected in normal commercial circumstances.

The AT&T argument that this matter could have been dealt with by reference to the SGAT's indemnification provisions (Section 5.9) ultimately proved to be disingenuous. This indemnification language applies to third-party actions arising from an SGAT signatory (whether Qwest or a CLEC) action that constitutes a "breach of or failure to perform" an SGAT obligation. The landowner claims at issue here would actually arise from full compliance with the applicable SGAT obligation, which is for Qwest to provide the agreements to CLECs. Thus, melding this issue with other indemnification questions is merely another way of accomplishing indirectly what the prior report recommended

against in the first place, which is to transfer to Qwest full responsibility for risks that Qwest must reasonably take to provide a service to CLECs.

To conclude, AT&T: (a) first overstates, as is clear from its own implicitly self-contradictory assertions, the magnitude of the risks at issue, and (b) second, diverges from the sound rule that the costs borne directly and reasonably to provide a service should flow not to the service's provider, but to its beneficiary. The initial recommendation remains appropriate.

C. Issues Resolved in this Workshop – General Terms and Conditions

1. SGAT Amendment Process

SGAT Section 1.7 provided that Qwest could modify the SGAT at any time, even after Commission approval.

Both AT&T[3] and XO[4] objected to this language, arguing that it permits unilateral SGAT amendment without Commission approval. In response, Qwest agreed to delete the existing language and replace it with the following:

> *Any modification to the SGAT by Qwest will be accomplished through Section 252 of the Act.*[5]

AT&T did not comment on this changed language, which addresses the unilateral amendment issue, it in its Supplemental Response, or in its closing brief. XO did not brief the issue either. This issue can be considered closed.

2. Implementation Schedule

SGAT Section 3.0 imposes specific requirements on CLECs for placing orders for service. XO commented that this section assumes that the parties have no prior relationship.[6] The SGAT requires CLECs to complete a "CLEC Questionnaire" even if the parties are operating under a prior agreement. XO suggested that this section should be modified to permit parties operating under a prior agreement merely to amend any prior implementation schedule, including completion of the Questionnaire.

AT&T[7] said that Section 3.1 required parties to "negotiate" an implementation schedule. Second, AT&T argued that the need for an implementation schedule was not clear, especially for a CLEC that had been doing business with Qwest for a number of years. Finally, AT&T noted that the elements of the CLEC Questionnaire should be identified in the SGAT so that the information that Qwest might seek is fixed for the term of the SGAT.

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[3] AT&T's Initial Comments on General Terms at Conditions (AT&T Comments) at 10.
[4] Response Testimony of David LaFrance on Behalf of XO Utah, (XO Response) at 8.
[5] Rebuttal Testimony of Larry B. Brotherson (Brotherson Rebuttal) at 5-6.
[6] XO Response at 8-9.
[7] AT&T Comments at 20-22.

Qwest agreed to remove the implementation schedule requirements from this section. It also agreed that a CLEC with an existing interconnection agreement would not need to complete the new customer CLEC questionnaire.[8] Neither AT&T nor XO briefed this issue. It can be considered closed.

3. SGAT Definitions

AT&T noted that Qwest's direct testimony did not contain Section 4 of the SGAT; therefore, the parties had no opportunity to review the current form of definitions in the SGAT.[9] Qwest filed this SGAT section as part of Brotherson's Rebuttal Testimony (Exhibit LBB 1). No further comment was made by any party on this section, with the exception of section 4.24(a) which sets forth the definition for individual case basis (ICB), addressed later in this report. This issue can be considered closed, subject to the later discussion herein addressing ICB issues.

4. Discontinuance of Specific Services

XO commented that, while SGAT Section 5.1.3 should allow either party to discontinue a specific service or circuit that is causing interference on the other party's network, this provision was too broad, because it allowed discontinuance for any level of interference.[10] Qwest agreed to modify the section to address XO's concern.[11] XO did not brief this issue. AT&T offered language to change this section also. AT&T commented that Qwest should attempt to resolve issues through good faith negotiation before unilaterally discontinuing service.[12] Qwest did not respond directly to this proposal, but did offer modified language for this section. AT&T did not raise this issue again and did not discuss this section in its closing brief. This issue can be considered closed.

5. Term of Agreement

AT&T suggested that SGAT Section 5.2.2.1 implied that the SGAT could only be replaced at the end of the two-year term. AT&T noted that this interpretation would create an inconsistency with rights under section 251(i) of the Act, and suggested language changes. Qwest agreed that there was an inconsistency, and deleted the section.[13] This issue can be considered closed.

6. Proof of Authorization

XO stated that state commission and FCC rules already address requirements for proof of authorization to change service providers; therefore it was unnecessary to include them in the SGAT.[14] AT&T made a similar comment, and suggested a language change to

[8] Brotherson Rebuttal at 14-15.
[9] AT&T Comments at 22.
[10] XO Response at 9
[11] Brotherson Rebuttal at 19.
[12] AT&T Comments at 23-24.
[13] Brotherson Rebuttal at 18.
[14] XO Response at 9.

section 5.3.1.[15] Qwest agreed to this proposal, but also added section 5.3.2 to give effect to AT&T's language. Qwest noted that these changes would address XO's concerns as well.[16] No participant addressed this section in the briefs; the issue can be considered closed.

7. Payments

SGAT Section 5.4 set forth the terms for payment of charges due under the SGAT. Section 5.4.2 permitted Qwest to discontinue processing orders after a CLEC failure to make full payment within 30 days of a bill's due date. AT&T proposed two language changes: (a) to extend the time period from 30 to 90 days, and (b) to require Qwest to seek Commission approval to disconnect in the event of a dispute.[17] Qwest did not agree in its testimony to either change. It stated that it was entitled to payment on time and should not have to wait nearly three months from the time it provided service for payment. Qwest also did not agree to the Commission review requirement. It commented that CLECs with good faith disputes could use the dispute resolution section of the SGAT.[18] The frozen SGAT does reflect a change to require a 10-day notice before the cessation of order processing and it specifically preserves the rights to secure relief from the decision to stop processing orders.

Both XO[19] and AT&T expressed concerns about section 5.4.3. Under this section, Qwest could disconnect service for failure to make full payment, less any disputed amounts, within 60 days of the due date on CLEC's bill. AT&T suggested that this period be extended to 120 days. Qwest rejected this proposal, saying that the change would guarantee a six-month revenue loss to Qwest. Qwest also rejected an AT&T proposal that would require Commission approval before disconnection.[20] The frozen SGAT reflects a changed to require a 10-day notice before the service disconnection and it specifically preserves the rights to secure relief from the decision to disconnect.

Qwest did agree to proposed AT&T language that added the words "under this agreement" to sections 5.4.2 and 5.4.3. This change had the effect of limiting charges for which disconnection could be made to those involved in this specific agreement.

AT&T also suggested that the 30-day time period in 5.4.4 for a party to identify problems with a bill be extended to six months. Qwest did not agree to this change.

AT&T also commented that Qwest should change SGAT Section 5.4.6 to provide that the conditions for return of deposits consider only the payment of undisputed amounts. The frozen SGAT reflected this change.

Qwest made substantial changes to address most of the comments and no participant briefed any issues on which Qwest declined to make requested changes. This issue can be considered closed.

[15] AT&T Comments at 26-27.
[16] Brotherson Rebuttal at 19.
[17] AT&T Comments at 27-29.
[18] Brotherson Rebuttal at 21.
[19] XO Response at 9-10.
[20] Brotherson Rebuttal at 21-23.

8. Taxes

AT&T stated that SGAT Section 5.5 was unbalanced, because it seemed to require that almost all taxes be paid by the CLEC. It proposed language changes to the SGAT to require the party who is responsible under applicable law to pay the applicable taxes.[21] Qwest countered that AT&T's reading of this language was incorrect, and stated that the SGAT calls for "no more than is required by applicable law".[22] However, Qwest did agree with AT&T that the result of the section should be to require the responsible party (under applicable law) to pay the given tax. Qwest suggested modifications to meet AT&T's concerns. These modifications, set forth in the Brotherson rebuttal testimony, were later incorporated into the frozen SGAT. This issue can be considered closed.

9. Insurance

AT&T and XO raised concerns about the insurance provisions of SGAT Section 5.6. XO commented that: (a) insurance should be part of an interconnection agreement, not the SGAT, (b) if this general provision remained in the SGAT, some type of limitation should be included, and (c) the provision should be made reciprocal.[23] Qwest said that because the SGAT offers terms and conditions for collocation and access to poles, ducts and rights of way, the insurance section is an essential term. Furthermore, Qwest did not want to be obliged to determine whether a CLEC had insurance whenever it entered Qwest's premises. Resolution of that question should instead be accomplished at the beginning of the relationship. [24] The frozen SGAT makes the insurance obligations reciprocal.

AT&T made several proposals for language changes to this section. AT&T would add Section 5.6.1 language that would permit a captive insurance company to provide coverage.[25] The frozen SGAT allows this option. AT&T also suggested that the word "business" be substituted for "comprehensive" in section 5.6.1.3. Qwest agreed to this change. In section 5.6.1.5, AT&T struck the sentence that relieved Qwest of liability for loss of profit or revenues for business interruption, and suggested that this be addressed in the indemnification provision. Qwest agreed that this exclusion is addressed elsewhere, and placed a reference to that provision into this section of the SGAT.

AT&T offered several clarifying changes to Section 5.6.2. The changes made to the language involving the date for providing a certificate were acceptable to Qwest, as was the modification of language naming Qwest as an additional insured. Qwest partially agreed to a proposal to change Section 5.6.2 (3) and (4) were partly agreed to by Qwest.

Qwest changed the SGAT section to address most of the comments made. No participant briefed any insurance issue disputes. This issue can be considered closed.

[21] AT&T Comments at 30.
[22] Brotherson Rebuttal at 24.
[23] XO Response at 10.
[24] Brotherson Rebuttal at 27.
[25] AT&T Comments at 30-32.

10. Force Majeure

SGAT Section 5.7 listed the external events or occasions that may relieve a party from liability for failure to perform its obligations. Both XO[26] and AT&T[27] asked Qwest to remove "equipment failure" from the list. Qwest agreed to eliminate that term from Section 5.7. XO also asked that "government regulations" and "inability to secure products or services of the other persons" be excluded from the force majeure provisions. Qwest responded that it was not appropriate to remove these two items from the list, but it did qualify the entitlement to claim force majeure conditions in the case of third party products, services, or transportation. This issue can be considered closed.

11. SGAT Section 5.11 – Warranties

AT&T offered a change to SGAT Section 5.11, which dealt with warranties, in order to make it consistent with warranty language proposed for section 5.10. This change would add the phrase "Except as expressly set forth in this agreement…" to qualify the general disclaimer against express or implied warranties.[28] The frozen SGAT incorporates the requested change. This issue can be considered closed.

12. Nondisclosure

Section 5.16, the SGAT's nondisclosure section, deals with the handling of confidential and proprietary information. Nondisclosure with respect to CLEC forecasts (Section 5.16.9 of the SGAT) is addressed in the disputed issues section of this report under "*Access of Qwest Personnel to Forecast Data*". AT&T suggested changes to Section 5.16.1. First, it wanted to include "business and marketing plans" as information that need not be marked confidential in order to be subject to the protections of this section.[29] AT&T also asked that Qwest add new language to this section in order to provide a 30-day period for identification of proprietary information. AT&T proposed that language be added to section 5.16.3 to address in greater detail the circumstances and protections that confidential information require. Qwest responded that AT&T has provided no compelling reason for its proposed changes, and did not agree to change the SGAT. AT&T proposed language for section 5.16.5 that would further explain when confidential information may be disclosed for regulatory and enforcement purposes. Qwest agreed to this proposed change, and revised the SGAT accordingly. AT&T also proposed that a new subsection be added to this section in order to allow a party to seek equitable relief to enforce confidentiality obligations. Qwest agreed to accept this new section with minimal changes. The new section is numbered 5.16.7.

The frozen SGAT made changes that address virtually all of the comments made. No participant briefed this issue, which can therefore be considered closed.

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[26] XO Response at 10-11.
[27] AT&T Comments at 32.
[28] AT&T Comments at 43.
[29] AT&T Comments at 46-47.

13. Agreement Survival

AT&T proposed a change to section 5.17.1 to account for the possibility that the SGAT may expire or terminate before or after the two-year term of the Agreement.[30] Qwest agreed to make this change.[31] This issue can be considered closed.

14. Dispute Resolution

XO commented that limiting the SGAT Section 5.18 dispute resolution provision to mediation and arbitration under American Arbitration Association processes would foreclose the option of seeking resolution dispute from the Commission.[32] Qwest responded that XO incorrectly read the language, which made it clear that parties "may" demand that the dispute be settled by arbitration, but does not limit the parties to this option.[33] AT&T offered a complete revision to this section. AT&T stated that the parties required a detailed process to follow in the event of a dispute, and proposed language.[34] The frozen SGAT reflects a substantial rewrite of this SGAT Section, incorporating many of the suggested AT&T changes. No participant briefed this issue, which, therefore, can be considered closed.

15. Controlling Law

AT&T commented that the federal law applicable to the SGAT under Section 5.19 should not be limited to the Telecommunications Act of 1996.[35] Qwest agreed to a change that would make "federal law" generally applicable.[36] This issue can be considered closed.

16. Notices

SGAT Section 5.21 governs notices to the parties. AT&T suggested two additional methods for providing notice: personal delivery and overnight courier.[37] Qwest agreed that these changes are reasonable, and revised the SGAT accordingly.[38] This issue can be considered closed.

17. Publicity

XO argued that SGAT Section, which addresses publicity, was overbroad because it might be read to the consent of another party to issue public statements about Commission or judicial proceedings.[39] Qwest agreed conceptually to XO's proposed

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[30] AT&T Comments at 50.
[31] Brotherson Rebuttal at 55.
[32] XO Response at 12.
[33] Brotherson Rebuttal at 59.
[34] AT&T Comments at 50.
[35] AT&T Comments at 51.
[36] Brotherson Rebuttal at 59-60.
[37] AT&T Comments at 52.
[38] Brotherson Rebuttal at 60-61.
[39] XO Response at 12.

change, and offered new language, which is contained in the frozen SGAT.[40] This issue can be considered closed.

18. Retention of Records

AT&T proposed a new SGAT section that would require Qwest to retain records under the SGAT for at least five years.[41] This provision would require Qwest to retain documents and other data for at least five years. Section 18.2.7 of the frozen SGAT requires the retention of SGAT transaction documents for 24 months. No party briefed this issue, nor is there any reason to contest the sufficiency of 24 months as a retention period, particularly given the large number of records likely to be created in the course of Qwest transactions with many CLECs. This issue can be considered closed.

19. Network Security

XO suggested that SGAT Section 11.3 be made reciprocal.[42] Qwest agreed and modified the section accordingly.[43] This issue can be considered closed.

D. Issues Remaining in Dispute – General Terms and Conditions

1. Comparability of Terms for New Products or Services

At the workshops, AT&T proposed a new SGAT section, which it had not previously noted in its pre-workshop filings. AT&T proposed new Section 1.7.2, which would require that Qwest offer new products and services on substantially the same rates, terms and conditions as existing products and services when the new and existing products and services were comparable.[44] AT&T did not brief this issue.

Qwest did brief the issue, opposing the new section on numerous grounds: (a) that SGAT Section 5.1.6 already obligated Qwest to price new products and services in accordance with applicable laws and regulations, (b) that under the CICMP process, Qwest is obligated to allow CLEC input on new products before formally introducing them,[45] (c) that Qwest's rates are already subject to review public service commissions under section 252(f)(2) of the Act, and (d) that the terms "comparable products and services" and "substantially the same rates, terms and conditions" are so vague as to invite lengthy and difficult to resolve disputes.[46]

Proposed Issue Resolution: There are already established standards and methods for resolving disputes related to the terms and conditions that Qwest may apply to offerings under its SGAT. Those standards are adequate to assure that such terms and conditions comport with Qwest's obligations under the Act and FCC requirements. Those methods are also sufficient to allow for a resolution of disputes in a timely and effective manner.

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[40] Brotherson Rebuttal at 63.
[41] AT&T Supplemental Response at 8.
[42] XO Response at 12.
[43] Brotherson Rebuttal at 65.
[44] June 28, 2001 Transcript at page 37.
[45] SGAT § 12.2.6. and June 28, 2001 Transcript at page 38.
[46] Qwest GT&C Brief at pages 3 to 6.

AT&T's proposed SGAT section would introduce substantial uncertainty over the applicability of those standards and those methods. AT&T indicated that comparability to other SGAT offerings should be the primary focus of disputes about terms and conditions for products or services added to the SGAT. Such comparability would, at best, be a secondary evidentiary indicator of compliance with statutory and regulatory standards; never should it replace those standards as the test for resolving disputes. Moreover, there is no reason on this record to support any conclusion that the existing methods by which disputes over the terms and conditions of SGAT offerings should be altered.

Therefore, changing the SGAT as recommended by AT&T would introduce uncertainty and complexity in a type of situation that is already adequately addressed by the SGAT.

2. Limiting Durations on Picked and Chosen Provisions

AT&T argued that it was improper for Qwest to limit CLEC access to provisions selected from other CLEC agreements to the termination date of the agreement from which the provisions were selected. AT&T argued that the FCC has set three conditions that Qwest may apply to limit CLEC "pick and choose" rights, none of which supports this limitation. AT&T argued that the three cases where Qwest is allowed to offer terms and conditions other than what the original CLEC acquired are: (a) where the service would cost more than it does to serve the carrier under the other agreement, (b) where it is technically infeasible to provide the service to the opting-in carrier; or (c) where the particular contract has been available for an unreasonable amount of time after its approval.[47]

Qwest responded that adopting AT&T's argument would allow CLECs, in succession, to indefinitely extend the duration of opted into provisions. For example, assume that CLEC A had an agreement with 6 months left and that CLEC B had an agreement with 2 years left. Under the AT&T approach, CLEC B could opt into a provision that would still be in effect when CLEC A's agreement expired. CLEC A could then enter a new agreement with a term extending past CLEC B's agreement term, and could opt into the same term. The CLECs could then, with overlapping terms indefinitely extend particular provisions of an increasingly dated interconnection agreement. Qwest also cited dicta from a case that the FCC decided on other grounds: [48]

> [i]*n such circumstances, the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or portions of the agreement), including its original expiration date.*

Proposed Issue Resolution: There needs to be an appropriate means for changing over time the terms and conditions under which Qwest provides service to CLECs. As the FCC has recognized in the provisions cited by AT&T, both costs and technical feasibility will change as time passes. However, AT&T's proposal would provide a major barrier to reflecting such change, particularly as it relates to costs. It would allow leapfrogging pick and choose decisions that could perpetuate prices long after the costs underlying

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[47] AT&T General Terms and Conditions Brief at page 8, citing 47 C.F.R. § 51.809(b) & (c).
[48] Qwest General Terms and Conditions Brief at page 9, citing *In re Global NAPs, Inc.,* CC Docket No. 99-154, FCC 99-199 (released Aug. 3, 1999).

them have changed. The provision cited by AT&T would only prevent opting in when the costs of serving the opting, or second, CLEC were different from those of the first CLEC. It would not allow relief where the costs of serving both rise to the point that makes the available price non-compensatory. In this respect, it is unreasonable.

Moreover, it is clear that opting in neither does, nor should, allow a CLEC to avoid the other terms and conditions that can be said to relate closely to the provision being elected. The duration or term of an agreement operates as a fundamental limit on all of the rights and obligations (absent explicit exceptions) that a contract creates.

Absent compelling circumstances (AT&T showed none here; it was arguing for a generally applicable rule), it should be concluded that the duration of the agreement from which the provision is being picked or chosen forms an integral part of any substantive provision that a CLEC seeks to use. Under this rule, a CLEC could take the provision from the agreement with the longest remaining duration, if it considered duration to be of primary importance. Where it did so, it would not be extending the duration of any commitment Qwest was already willing or obligated to accept. There should, however, be no right, in the case of picking and choosing, to require Qwest to make an offering at a time beyond that for which it is already obligated. If a CLEC wants to do that, it should employ the Acts negotiation and arbitration procedures.

3. Applying "Legitimately Related" Terms Under Pick and Choose

AT&T commented that Qwest had abused the "legitimately related" requirement by requiring adherence to other, peripheral SGAT requirements. AT&T cited a Qwest requirement (from a state that was not identified) that AT&T accept forecasting provisions before it could take advantage of a provision allowing access to trunk blocking reports. AT&T also cited a Wyoming instance where Qwest required AT&T, before opting into a single point-of-interconnection provision to accept other (unidentified) unrelated provisions.[49] AT&T argued that these cases demonstrate a general failure to comply with the Act's section 252(i) requirement that an incumbent not require, as a condition of opting into another agreement, adherence to terms and conditions not related to interconnection, services, or elements being requested.[50]

Qwest responded to AT&T's concerns by adding SGAT Section 1.8.2 language, which would provide that:[51]

> *In addition, Qwest shall provide to CLEC in writing an explanation of why Qwest considers the provisions legitimately related, including legal, technical or other considerations.*

Qwest also proposed to add the following language to SGAT Section 4.0:

> *"Legitimately Related" terms and conditions are those rates, terms and conditions that relate solely to the individual interconnection, service or element being requested by CLEC under Section 252(i) of the Act, and not those that specifically relate to other interconnection, services or elements*

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[49] AT&T's Initial Comments on General Terms and Conditions (AT&T GT&C Comments), at page 15.
[50] AT&T GT&C Brief at page 9.
[51] Qwest GT&C Brief at pages 10 and 11.

> *in the approved Interconnection Agreement. These rates, terms and conditions are those that, when taken together, are the necessary rates, terms and conditions for establishing the business relationship between the Parties as to that particular interconnection, service or element. These terms and conditions would not include General Terms and Conditions to the extent that the CLEC Interconnection Agreement already contains the requisite General Terms and Conditions.*

Qwest also noted that the already existing language of SGAT 1.8.1 placed on Qwest the burden of demonstrating that any provision it sought to include was in fact legitimately related.

Proposed Issue Resolution: When combined with the placing of the burden on Qwest to demonstrate a legitimate relationship, the new Section 1.8.1 and 4.0 provisions adequately limit Qwest's rights to attach other provisions to those that a CLEC might pick and choose. They go as far as can be expected to address what will often have to be case-by-case decisions about what other terms should go along with those that a CLEC chooses. The changes establish a proper foundation for resolving disputes, which is sufficient. AT&T's evidence did not show a firm pattern of unreasonable conduct in the participating states; therefore, it is appropriate to conclude that Qwest's past conduct does not require more than what these changes already accomplish.

4. Successive Opting Into Other Agreements

AT&T argued that Qwest does not allow a CLEC (call it "CLEC 3") to opt into an agreement that itself is an agreement reached by a CLEC (call it "CLEC 2") that made that agreement by opting into an agreement with yet another CLEC (call it "CLEC 1"). Rather, AT&T said, Qwest requires that CLEC 3 opt into the agreement of CLEC 1, not into the agreement that CLEC 2 secured by opting into the agreement of CLEC 1.[52] Qwest's brief did not respond to this issue.

Proposed Issue Resolution: Once a CLEC has opted into an agreement of another, that opting CLEC's agreement has its own status as an interconnection agreement. It thus should acquire the ability to be "opted into" by yet another CLEC. There is not a sound reason, particularly given the recommendation above not to extend the duration of provisions opted into, for denying other CLECs the ability that AT&T seeks. It must be recognized, however, that if all other terms and conditions remain the same, and are not extended by the first opting in decision, that there should generally not be a material difference between the Qwest and the AT&T approach. The one possible difference that could apply is where Qwest agrees at the first opting to extend the term of the first agreement. However, that case provides a good example of why Qwest should allow the next CLEC to opt into the extended agreement. Otherwise that next CLEC would be denied an offering that Qwest has already agreed to make available. Therefore, the SGAT should contain a provision stating that:

> *Nothing in this SGAT shall preclude a CLEC from opting into specific provisions of an agreement or of an entire agreement, solely because such*

[52] AT&T GT&C Brief at page 10.

> *provision or agreement itself resulted from an opting in by a CLEC that is a party to it.*

5. Conflicts Between the SGAT and Other Documents

AT&T argued that tariff filings should not have the effect of automatically amending any interconnection agreement or the SGAT. AT&T said that, tariffs were generally subject to change at the sole discretion of Qwest.[53] XO more broadly argued that Qwest should be prohibited, upon a complaint by a CLEC, from imposing the terms of any other document (citing tariffs, methods and procedures, technical publications, policies, product notifications, or other Qwest documents) outside the SGAT unless and until Qwest should prevail under the SGAT's dispute resolution procedures.[54]

Qwest first said that a later commission decision specifically overriding the SGAT should prevail. It then agreed to adopt language that would eliminate "conflicts" as the basis for deciding when there was incompatibility between the SGAT and other documents. The language of the frozen SGAT instead makes it clear that the SGAT prevails over other documents that abridge or expand the rights or obligations of each party to the SGAT.[55]

Proposed Issue Resolution: The first part of this issue is AT&T's tariff conflicts concern. Likely conflicts between the SGAT and tariffs consist of two principal types: (a) the SGAT makes a tariff provision applicable for some SGAT purpose and the tariff later changes from the version in existence at the time of the SGAT's adoption, and (b) there is no such SGAT reference, but a tariff provision that becomes effective after the SGAT did contains terms that conflict with those of the SGAT. In the first case, Qwest's frozen SGAT language contains a Section 2.1 statement that:

> *any reference to any statute, regulation, rule or Tariff applies to such statute, regulation, rule or Tariff as amended and supplemented from time to time (and, in the case of a statute, regulation, rule or Tariff, to any successor provision).*

This provision resolves the first type of conflict by providing that the most recent tariff provision applies. This resolution is appropriate, given that there was agreement in the first place to subject an aspect of the Qwest/CLEC contractual relationship to tariffs, which are changeable by their nature. Had there been intent to freeze the tariff provisions to those existing at the time of SGAT adoption, the words of the tariff, then existing rather than a mere reference to it, could have been used. Moreover, opting in opportunities would become confusing to administer in the event that the tariff provision in effect at the date each CLEC began to use the SGAT would apply to that CLEC.

Finally, CLECs generally have the ability to participate in tariff proceedings that affect them. Thus they have the power to ask commissions to impose limits on the effectiveness of new or changed tariff provisions (for SGAT or Interconnection Agreement purposes), should CLECs consider them appropriate. It does not demand too much of CLECs

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[53] AT&T GT&C Brief at page 11.
[54] Brief of XO Utah on General Terms and Conditions (XO GT&C Brief), at page 4.
[55] Qwest GT&C Brief at pages 15 and 16.

providing local exchange service in a state to maintain a reasonable level of diligence regarding Qwest tariff provisions that they know are included in their SGATS or Interconnection Agreements.

The second type of conflict is also addressed in the SGAT Section 2.3:

> *Unless otherwise specifically determined by the Commission, in cases of conflict between the SGAT and Qwest's Tariffs, PCAT, methods and procedures, technical publications, policies, product notifications or other Qwest documentation relating to Qwest's or CLEC's rights or obligations under this SGAT, then the rates, terms and conditions of this SGAT shall prevail. To the extent another document abridges or expands the rights or obligations of either Party under this Agreement, the rates, terms and conditions of this Agreement shall prevail.*

This provision clearly prohibits the application of any new tariff provision, unless a public service commission decrees otherwise, that would conflict with the SGAT directly, or would abridge or expand any party's rights or obligations under the SGAT, even if there were not direct conflict. This provision provides sufficient protection against subsequent changes in tariffs. The only possibility left open is one that should be left open; i.e., an explicit decision by a commission that a new or changed tariff provision for some reason should affect the SGAT. It would be inappropriate to take from commissions the right to consider such issues efficiently at the time that Qwest tariffs are before them. Moreover, the Qwest language also precludes changing the SGAT by allowing a tariff to go into effect by operation of law (there would be no required "specific determination" by the commission in that case). Therefore, the concern raised by AT&T is already satisfied; going further would unduly restrict the ability of public service commissions to consider at convenient times and in efficient manners the relationship between tariffs and the SGAT.

The second part of the issue is XO's broader concern about the proper method for assuring that other kinds of documents do not override SGAT provisions. The Qwest language about expansion or constriction of rights and obligations establishes a sound general rule. What remains in issue is whose view should prevail while the SGAT dispute resolution methods take their course. XO's language arises from a concern that Qwest's position about inconsistencies (i.e., that there are none) will prevail pending resolution of disputes. XO would solve the problem by making the CLEC's provision prevail in that case.

The problem with XO's approach is that it does not take into account the great practical difficulties that would arise in the operation of Qwest's business if but a CLEC complaint could prevent Qwest from applying the business and operations rules that the documents at issue will contain. The Congress, the FCC, and the participating states all expect that Qwest will act promptly and effectively to meet requirements across the spectrum of activities that it takes to provide local exchange service, whether directly to end users or at wholesale to CLECs who are making use of Qwest's network. It is simply not realistic to instantly negate the substantial guidance, procedures, operational requirements, and methods that make a company like Qwest able to serve CLECs in this fashion.

There will almost certainly be cases where Qwest documentation abridges or expands SGAT rights or responsibilities. However, the problem we have to solve is determining who, pending dispute resolution, ought to be able to define how needed activities, processes, procedures, methods, and the like need to progress in that interim period. Quite simply, it ought to be the one obliged to provide service who retains the right to decide what it takes to provide that service while such disputes remain pending. XO's recommended approach would remove from Qwest too important a control that a service provider should have to define and manage the processes by which it provides services. However, lest the degree of this authority be misinterpreted, it should remain clear that an outside resolver of disputes should have the power to decide finally, and should be expected to decide with dispatch, whether other and, by definition, subsidiary Qwest operational and business practice documents abridge or expand the rights and obligations imposed by the SGAT. To best implement this approach, the SGAT should, as it does, remain silent on the question of whose interpretation of consistency as here defined prevails while disputes remain in the process of resolution.

6. Implementing Changes in Legal Requirements

AT&T objected to what it termed Qwest's desire to change SGAT provisions to conform to changes in law as soon as the decisions making those changes (e.g., a court decision) become effective. AT&T argued that such an approach unduly favors Qwest. It is generally easy to stop offering something almost immediately after a ruling that ends an obligation to provide it. However, it takes time to develop a product or service offering after a ruling that first creates an obligation to provide it. AT&T recommended that the SGAT instead provide for a period of time for parties either to: (a) mutually agree to change their agreement after a ruling, or (b) resolve disagreements about the change through the SGAT dispute resolution procedures. AT&T said that this approach would create more balance in the transition needed upon a change in law, and that it would better comport with the impairment of contracts provision of Article 1, Section 10 of the United States Constitution. [56]

In response to concerns raised in the workshops, Qwest revised SGAT Section 2.2 to allow a 60-day status-quo maintenance period to allow negotiation of disagreements about whether a change in law (which Qwest broadened to include and "Existing Rules") would require a change in the SGAT. After that period, the SGAT dispute resolution provisions would apply, with allowance for creating an interim operating arrangement pending completion of the procedures called for by those provisions. Qwest's language would make the eventual resolution of the dispute effective back to the effective date of the change in the existing rules. Qwest said that such a "true-up" mechanism was necessary to take away any incentive to extend the time taken to resolve disputes.[57]

Proposed Issue Resolution: In the first instance, the impairment of contract provision has no applicability here. The issue is what the contract (i.e., SGAT) should say in the first place, not how to interpret it after the fact of its execution. If and as that contract allows for changes due to changes in applicable legal requirements, there is no colorable

[56] AT&T GT&C Brief at pages 12 and 13.
[57] Qwest GT&C Brief at pages 12 and 13.

constitutional claim. Nevertheless, it is necessary to provide for a reasonable period for the determination of what changes to the SGAT are appropriate in such cases, and for the determination of how any changes should be implemented. Qwest's new SGAT language, which arose in response to concerns we also raised at the workshops, provides for a reasonable means for accomplishing the needs at hand. The modifications that these provisions make to the SGAT's generally applicable dispute resolution procedures are appropriate to the need for particularly prompt action to address changes in those legal requirements that are fundamental premises underlying the SGAT. Qwest's so-called "true-up" mechanism is also appropriate, because it allows an outside dispute resolver to temper any resolution, if deemed appropriate.

The Qwest language changes accomplish the purposes that underlie AT&T's objections to the old SGAT language. Moreover, these amendments do so in a way that will promote the reasonably prompt adjustments that should accompany changes in legal requirements. If Qwest includes that language in the SGAT, it will adequately protect CLECs in the event that changes to the SGAT become necessary as a result of such outside factors.

7. Second-Party Liability Limitations

AT&T objected to the scope of Qwest's SGAT Section 5.8 agreement to bear liability, arguing that the scope was too narrow either to compensate CLECs for damages, or to provide an adequate incentive for Qwest to provide good service after it receives Section 271 approval. AT&T requested a number of specific changes to the language of Qwest's frozen SGAT:[58]

- Section 5.8.1: Address the parties' liability for damages assessed by a public service commission (addressed in the next succeeding issue)
- Section 5.8.2: Change Qwest's language addressing the inter-relationship between these general damages provisions and the Qwest post-entry assurance plan (PAP or QPAP)
- Section 5.8.3: Removing Qwest's provision limiting damages to the amount that would have been paid for services under the SGAT
- Section 5.8.4: Allowing consequential damages for gross negligence (Qwest limited it to willful conduct) and for bodily injury, death, or damage to tangible property caused by negligence
- Section 5.8.6: Expanding Qwest's liability for fraud by CLEC customers to any applicable theory of liability (Qwest limited it to its own intentional conduct).

Qwest responded by saying that its Section 5.8.2 language adequately addressed the PAP concern, that the expansion of liability in Section 5.8.4 was not consistent with industry practice, and that the AT&T changes to Section 5.8.6 would also unduly expand Qwest's liability.[59]

[58] AT&T GT&C Comments at pages 33 through 35, and AT&T GT&C Brief at pages 14 through 17.
[59] Qwest's GT&C Brief at pages 20 through 22.

Proposed Issue Resolution: The parties generally agreed that the SGAT should rule out indirect, incidental, and consequential damages. This agreement is consistent with general commercial practice and, more particularly, with the provisions of telecommunications tariffs. One of the purposes of such limitations is to limit the exposure of a service provider to reasonably foreseeable and insurable risks. Indirect, incidental, and consequential damages tend to be less predictable and more plaintiff-specific.

Having generally agreed to this standard, much of the dispute between the parties amounts to the identification of appropriate carve-outs to the general rule limiting damages to direct ones. One exception is the AT&T Section 5.8.2 change regarding the PAP. The degree to which the provisions here will overlap with the PAP and the question of what to do about that overlap cannot be meaningfully addressed without considering the matters being addressed in connection with the PAP. Therefore, it is necessary to defer consideration of this issue until the forthcoming report that will address the PAP.

Returning to the other disagreements, the general rule that should be followed is that predictable and readily insurable risks should generally lie with the party whose conduct creates those risks. Moreover, insurance against those risks should be considered a reasonable cost of doing business.[60] With that general rule in mind, we approach the remaining AT&T arguments about the SGAT's liability provisions; i.e., 5.8.3, 5.8.4, and 5.8.6.

With respect to 5.8.3, the language in AT&T's brief notes Qwest's deletion of Section 5.8.3, which removed the general limitation on damages to payments for services. However, Qwest's frozen SGAT moved it to Section 5.8.2; it reappears nowhere in the language set forth in AT&T's brief. The provision should remain as Qwest has proposed it in the frozen SGAT. Otherwise, Qwest's exposure to damages becomes extended beyond the point that is reasonable in light of general commercial and telecommunications tariff experience.

With respect to Section 5.8.4, AT&T's language first combines notions of liability to second-parties (i.e., the parties to the SGAT) and third parties (e.g., CLEC customers or members of the public). This combination is not appropriate to the structure of the SGAT, which treats second-party liability in Section 5.8 and third-party liability in Section 5.9 (the indemnification section). Thus, no change to Section 5.8.4 should provide for liability other than by Qwest to CLECs and by CLECs to Qwest. That said, bodily injury and death are not appropriate subjects to treat at all in Section 5.8.4, because they concern third-party liability in a contract between two corporations.

[60] What this last point means here is that, to the extent that Qwest's liability is expanded beyond what it proposed in the SGAT, it should be able to recover through its prices to CLECs the reasonable costs of insuring against such liabilities, whether such insurance come from be by a third-party carrier or through self insurance. No large, complex business is perfect; from an economic perspective, the reasonable costs of insuring against ones own errors or omissions is a cost of doing business that one can expect to recover in an efficient market. Certainly, insurance premiums, even for liability, are traditionally considered appropriate for recovery.

After these exclusions concerning the AT&T Section 5.8.4 language, the next matter of concern becomes responsibility for damage to tangible property. It is not appropriate for Qwest to exclude liability for damage to the tangible property of one party to the SGAT, where that damage results from acts or omissions by the other party. It would be hard to imagine Qwest or AT&T disclaiming responsibility for physical damage to a customer's home if they were to cause it during a service call. Moreover, it would contravene public policy to diminish (by removing consequence) Qwest or CLEC incentives to act with due care where their activities place the property of others in harm's way. The same is true if the property is not of a customer, but is that of the other party to the SGAT. Both Qwest and CLECs will come into contact with very valuable property of the other in their relationship. It would be simply nonsensical to have those contacts take place with the knowledge that their actions need not pay due respect to the property of the other. Moreover, the risk of second-party property damage is a reasonably predictable and insurable one. The party creating it should insure against the risk. Therefore, the SGAT should contain a provision that provides as follows:

> *5.8.4 Nothing contained in this Section shall limit either Party's liability to the other for (i) willful or intentional misconduct or (ii) damage to tangible real or personal property proximately caused solely by such Party's negligent act or omission or that of their respective agents, subcontractors or employees.*

This language change also alters two other aspects of AT&T's proposal. First, it does not adopt gross negligence as a standard under item (i), but limits liability to willful or intentional conduct. The reason is that gross negligence is often an elusive thing to prove. There is precedent and good cause for leaving it out of commercial contracts. Second, unlike AT&T's proposal, the above language imposes liability only where the damage to the tangible property of an SGAT party arises from the sole negligence of the other. Because the harmed party has insurance opportunities as well, it is appropriate to make it bear the risk where its own actions materially contribute to loss, even in cases where the other party is at fault as well.

With respect to AT&T's proposed change to Section 5.8.6, we should begin from the premise that fraud by end-user customers or by those using customer services should be the primary responsibility of the carrier who provides, vis-à-vis the end user, the service used to perpetrate the fraud. Therefore, the CLEC should always bear responsibility for fraud in cases where its own acts or omissions materially contributed to its perpetration. AT&T's proposed language applies a much looser standard. First, it makes its own contribution to the fraud irrelevant, providing, it would appear, that Qwest is responsible even if its acts or omissions were not the sole cause of the ability to perpetrate the fraud. AT&T's language would be appropriate, however, if it applied to cases where Qwest was the only party whose acts or omissions contributed. Therefore, SGAT Section 5.8.6, as proposed in Qwest's frozen SGAT, should be changed to read as follows:

> *5.8.6 CLEC is liable for all fraud associated with service to its customers. Qwest takes no responsibility, will not investigate, and will make no adjustments to CLEC's account in cases of fraud unless: (a) such fraud is the result of any act or omission by Qwest, and (b) the ability to perpetrate*

such fraud was not contributed to by an act or omission by CLEC. Notwithstanding the above, if Qwest becomes aware of potential fraud with respect to CLEC's customers, Qwest will promptly inform CLEC and, at the direction and sole cost of CLEC, take reasonable action to mitigate the fraud where such action is possible.

8. Third-Party Indemnification

AT&T argued that the SGAT's Section 5.9 indemnity provisions must complement the Section 5.8 liability-limitation provisions and the PAP to provide an adequate incentive for Qwest, as a monopolist, to avoid anti-competitive and discriminatory conduct. AT&T expressed concern about SGAT language (in Section 5.9.1.2) that would limit Qwest responsibility for damages CLECs must pay to their end users. AT&T argued that the SGAT's indemnity provisions should "more closely mirror those found in competitive markets between willing buyers and sellers."[61] AT&T offered language (in Exhibit B of its brief) that would accomplish its purpose.

Qwest responded that its indemnity language did reflect a market-based approach. Qwest also noted that making a wholesale supplier broadly responsible for claims by the wholesale customer's end users would discourage the wholesale customer from imposing reasonable limits on its liability to its end users, because it could simply transfer those liabilities back to its wholesale service provider.[62] In the specific context of claims by CLEC end users, Qwest said that CLECs should not be encouraged to offer their end users an especially generous acceptance of liability, merely because they could transfer that liability back to Qwest and thereby gain a competitive advantage (since Qwest would presumably not be able to pass to someone else its own costs resulting from such generosity).[63] Qwest's proposed SGAT Section 5.9.1.2 would protect itself by requiring the CLEC to indemnify Qwest for any damages sought by the CLEC's end user.

Proposed Issue Resolution: AT&T sought a market-based approach, but did not provide evidence to demonstrate what a typical wholesaler/retailer agreement (particularly where the wholesaler also acts as a retailer in competition with its wholesale customer, which is not an unknown concept) would provide in analogous circumstances. However, we can, from the record here work to a reasonable approximation of market conditions by starting at the end of the value chain, which here is the relationship between the CLEC and its end user. The evidence shows that typical custom is to impose significant limits on customer compensation in the event of failure to deliver service.

One would expect in a competitive market that a wholesale supplier would: (a) provide service in accord with reasonable expectations and customs prevailing in the retail portion of the market, and (b) charge, in any case, premium prices for added services requested by its wholesale customer. Thus, if a wholesale purchaser wanted to provide added services to its retail customers, it should expect its wholesale seller to charge it for any special requests that impose more costs.

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[61] AT&T GT&C Brief at pages 18 and 19.
[62] Qwest GT&C Brief at pages 22 and 23.
[63] Qwest GT&C Brief at page 25.

It can be taken as a virtual certainty that Qwest's prices for wholesale service to CLECs do not include the costs that it would incur if it had to bear the costs involved were a CLEC to provide better than usual damage limitations in the CLECs agreement to serve an end user. Therefore, a competitive market analogy would strongly indicate that AT&T's request to transfer to Qwest the cost of relatively liberal damage responsibilities, vis-à-vis the CLEC's end users, is not appropriate.[64]

In addition to asking for a competitive market analogy, AT&T also argued that Qwest needs incentives to counteract the natural tendencies that a monopolist wholesaler has to deny good service to those who seek to take from it a share of its own end users. There is no fallacy in this argument's roots. However, the correct incentive is not to encourage CLECs to provide their end users with more than usually liberal damage provisions at Qwest's expense. As Qwest's incentives as a monopolist are questioned, so should we question the motives that would be created if CLECs were free to provide whatever benefits they chose for their end users, in the knowledge that, however high the cost of doing so, Qwest would have to pay them. The better course is to address the incentives issue in the context of the PAP, leaving us here to decide only the question of damage recovery. In that context, the record demonstrates that Qwest's SGAT provisions concerning indemnity, insofar as it involves CLEC end users, better reflect the competitive-market mirroring test that AT&T proposed.

There is, however, a separate concern about Qwest's Section 5.9.1.2 language. The Qwest indemnification language exempts itself not just from liberal lost-service compensation mechanisms that CLECs might wish to employ at its expense. The provision is written so broadly as to indemnify Qwest also in cases where its negligence causes bodily injury to CLEC customers or physical injury to their tangible property. It is proper to expect that Qwest will retain responsibility for its acts or omissions that cause such injury, on reasoning similar to that which applies to lost-service compensation.

A CLEC that wishes to offer liberal service-interruption benefits should bear their costs; the reason is that such a rule makes the causer of costs responsible for incurring them. Where Qwest's employees, contractors, agents, or representatives tortiously cause physical harm to CLEC customers or their property (during a service call, to repeat the example used in the discussion of the prior issue), Qwest should be responsible, again to align cause and effect. This is not a case where a CLEC is extending a benefit of value, while transferring the cost to someone else. Instead, the issue here is to preclude Qwest from transferring to someone else the consequences of its actions that cause physical injury. Therefore, SGAT Section 5.9.1.2 should include, as follows, a new sentence at its end:

> *The obligation to indemnify with respect to claims of the Indemnified Party's end users shall not extend to any claims for physical bodily injury*

[64] The XO GT&C Brief, at page 7, argues that the existence of the customer remedies in the CLEC's tariff should remove concerns about the lack of CLEC concerns to limit them. That factor certainly will tend to limit the extent to which CLECs will go in their arrangements with customers, because CLECs will have to bear the costs in the absence of Qwest fault for the underlying service problems. However, to the extent that we create a system where CLECs will have the opportunity to transfer a portion of the costs of their offerings to customers, not only away from themselves, but also to Qwest, a non-economic incentive will remain.

or death of any person or persons, or for loss, damage to, or destruction of tangible property, whether or not owned by others, alleged to have resulted directly from the negligence or intentional conduct of the employees, contractors, agents, or other representatives of the Indemnifying Party.

9. Responsibility for Retail Service Quality Assessments Against CLECs

XO argued that Qwest should bear responsibility for assessments or fines levied against a CLEC that fails to meet a state commission's retail performance standards because of a failure by Qwest to provide the CLEC with SGAT-compliant service.[65]

Proposed Issue Resolution: The XO request establishes an immutable rule about who should ultimately be responsible for state-commission imposed assessments for violating retail service requirements. The problem with this approach is that it may not be consistent with each state's policy regarding such assessments. For example, a commission could legitimately seek to penalize a CLEC whose failure to demand proper performance from its wholesale supplier (or perhaps even to be watchful enough to know that its end users were getting poor service due to the actions of Qwest as a vendor) contributed to the poor service that the commission may find cause to penalize. The fact that the vendor in this case is a competitor with a monopoly to protect may mitigate the usual prudence rule that requires a utility to manage its suppliers effectively, but it by no means should be read to obviate that important customer-protection rule ab initio.

The superior way to deal with CLEC concerns about such "vicarious" liability is for them to make arguments in proceedings that either establish such standards and assessments in the first place, or in cases that are opened to enforce them. This approach, as opposed to the inclusion of XO's language in the SGAT, is better designed to give commissions the ability to impose their view of what customer-protection demands in their individual jurisdictions.

10. Intellectual Property

There were disagreements at the workshop about SGAT Section 5.10, which deals with intellectual property. AT&T represented that agreement had been reached on a revised Section 5.10, the terms of which AT&T included in Exhibit C of its brief. AT&T said that this issue could be considered resolved, in the event that Qwest continued to agree to the Exhibit C language.[66] Qwest did not brief this issue, but its frozen SGAT contained language identical to that of AT&T, except as to several particulars.

Proposed Issue Resolution: There is no way from the record to verify that the differences between AT&T brief Exhibit C and frozen SGAT Section 5.10 are material to AT&T. It should, however, be presumed that this issue is closed, in the absence of

[65] XO GT&C Brief at pages 6 through 8. XO's argument would also obligate Qwest to make a CLEC whole for any payments it made to its customers for poor service, when Qwest caused it. That argument should fail for the same reasons set forth in the discussion of the immediately preceding issue.

[66] AT&T GT&C Brief at page 22.

comments to the contrary within the 10-day period established for filing comments on this report with the individual participating commissions.

11. Continuing SGAT Validity After the Sale of Exchanges

AT&T proposed a series of provisions that would apply upon the sale by Qwest of exchanges that include end users whom CLECs serve through services acquired under the SGAT. AT&T proposed the following language for SGAT Section 5.12.2:[67]

a. Requiring the written agreement of Qwest's transferee to be bound by the SGAT terms and conditions until a new agreement between the transferee and CLEC becomes effective

b. Providing notice of the transfer to CLECs at least 180 days prior to completion (AT&T agreed in its brief to less notice if 180-day notice could not be provided

c. Obligating Qwest to use best efforts to facilitate discussions between the transferee and CLECs with respect to SGAT continuation

d. Serve a copy of the transfer application on CLECs

e. Denying Qwest the ability to contest CLEC participation in the transfer approval proceedings or to challenge the Commission's authority to consider obliging the transferee to assume the SGAT obligations.

Qwest agreed to providing notice (item b above) and to facilitating discussions (item c above). Qwest objected to the remainder, on the grounds that those conditions would unreasonably "devalue" Qwest's assets by placing burdensome obligations on it or on transferees. Qwest cited as an example the burden that a PAP with substantial penalty obligations would be on a much smaller company that might be interested in purchasing some Qwest exchanges.

Proposed Issue Resolution: There should be no section 271 induced prohibition on the disposition by Qwest of its assets and no participant has proposed otherwise. On the other hand, there should be a reasonable transition period when exchanges contain CLEC end users (where service to them comes through facilities that CLECs secure under the SGAT). It would not serve the public interest to force customers to make changes too hastily. Qwest appears to accept this notion; it did not contest the need for it to provide notice of exchange transfers and to work with the transferee and CLECs to promote an effective transition.

The basic interests that clearly need to be protected are the following: (a) end user transitions to new suppliers should the new transferee not be willing to provide service on terms that a CLEC, or in turn its end users, can accept, (b) a reasonable CLEC opportunity to negotiate with the transferee, and (c) an opportunity for the commission to consider the application of any regulatory authority it may have to condition the transfer on commitments respecting continuation in whole or in part of the SGAT, with the transferee stepping into the shoes of Qwest.

[67] AT&T GT&C Brief at pages 20 and 21.

AT&T's proposal in effect goes beyond these needs in two critical respects: (a) it would give CLECs what amounts to an option to continue the SGAT to its scheduled duration, with the transferee accepting all of its obligations, and (b) it strives to preclude debate about the authority of commissions to consider the kinds of conditions noted in the third need area listed in the preceding paragraph. These two aspects of AT&T's proposal are inappropriate for inclusion in the SGAT.

The continuation option would exist because a CLEC could, to the extent it preferred the existing SGAT, merely choose not to execute a new agreement with the transferee. That unilateral act alone, under AT&T's language, would extend the SGAT at least until the termination date it contains. Such a possibility would have at least some support, if it were clear that the obligations of the transferee under the Act were the same as those applicable to Qwest. However, that has not been shown to be true and Qwest has provided at least one example of a case (the economic exposure under a PAP) where there would likely be a very different set of both requirements and expectations about what to anticipate from the transferee.

Because requirements applicable to Qwest and the transferee may well differ, CLECs should not have the unilateral right to continue the SGAT indefinitely. However, they should have a reasonable opportunity either to negotiate with the transferee or to seek relief from the commission in the event that negotiations are not sufficient. This need can be served by a minimum notice period, similar but not identical to what AT&T has proposed in its brief. That notice period is discussed below. Therefore, clause A of AT&T's proposed language should not be included in the SGAT.

Qwest should, however, provide notice of the transfer sufficiently in advance of its proposed effective date to permit the end-user transitions, transferee/CLEC negotiations, and CLEC requests to commissions discussed earlier. Given the nature of such transactions and the likely time requirements of commission approvals in the states where they apply, it would be sufficient and appropriate to include a new sub-paragraph of the SGAT's assignment clause (Section 5.12) as follows:

> *5.12.2 In the event that Qwest transfers to any unaffiliated party exchanges including end users that a CLEC serves in whole or in part through facilities or services provided by Qwest under this SGAT, the transferee shall be deemed a successor to Qwest's responsibilities hereunder for a period of 90 days from notice to CLEC of such transfer or until such later time as the Commission may direct pursuant to the Commission's then applicable statutory authority to impose such responsibilities either as a condition of the transfer or under such other state statutory authority as may give it such power. In the event of such a proposed transfer, Qwest shall use its best efforts to facilitate discussions between CLEC and the Transferee with respect to Transferee's assumption of Qwest's obligations pursuant to the terms of this Agreement.*

This provision gives Qwest the option of providing notice more than 60 days ahead of time or of having the transferee accept responsibility for a limited period of time should it decide not to do so. The provision also provides notice to a transferee that the

commission may impose SGAT transition requirements, provided that it already has the power to do so (i.e., the SGAT will not confer any such power, nor, if there is no such power, will the SGAT effectuate a continuation of the SGAT for more than the prescribed period). This clause excludes AT&T's no-contest clauses related to intervention or jurisdiction to condition transfers. Commissions are creatures of statute; their jurisdiction cannot be expanded by agreement. Moreover, commissions are competent to determine the public interest involved in requests for intervention; their decisions should be informed by what all parties in interest have to say on the relevant considerations.

This leaves the question of serving applications. It is unnecessarily burdensome to require Qwest to determine which of the more than 100 CLECS serving in its territory have end users in the exchanges involved or to send each a lengthy application. It is sufficient for Qwest, should it choose, merely to inform all CLECs of the pendency of a transfer of identified facilities. CLECs may then determine for themselves their interest in the transfer and seek intervention as appropriate.

12. Misuse of Competitive Information

AT&T provided evidence that it said showed an abuse of Qwest's obligation not to disclose information to it marketing and sales personnel. Specifically, AT&T provided evidence that Qwest contacted a Minnesota end user to secure a rescission of the customer's election to transfer to AT&T, between the time that AT&T submitted the necessary LSR and the time that the transfer was to take place. AT&T took the position that Qwest's marketing and sales personnel must have learned of the switch through the LSR, which means that Qwest can similarly misuse information throughout its region, because it employs a system-wide OSS.[68] AT&T said that Qwest should not be deemed to comply with the requirements of Section 271 until it "demonstrates that it has corrected every mechanism through which Qwest's retail marketing personnel gain access to CLEC confidential customer information". Qwest did not brief this issue.

Proposed Issue Resolution: Abuse of information that Qwest gains through the ordering systems that CLECs use to secure facilities or services that will deprive Qwest of existing end users is a very serious matter. For competition to succeed, there must be a high level of confidence that Qwest will limit its use of such systems to serve CLECs, not to gain competitive advantage over them. Certainly, CLECs have no fully comparable method for learning of other carrier efforts (including those of Qwest) that will do them competitive injury.

The problem on this record becomes one of deciding what to make of the single incident cited by AT&T. It did not describe the kind of effort it undertook to uncover incidents of this type. Such a description would have helped to decide whether this case was symptomatic or isolated. There are surely circumstances where Qwest may learn of CLEC attempts to win its end users by means other than illicit access to LSR information. Qwest serves millions of access lines throughout its region. It would not be surprising for a telemarketer selling new services to Qwest end users to encounter by chance a household member who says that there has just been a decision to switch to another

[68] AT&T GT&C Brief at page 23.

carrier. Given these possibilities, citing a single incident (although AT&T does correctly observe that the state involved is not per se material) does not support a broad conclusion that Qwest's performance fails in meeting Section 271 requirements, or that there exists a need for imposing a potentially very substantial remedial plan.

However, the record does not allow a determination of whether Qwest takes reasonable steps to: (a) minimize the possibility of, (b) discourage, (c) detect, or (d) punish inappropriate conduct. Moreover, Qwest said at the workshop that it did not know whether its customer service representatives could determine from customer account screens whether a CLEC had recently issued through the OSS interface an order affecting that account.[69] Given the importance of this issue, therefore, Qwest should submit a report to the commissions within 30 days detailing its programmatic efforts addressing all four of these key steps in assuring that reasonable steps are taken to control the use of sensitive information. This report should be designed to allow the commissions to make a finding that Qwest has in place a reasonable and comprehensive program for assuring that the possibility for inappropriate use of information received through its GUI and EDI interfaces with CLECs is appropriately minimized.

13. Access of Qwest Personnel to Forecast Data

XO commented that Qwest's legal personnel should not have free access to aggregated CLEC forecast information to use in regulatory filings. XO considers the information in forecasts to be competitively sensitive. It said that Qwest should seek the information through discovery requests if it considers it important for regulatory purposes. XO concluded that the SGAT should preclude use of CLEC confidential information for any purpose other than that for which it was provided.[70]

AT&T expressed concerns about both the sufficiency of the description of those who can see individual CLEC forecast information (it said it could not determine all those to whom Qwest considered disclosure appropriate) and about the ability of Qwest to make free use of aggregated CLEC forecast information. AT&T argued that Qwest receives only a limited license to use CLEC information, not a more general right to transform it and use it for other purposes.[71]

Qwest responded that the language of SGAT Sections 5.16.9.1 and 5.16.9.1.1 would prohibit the disclosure of both individual and aggregated CLEC forecast data to its marketing, sales, and strategic planning personnel. Qwest also said that the language in question allows access to individual CLEC forecasts only by those Qwest personnel who need to have it for use in responding to the forecasts at issue. The positions that Qwest said this need extends to include wholesale account managers, wholesale LIS and collocation product managers, network and growth planning personnel. Qwest would also allow access by its attorneys when a legal issue arises about a specific forecast.[72]

Proposed Issue Resolution: Qwest's language does generally limit individual forecast information to those with a need to use the information to manage Qwest's contractual

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[69] June 28, 2001 transcript at page 249.
[70] XO GT&C Brief at pages 2 and 3.
[71] AT&T GT&C Brief at pages 25 through 27.
[72] Qwest GT&C Brief at pages 30 and 31.

relationship with the CLEC who provided it. The list of authorized recipients is appropriately limited. However, the language allowing access by Qwest legal personnel is more open ended than it needs to be. As written, any time that there is any issue regarding the forecast, or access to it presumably, the language applies. That language should be limited to cases where the issue involved is about the quality or timeliness of the forecast in connection with the purposes for which it was submitted. Therefore, the phrase "legal personnel, if a legal issue arises about that forecast" in SGAT Section 15.16.9.1 should be replaced with:

> *Qwest's legal personnel in connection with their representation of Qwest in any dispute regarding the quality or timeliness of the forecast as it relates to any reason for which the CLEC provided it to Qwest under this SGAT.*

The other concern expressed about Qwest's language concerns the use of aggregated forecast information. SGAT Section 5.16.9.1.1 allows Qwest to file or use aggregated CLEC data for any regulatory filing or for any other purpose generally related to fulfilling its SGAT obligations. This section is again too open ended. The information involved clearly is highly sensitive and it is not sufficiently comforting merely to, as Qwest has, take precautions when it believes that aggregation will not be sufficient to protect the confidentiality of an individual CLEC's data.

The protection of the information is too important to trust only to such a provision. However, it is recognized that the participating commissions may have legitimate needs for access to such information; those needs should not require the commissions to solicit it from a vast number of individual CLECs. Therefore, Qwest should be permitted to provide the data upon a specific Commission order requiring it, upon the initiation by Qwest of any protective processes applicable in the state requiring it, and upon notice by Qwest to the CLECs involved on a basis that the commission involved determines to be sufficient to permit the completion of any procedures required to continue to protect its confidentiality. The following replacement language for SGAT Section 5.16.9.1.1 will accomplish this purpose:

> *5.16.9.1.1 Upon the specific order of the Commission, Qwest may provide the forecast information that CLECs have made available to Qwest under this SGAT, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures and further provided that Qwest provides such notice as the Commission directs to the CLEC involved, in order to allow it to prosecute such procedures to their completion.*

Note that this provision, unlike Qwest's language, does not allow Qwest to use aggregated CLEC forecast information for any other purpose whether or not related to fulfilling its responsibilities under the SGAT. Section 5.16.9.1 already makes individual CLEC forecast information available to the specified persons who need to know it to fulfill Qwest's SGAT responsibilities. There is thus no basis for concluding that anyone else within Qwest has a need for aggregate information.

14. Change Management Process

AT&T cited the FCC's SWBT Texas 271 Order as requiring the existence of a change management process that meets five specific criteria.[73] Qwest's relevant change management is called CICMP (Co-Provider Industry Change Management Process). At the workshops, Qwest indicated that it was in the process of making significant changes to CICMP. Therefore, the record in these workshops does not allow for an assessment of Qwest's compliance with the cited FCC standards, which are:

- Clearly organized and readily accessible change management process information
- Substantial CLEC input into the creation and operation of the process
- Existence of a procedure for timely dispute resolution
- Availability of a stable test environment that mirrors production
- Adequacy of documentation available for use in building an electronic gateway

Proposed Issue Resolution: The record here does not allow meaningful consideration of the sufficiency of Qwest's CICMP, which forms part of Section 12.2.6 of the SGAT. Therefore, there is not at present a sufficient basis for concluding that Qwest meets applicable requirements in this aspect of its relationship with CLECs.

15. Bona Fide Request Process

AT&T said that the SGAT Section 17 bona fide request process could not be shown to be nondiscriminatory, for two reasons:[74]

- There is no evidence to show that it would apply similarly to the process Qwest uses when its own end users ask for services not already provided for under tariffs
- Qwest fails to provide notice of previously approved BFRs with similar circumstances
- Qwest has no objective standards for standardizing products or services that result from repeat BFR requests.

Qwest noted that it had only received 17 BFR requests since 1999.[75] Qwest also noted that it would not require subsequent BFRs for substantially similar cases, with the burden on Qwest to show that a subsequent request is not substantially similar. SGAT Section 17.12, which incorporates this concept, provides that a CLEC can get substantially similar services without a BFR, but must still pay individual case basis prices until Qwest standardizes the offering reflected in the granted BFR. Qwest will also not require a BFR and will refund the BFR application fee if it has recently denied a similar request.

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[73] AT&T GT&C Brief at page 27, citing paragraph 108 of the FCC's order *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas,* Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238 (Released. June 30, 2000).

[74] AT& T GT&C Brief at pages 30 and 31.

[75] Rebuttal Testimony of Larry B. Brotherson Re: Terms and Conditions and BFR (Brotherson Rebuttal), May 23, 2001, at page 66.

Qwest objected to providing general notice (i.e., other than in the context of the filing of a similar BFR by an individual CLEC) of granted BFRs because a CLEC could object to the providing of public notice about something it developed and requested and in which it therefore has a proprietary or trade secret interest. With respect to standardizing products or services made available through repeat BFRs, Qwest opposed a firm, objective standard, arguing that it should have the discretion to determine when conditions justified standardization.[76]

Proposed Issue Resolution: The first aspect of this issue concerns the issue of parity with Qwest end-user requests for non-standard retail services. There is not a sound basis for concluding that this retail process is analogous in purpose or scope to the wholesale BFR process. The latter focuses often and centrally on: (a) the question of technical feasibility, recognizing that federal law in many cases requires an incumbent to provide some form of access on that condition, and (b) the related question of whether access is necessary to give a CLEC a reasonable opportunity to compete. Those are not often, if ever, the same types of standards that will apply to Qwest's analyses of whether to make a non-standard service available to its end users. Moreover, the cost analysis under a wholesale BFR will often differ widely from that applicable to a request for service by an end user, depending on what cost underpinnings, if any, will apply to what can be charged by Qwest for non-standard services at retail.

Therefore, it would be misleading to broadly consider wholesale BFRs comparable with requests by Qwest end users for retail services. Perhaps some subset of retail requests could be considered comparable, but identifying them would be difficult, and would require facts well beyond those on the record here. Moreover, even if such a subset could be defined after the expenditure of great effort, it is not clear that the resulting rule or standard would better protect CLEC interests, as compared with a direct analysis of how well and how promptly Qwest responds to individual BFR requests. Therefore, the parity standard that AT&T suggests here is not appropriate.

The second aspect of this issue concerns notice of previously granted BFRs. In the first place, we must bear in mind that what a BFR seeks is access to Qwest's property. What a CLEC wants to do with that access or how it will advantage it to have such access are not the directly relevant point. What is of immediate concern is what access Qwest will give to its network. It is difficult to see how a CLEC can gain proprietary rights in Qwest facilities. Moreover, it seems less likely that a BFR will come because a CLEC has invented a "better mousetrap." It is far more likely that it will simply be the first to ask for access that, theretofore was not technically feasible, but which since has become feasible. It makes for bad policy to require CLECs to bear the burden of asking Qwest continuously whether technical barriers precluding an important form of access have come down. It is also not appropriate to make CLECs ask informally what progress may have been made on certain offerings before they expend the time and expense to prepare a BFR. It is far better to require Qwest to inform CLECs generally, because Qwest will know as soon as any material change takes place.

CLECs should be required to take the risk that others will learn something about portions of their business that rely upon the same rights of access to Qwest network that others

[76] Qwest GT&C Brief at pages 34 and 35.

have, when such knowledge comes through information about network access Qwest makes available through the BFR process. When balancing the risks of this exposure against the need for assuring nondiscriminatory treatment of all CLECs, the outcome is clear. CLECs should have prompt notice from Qwest when important technical feasibility barriers have been overcome.

If there is confidential information in the CLEC request, it can be protected adequately. What other CLECs need to see is not the request, but the particular form of access to Qwest's network that Qwest will provide as a result of the request. That access, because it forms part of the requesting CLEC's "contract" with Qwest, should be available to other CLECs. As is true for those contracts, a reasonable rule for assuring nondiscrimination is to make knowledge of access so gained generally available. Apart from the protection given through denying access to the request itself, CLECs will be on notice of this rule, and therefore should be expected to be judicious in what they provide to Qwest in their requests. The SGAT should therefore contain the following language:

> *Qwest shall make available a topical list of the BFRs that it has received with CLECs under this SGAT or an interconnection agreement. The description of each item on that list shall be sufficient to allow a CLEC to understand the general nature of the product, service, or combination thereof that has been requested and a summary of the disposition of the request as soon as it is made. Qwest shall also be required upon the request of a CLEC to provide sufficient details about the terms and conditions of any granted requests to allow a CLEC to elect to take the same offering under substantially identical circumstances. Qwest shall not be required to provide information about the request initially made by the CLEC whose BFR was granted, but must make available the same kinds of information about what it offered in response to the BFR as it does for other products or services available under this SGAT. A CLEC shall be entitled to the same offering terms and conditions made under any granted BFR, provided that Qwest may require the use of ICB pricing where it makes a demonstration to the CLEC of the need therefore.*

Qwest may satisfy the latter, more detailed portion of this request by making the information available on the generally available list or by providing the information on request.

The third aspect of this issue concerns standardization of products or services first made available through BFRs. There is a substantial interest in assuring that network access granted through the BFR process become standardized as soon as it reasonably can. Qwest made note of the expense of the BFR process, but that expense falls largely on the CLECs in the last analysis. Qwest charges fees to recover its costs for processing BFRs; CLECs must prepare each one at their own expense. There is not sufficient information, given the small number of BFRs to date, from which to determine whether Qwest can improve the process of moving from BFR to standardized product and service offerings. Moreover, there is no pre-set number of "similar" BFRs after which there should of necessity be such standardization. How similar those BFRs were and how complex are the offerings are factors that will need to be considered.

The SGAT language proposed by this report immediately above should do much to mitigate the costs associated with subsequent requests, including, in some cases, considerations of costs and prices. Should experience demonstrate in the future, as it has not done to date, that Qwest lags in standardizing offerings, the dispute resolution procedures of the SGAT are available for CLECs to seek relief.

16. Scope of Audit Provisions

SGAT Section 18 addresses audits. This section limits allowable audits and examinations to "the books, records, and other documents used in the billing process for services performed" under the SGAT. AT&T wanted to expand the scope of these provisions, in order to allow audits and examinations of other aspects of performance under the SGAT. AT&T cited only verification that proprietary information is being maintained as required as an example of a significant additional area for audits and examinations, but it would not limit the audit and examination provisions to this additional area. AT&T's brief did assert that audit provisions are routinely granted in other contracts that require the exchange of intellectual property.[77]

Qwest responded that if AT&T had concerns in other areas of performance, it could use the SGAT's dispute resolution procedures to get any documents necessary to resolve them. Qwest particularly objected to the fact that CLEC examinations would provide an opportunity to get around the SGAT's dispute resolution discovery provisions, merely by requesting an "examination," which is substantially similar in purpose. Qwest also objected to the disruption that could occur in the case of unfettered CLEC examination rights across the broad spectrum of activities that Qwest must perform to meet its SGAT obligations. Finally, Qwest objected to allowing CLECs such deep access into the operation of its business.[78]

Proposed Issue Resolution: The audits of information about billing share an important characteristic; they are mutual, because both parties may make errors or omissions that affect bills. The parties will mutually exchange confidential or proprietary information as well. Moreover, abuse of the protections applicable to such information, whether by design or through neglect, can be hard to detect through the normal interchanges that will take place between the parties. Therefore, there is a sound reason for extending the audit provisions to any question that may exist with respect to either party's compliance with requirements to protect such information. However, there are valid concerns about extending examination rights to these cases. Examinations are not limited in number, which distinguishes them from audits.

There are natural limits to the places where billing examinations may go, because of the narrowness of the parts of the organizations that address billing matters. The same is not true of confidential information. Examinations to investigate or discover who has what proprietary information could extend to a wide range of each party's organization. Those examinations could become disruptive. Moreover, there has been no showing that they, as opposed to occasional audits have an important role in investigating compliance with SGAT requirements. It is one thing to seek access to sets of documents that each party

[77] AT&T GT&C Brief at page 31.
[78] Qwest's GT&C Brief at pages 38 and 39.

knows or expects to be in existence to support proper billing. It is quite another to pursue open-ended inquiries into whether any place contains or any person possesses documents that should be in only a very few places and known to a very small group of persons. Therefore, while audits should be allowed in the case of compliance with proprietary information protections, examinations should not.

As to areas beyond billing and proprietary information, it must be remembered that the PAP will address performance measurement auditing and other testing and the PAP will also address root cause analyses of persistent performance deficiencies. The PAP should also provide substantial financial incentives in all areas that the parties have agreed are important to successful performance by Qwest, from the Commission and CLEC perspectives. There is no reason at present to question the sufficiency of these measures to assure quality and compliant performance, which is the purpose that audits and examinations would serve.

Moreover, even if there were some reason to doubt the sufficiency of the PAP to address other areas of performance, the gravity of that doubt would have to be balanced against the potentially great inconvenience that could result from unconstrained CLEC examinations into any area of performance. Also weighing substantially in that balance would be the issue of competitive information transfer that could result if CLECs had wide access to how Qwest performs activities that compete with the CLEC's own existing or potential means of performing similar activities. Qwest does have to make its network available to CLECs; it does not have to make available peculiar knowledge that makes certain aspects of its operations particularly competitive.

There is of course, the argument that confidentiality can be protected by the use of protective agreements limiting use of the information in CLEC business operations. However, a practical conception of the use of such agreements must recognize that their effectiveness is inversely proportional to both the number of people who have access and the breadth of knowledge of the competitor's total business operations involved. From that view, offering them as a protective measure is not highly comforting.

Therefore, the SGAT section on auditing should contain the following section to address audits of proprietary information use:

> *Either party may request an audit of the other's compliance with this SGAT's measures and requirements applicable to limitations on the distribution, maintenance, and use of proprietary or other protected information that the requesting party has provided to the other. Those audits shall not take place more frequently than once in every three years, unless cause is shown to support a specifically requested audit that would otherwise violate this frequency restriction. Examinations will not be permitted in connection with investigating or testing such compliance. All those other provisions of this SGAT Section 18 that are not inconsistent herewith shall apply, except that in the case of these audits, the party to be audited may also request the use of an independent auditor.*

The granting of the right of the audited party to request an independent auditor (only the auditing party has that right now under the frozen SGAT) is intended to reflect the

particularly extensive access such an audit might require in organizations dealing with particularly sensitive information of the audited company.

Qwest's brief also noted that AT&T objected to the SGAT Section 18.3 provisions for treating audit information as confidential. AT&T did not brief this issue. Moreover, it is evident that audit information should be treated as confidential.

17. Scope of Special Request Process

AT&T noted that Qwest limited the special request process to UNE combination requests. The SRP is more streamlined than the BFR process is, because the SRP does not require a consideration of technical feasibility, which must already have been established. The purpose of the SRP is to address deviations in a requested service from the circumstances that apply to services and products that have pre-established prices and other terms and conditions. AT&T argued that the SRP should be available for all non-standard offerings for which there is no question about technical feasibility.[79]

Qwest made no response to this proposal on the merits. It argued that this workshop was intended only to address how the process worked, not to what it would apply.[80]

Proposed Issue Resolution: Qwest took too narrow a view of the questions deferred to this workshop. We are unaware of any document or statement that would have put all the participants on notice that we would here consider anything less than a general review of the SGAT provision dealing with the SRP. AT&T's request is reasonable; there is nothing unique about UNEs that makes them any more or less amenable to SRP resolution than are other non-standard elements or services, such as stand-alone UNEs, for example. That concluded, however, the language of SGAT Exhibit F, which addresses the SRP, does extend beyond UNE combinations. It is not clear what specific kind of expansion AT&T now seeks; therefore, the SGAT should be deemed as already providing an adequate basis for streamlined consideration of access to UNEs not yet subject to standard terms and conditions.

AT&T also incorporated by reference those parity arguments it made in connection with the BFR process, which was addressed under the *Bona Fide Request* issue above.[81] The resolution proposed there is equally applicable here. Parity with Qwest's retail operations is not an appropriate way to evaluate Qwest's execution of the SRP for CLEC requests.

18. Parity of Individual Case Basis Process with Qwest Retail Operations

As it did in the case of the Special Request Process, AT&T also incorporated by reference those parity arguments it made in connection with the BFR process, which was addressed under the *Bona Fide Request Process* issue above.

Proposed Issue Resolution: The resolution proposed under the preceding *Bona Fide Request Process* issue is equally applicable here. Parity with Qwest's retail operations is not an appropriate way to evaluate Qwest's execution of the SRP for CLEC requests.

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[79] AT&T GT&C Brief at page32.
[80] Qwest GT&C Brief at page 36.

IV. Section 272 Separate Affiliate Requirements

A. Background

Section 272 of the Telecommunications Act of 1996 imposes substantial structural and nonstructural safeguards applicable to the provision of in-region InterLATA service by BOCs, such as Qwest. The FCC has said that section 271(d)(3)(B) of the Act makes compliance with section 272 an independent ground for denying relief under section 271.[82] The FCC specifically said that:[83]

> *Congress required us to find that a section 271 applicant has demonstrated that it will carry out the requested authorization in accordance with the requirements of section 272. We view this requirement to be of crucial importance, because the structural and nondiscrimination safeguards of section 272 seek to ensure that competitors of the BOCs will have nondiscriminatory access to essential inputs on terms that do not favor the BOC's affiliate. These safeguards further discourage, and facilitate detection of, improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate. These safeguards, therefore, are designed to promote competition in all telecommunications markets, thereby fulfilling Congress' fundamental objective in the 1996 Act.*

The FCC has recognized that this requirement obliges it to make "a predictive judgment regarding the future behavior of the BOC."[84]

Section 272 imposes a series of specific requirements, whose purposes include: (a) preventing improper cost allocation and cross-subsidization between Qwest and its §272 affiliate, and (b) assuring that Qwest does not discriminate in favor of this affiliate.[85] In summary, the provisions of Section 272 that are in dispute here require that:

- Qwest Communications provide in-region InterLATA service through an affiliate that is separate from Qwest Communications (the BOC) [§272(a)]
- The §272 affiliate "maintain books, records, and accounts in the manner prescribed by the Commission, which shall be separate from the books, records and accounts maintained by" Qwest Communications [§272(b)(2)]

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[81] AT& TGT&C Brief at page 32.

[82] *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271 (released. Oct. 13, 1998) ("Bellsouth Louisiana II Order"); at ¶ 322.

[83] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (released. Aug. 19, 1997), ("Ameritech Michigan Order"), at ¶ 346.

[84] Ameritech Michigan Order at ¶ 347.

[85] *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404 (Dec. 22, 1999), (FCC BANY Order) at ¶401.

- The §272 affiliate have "separate officers, directors and employees" from those of Qwest Communications [§272(b)(3)]
- Transactions with Qwest Communications be conducted "on an arm's length basis with any such transactions reduced to writing and available for public inspection" [§272(b)(5)]
- Qwest Communications not discriminate in favor of its §272 affiliate in any dealings between the two [§272(c)(1)]
- Qwest Communications account for all transactions with its §272 affiliate in accord with FCC accounting principles [271(c)(2)].

For ease of reference, the following list of Qwest entities will be discussed in this portion of the report:

- Qwest Communications International (QCI): the parent company of the Qwest family of enterprises
- Qwest Corporation (QC): the BOC, which is the entity that provides local exchange service in the 14-state region once served by US WEST
- Qwest Services Corporation (QSC): a wholly owned subsidiary of QCI, the parent; QSC owns the long distance affiliate, which is Qwest Communications Corporation
- Qwest Communications Corporation (QCC): the currently designated §272 affiliate; QCC is wholly owned by QSC and it is the pre-merger entity through which Qwest had previously provided InterLATA services in many areas of the United States
- Qwest Long Distance, Inc. (QLD): the entity that Qwest and before it US WEST used for some time to provide InterLATA service outside its 14-state region, and, until fairly recently the designated §272 affiliate.

Qwest filed the Section 272 testimony of Marie Schwartz and Judith Brunsting on March 30, 2001. AT&T filed the Affidavit of Cory Skluzak on May 4, 2001 and the Supplemental Affidavit of Cory Skluzak on May 17, 2001. Qwest filed the rebuttal testimony of Marie Schwartz and of Judith Brunsting on May 23, 2001. Qwest, AT&T and the Wyoming Consumer Advocate Staff filed briefs on section 272 issues[86] on July 25, 2001. AT&T and Qwest both filed Reply briefs on August 1, 2001.

[86] WYCAS's comments on section 272 urged the Wyoming Commission to review the entire record, including confidential testimony and exhibits, and to "seriously consider the concerns raised by the intervening parties". Post-workshop Brief of the Consumer Advocate Staff on Issues Relating to Public Interest, Track A and Section 272, Arising Out of Workshop Session 7 and Workshop Session 8, pages 4-5.

B. Separate Affiliate Requirements

1. Separation of Ownership

Qwest's testimony was that QCC, its designated §272 affiliate, is a wholly owned subsidiary of QSC, which in turn is wholly owned by the parent, QCI. Qwest also testified that QC and QCC own no stock in each other.[87] AT&T presented no evidence or argument to contest this testimony, although it did perform and present the results of its extensive examination of Qwest's compliance with Section 272 requirements.[88]

Proposed Conclusion: The uncontroverted evidence of record in these workshops fully supports a conclusion that QCC, the QCI entity currently proposed to provide in-region InterLATA service following anticipated §271 approval, is, by virtue of the corporate structure and ownership under which it operates, separate from QC, which is the entity that provides local exchange service in the seven participating states.

2. Prior Conduct

AT&T cited three prior instances that it says demonstrate a history of Qwest's non-compliance with the §272(a) requirement that in-region InterLATA services be provided through a separate affiliate:

- A September 27, 1999 FCC finding that "U S WEST's provision of non-local directory assistance service to its in-region subscribers constitutes the provision of in-region, InterLATA service," and that "the nationwide component of U S WEST's non-local directory assistance service was unlawfully configured."[89]
- A September 28, 1998 FCC conclusion that U S WEST, through its marketing arrangement with pre-merger Qwest, was "providing in-region, InterLATA service without authorization, in violation of section 271 of the Act."[90]

A February 16, 2001 FCC ruling that Qwest's "1-800-4US-WEST" calling card service constituted the provision of in-region, InterLATA service in violation of section 271.[91]

Qwest argued that each of these three cases resulted from a good faith difference of opinion (in some cases the same ultimately rejected opinion was held by at least one other BOC) about what the statutory term "provide" means in the context of in-region, InterLATA service. Finally, Qwest argued that reliance on past behavior as predictive of likely §272 compliance should be confined to behavior related to §272. Qwest argued

[87] Brief of Qwest Corporation in Support of Its Compliance with the Requirements of 47 U.S.C. §272 (Qwest 272 Brief), at pages 5 and 6.
[88] Affidavit of Cory W. Skluzak Regarding Section 272, Exhibit S7-ATT-CWS-1 (Skluzak 272 Affidavit).
[89] *Petition for US WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, CC Docket No. 97-172, Memorandum Opinion and Order, FCC 99-133 (released September 27, 1999), ¶¶ 2 and 63. See Exhibit S7-ATT-CWS-1, ¶¶ 106-109.
[90] *AT&T Corp. et al., v. US WEST Communications, Inc.*, File No. E-99-42, Memorandum Opinion and Order, FCC 98-242 (released October 7, 1998), ¶¶ 1, 38 and 52. See Exhibit S7-ATT-CWS-1, ¶ 110.
[91] *AT&T Corp v. US WEST Communications, Inc.*, File No. E-99-28, Memorandum Opinion and Order, DA01-418 (released February 16, 2001). See S7-ATT-CWS-1, ¶ 113.

that historical performance with respect to §271 requirements, which are different, has no place in a predictive examination related to §272.[92]

Proposed Conclusion: The examples cited, while significant in their own right, are not predictive of future Qwest conduct that is relevant to the issue of meeting the separate subsidiary requirements of §272(a). A proper examination of the significance of AT&T's references to the three prior FCC findings requires us to separate the analysis of §272(a) requirements into two related, but distinct, parts:

- Does the service in question constitute in-region intraLATA service?
- Assuming it does, then, is it being provided through a separate affiliate?

AT&T has unarguably demonstrated that Qwest has failed in a significant number of prior cases to determine correctly what does and does not constitute in-region InterLATA services. In other words, Qwest has often enough answered the first question incorrectly. However, there is no reason to believe that Qwest's subsequent decision to provide the services directly was a consequence of its refusal to accept the obligation to use a separate subsidiary for in-region, InterLATA services. Quite to the contrary, it is self-evident that Qwest only failed to use a separate subsidiary in the mistaken belief that the services did not constitute in-region, InterLATA service.

The important question here is whether Qwest accepts the separate subsidiary obligation and stands ready to meet it; the preceding proposed conclusion demonstrates that it does. Qwest's violations in the three examples cited were entirely a function of failing to meet the requirements of section 271, which is what the FCC found. Extending that to a §272 violation is at best peripheral to a predictive assessment of whether Qwest will accept the responsibility to provide in-region, InterLATA service through a separate subsidiary.

Qwest was held accountable in the past for failing to correctly interpret what constitutes in-region, InterLATA service; it should and undoubtedly will be so held in the future. There is, however, no reason to conclude here that such interpretations have had or will have anything material to do with the parallel issue of creation and maintenance of a separate subsidiary to provide in-region, InterLATA service.

C. Books and Records

Section 272(b)(2) of the Communications Act says that the §272 affiliate:

> *shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records and accounts maintained by the Bell operating company of which it is an affiliate.*

AT&T took issue with several aspects of Qwest's performance under this standard:

- Use of generally accepted accounting principles (GAAP)
- Relevance of the GAAP Materiality Principle

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[92] Qwest 272 Brief at pages 29 and 30.

- Adequacy of Documentation or "Audit Trail"
- Sufficiency of Internal Controls
- Separate Charts of Accounts
- Separate Accounting Software

1. Generally Accepted Accounting Principles

Qwest cited the testimony of its witness Brunsting in support of the conclusion that QCC follows GAAP. [93] Qwest said that QCC and QLD have used accrual accounting, which is required by GAAP. Moreover, while contesting the requirement that QC must also follow FCC requirements in accounting for transactions with the §272 affiliate,[94] Qwest said that the rebuttal testimony of its witness Schwartz shows that QC (the BOC) does follow such accounting requirements.

AT&T's examination of books and records disclosed what it considered to be many examples of a failure by QCC and by QLD (when it was the §272 affiliate) to follow accrual accounting and to make timely transaction entries into its books and records:[95]

- Failure to record any QC/QCC transactions between July 2000 and April 2001
- Use of artificially high billing rates for service to QCC, which served to create cross subsidies and to deter use of services by third parties
- Failure to accrue and pay expenses for roughly half (as a percentage of total services billed) the services rendered to QLD until the year after the services were provided
- Billing monthly services provided to QLD (such as rent) only yearly
- Other failures to accrue expenses for services to QLD on a timely basis

Qwest's main brief did not address the merits of each of the findings made by Mr. Skluzak in his Exhibits S7-ATT-CWS-1 and 2. However, it did concede that it had not accrued expenses payable to QCC before it was designated as its §272 affiliate, but argued that this fact is not probative because the amount in issue constituted less than 1 percent of QC's total yearly affiliate transactions, and because the failure to accrue expenses was for a time period before QCC became its designated §272 affiliate.[96]

Qwest's reply brief did object to the AT&T contention that no QC/QCC transactions were posted between July 2000 and April 2001, but again relied not on contesting the factual accuracy of the findings of Mr. Skluzak, but upon the arguments that: (a) the transactions in question predated the time when QCC was designated as the §272

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[93] Qwest 272 Brief at page 7.

[94] Qwest said that the FCC's GAAP requirements under §272(b)(2) and (c) apply only to the §272 affiliate, not to the BOC.

[95] AT&T's Brief on Section 272 of the Act (AT&T 272 Brief), at page 5, citing specific paragraphs (see fn 17 and 18) of the examinations that Mr. Skluzak performed of Qwest books and records, which were described in Exhibits S7-ATT-CWS-1 and 2.

[96] Qwest 272 brief at page 8.

affiliate, and (b) that AT&T made no claim that Qwest is now failing to accrue and pay expenses on a timely basis.[97]

Qwest's reply brief did address some of the AT&T findings about the failure to accrue expenses associated with services to QLD when it was the designated §272 affiliate. It provided evidence to show that:

- One expense item that AT&T found to be accrued in the year after services was in fact was accrued on a timely basis
- Two expense items that AT&T said were paid late were not paid on a current basis because they were disputed by QLD under Master Services Agreement procedures posted on the web site
- One expense item that AT&T said was not accrued properly appeared to duplicate another already criticized by AT&T.

Qwest's brief did appear to acknowledge what it would term "isolated instances" and insignificant failures to bill or accrue expenses involving QLD.[98]

Qwest also argued that consideration should be given to the difficulty it faced when it decided after the merger to change from one affiliate to another as the entity that would provide in-region, InterLATA service. Qwest cited the testimony of its witness Brunsting that it took from mid-January to late-March of 2001 to accomplish the transition, which included a review of all QCC asset records to address asset ownership and special billing controls issues, to realign more than 7,500 employees, and to examine all relevant contracts and post-merger transactions. QCI's outside auditor provided assistance in identifying the transactions. Qwest noted that, after completing this transition, it was able to reduce discrepancies between its postings and its billings to zero percent for April and May 2001. The April data was submitted as an exhibit at the workshop; the May data was submitted in an e-mail sent two days before the filing of reply briefs on §272 issues.[99]

Qwest's brief summarized a number of the detailed changes it made to assure proper controls in the area of §272 compliance:[100]

- Quarterly monitoring of asset transfers
- Training of "key network leaders"
- Establishment of a Compliance Oversight Team that reviews all QCC transactions for compliance
- Annual code-of-conduct training and employee certification
- Targeted training for QC sales executives who do business with QCC
- Physical separation and color-coded badging of employees

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[97] Reply Brief of Qwest Corporation in Support of its Compliance with the Requirements of 47 U.S.C. §272 (Qwest 272 Reply Brief) at page 3.
[98] Qwest 272 Reply Brief at pages 10 and 11.
[99] Qwest 272 Reply Brief at pages 7 and 8.
[100] Qwest 272 Reply Brief at page 9.

- Establishment of a compliance hotline
- Other special training

Qwest said that the FCC has found similar measures at other BOCs sufficient to meet what Qwest quoted as the applicable test, which is to demonstrate that the BOC

> *has implemented internal control mechanisms reasonably designed to prevent, as well as detect and correct, any noncompliance with Section 272.*[101]

Proposed Conclusion: Qwest focuses overmuch on the date at which QCC and QLD were and were not designated §272 affiliates. The issue that is material here is to determine the degree of confidence that can be placed in the ability to provide proper, complete, and timely recognition on the books and records for transactions between these entities. The past customs of the Qwest family of companies is relevant whether or not the transactions occurred when QCC was designated as the §272 affiliate. QC provides local exchange service under regulation by each of the seven participating commissions. It would be difficult to imagine Qwest arguing before them that the regulated entity has not operated since time out of mind under an obligation to provide adequate assurances that the regulated entity charges and receives (with respect to services among affiliates) fair and appropriate prices. Cross-subsidization is by no means an issue that the Telecommunications Act of 1996 created. Public service commissions have long concerned themselves with whether regulated services were burdened by costs that other affiliates should bear, or deprived of revenues that other affiliates should not be taking. It is doubtful that US WEST has in the past operated without recognition of this concern of state regulators; in any case if it failed to have such recognition, it should draw no sympathy at this point.

Therefore, we begin the analysis of this issue under the proposition that the burden to account properly for inter-affiliate transactions has not changed sufficiently (by passage of the 1996 Act or any FCC pronouncements thereunder) to render irrelevant the performance history for periods prior to designation as a §272 affiliate. However, we begin as well by rejecting any notion that once an entity is so designated, one should look at transactions involving that entity before it was such an affiliate no differently from the transactions that predated it. We will look at transactions from the perspective of what status the involved entities had when the transactions took place and we will judge the significance of those transactions to forward-looking circumstances appropriately. To do otherwise, would be to anomalously apply hindsight, on the one hand, or to erroneously expunge all transaction history before the 1996 Act came along.[102]

The material conclusions that can be drawn include the following:

- Qwest did not, outside the context of §272, find it sufficiently important to assure that transactions between QC and QCC were accrued on a timely basis, or paid promptly or subjected to interest penalties for untimely payment

[101] Qwest 272 Reply Brief at pages 9 and 10, citing the *SBC Texas Order* at paragraph 398 and the *BANY Order* at paragraph 405 and note1253.
[102] This sentence of course assumes that it is acceptable to selectively split infinitives, as it were.

- Qwest did eventually undertake substantial efforts to bring its transactions, both past and current, into compliance with applicable accounting requirements
- The very magnitude of that effort gives reason to merit validation that the efforts undertaken have had current effect and are likely to continue to prove sufficient to meet applicable requirements
- The evident lack of attention to the kinds of transaction details that QC clearly would have paid had a third party (as opposed to an affiliate) been at the other end of the bargain buttresses the need for validation of the current and future effectiveness of the recent improvement efforts by Qwest
- The fact that AT&T's testing did disclose some errors with respect to QLD also buttresses this need, although it should be emphasized that the AT&T findings that remain valid after consideration of the documents Qwest provided on the record would not alone produce sufficient concern to warrant special measures at this time.

Therefore, Qwest should be required to arrange for independent (i.e., third-party) testing, covering the period from April through August of 2001 to determine: (a) whether there have been adequate actions to assure the accurate, complete, and timely recording in its books and records of all appropriate accounting and billing information associated with QC/QCC transactions, (b) whether the relationship between QC as a vendor or supplier of goods and services and QCC has been managed in an arm's length manner, including, but not necessarily limited to a consideration of what would be expected under normal business standards for similar contracts with an unaffiliated third party, and (c) whether there are reasonable assurances that a continuation of the practices and procedures examined will continue to provide the level of accuracy, completeness, timeliness and arm's length conduct found in examining the preceding two questions.

This examination should be conducted under the following requirements:

- Apply the testing and evaluation criteria deemed necessary by an independent party (qualified to perform such an examination) to provide a high degree of confidence that the answers it provides to these two questions can be relied upon by regulators
- Consider in the development of test procedures the need for the completion of the examination and the filing with the seven participating commissions of the report described below no later than November 15, 2001
- Produce a report and supporting work papers that present a factual basis upon which regulators can form their own, independent answers
- The current independent auditor, whose personnel have substantially contributed to the creation of transaction detail whose adequacy will be examined, should not be considered for the performance of this examination
- Apply a materiality standard that does not consider consolidated financial results, or even the overall financial results of QC. In determining what would constitute a material failing or exception in connection with the two questions to be

answered, the examination will consider as the applicable universe not more than the total transactions between QC and QCC over the period to be covered. The reasons for this application of this materiality standard are described in the discussion of the immediately following issue.

Positive answers to the three established questions, under the type of examination identified herein, should be sufficient to reduce to an acceptable level the current uncertainty about whether entry into the in-region, InterLATA market will be accompanied by compliance with the requirements of section 272(b)(2). Such answers will do so by validating whether the major efforts that Qwest has recently undertaken to produce significant change in its prior practices have achieved the changes from past practice that are necessary to comply in the future with these requirements.

Qwest's brief correctly noted that the "biennial audits" contemplated under section 272(d)(1) do not begin until after market entry under §271. Those audits serve a much broader purpose than the examination procedures contemplated here. Biennial audits, for example, will have to examine the much-expanded relationships between BOCs and their affiliates after those affiliates enter new markets. Qwest's brief also suggested that requiring it to undergo an audit here would impose an inordinate burden on it, because the FCC has required no other BOC to undergo a §272 audit before gaining §271 relief.[103] The examination proposed here is not, however, a "§272 audit." Rather, this examination is intended to determine whether the substantial efforts that Qwest has only recently undertaken, which it presumably undertook because it recognized the need for them, are sufficient to provide, in light of its recent history, adequate assurances that it will begin (presuming that the FCC allows it) an era of in-region InterLATA service in compliance with §272(b)(2) requirements.

Qwest did provide evidence of at least partial success (its findings of zero percent discrepancy in reconciling Internet postings with billing detail). However, their introduction, particularly the one that was filed two days before the reply briefs, so late in the process does not give sufficient comfort that they resulted from complete and fully reliable (for our purposes here) examinations.

2. Materiality

Qwest cited the opinion of its outside auditor for QCI's consolidated operations as evidence that QCI follows GAAP in all material respects. Qwest further said that the FCC has found that a showing about the parent's consolidated financial statements was sufficient to persuade the FCC in the Louisiana II 271 order that the §272 affiliate also followed GAAP.[104]

AT&T took issue with Qwest's use of such a materiality standard. It noted that the testing and examination undertaken by the outside auditor before providing its opinion might not have tested any transactions between QC and QLD. AT&T said that, in designing its sampling, the auditor would have had to deal with a universe that included $13.2 billion in consolidated QCI income and $9.8 billion in consolidated expenses in

[103] Qwest 272 Reply Brief at pages 8 and 9.
[104] Qwest 272 Brief at page 7.

1999. By contrast, QC paid QLD $29 million and QLD paid QC $3.5 million in this period. Thus, AT&T said, what was material to the BOC/§272 affiliate relationship might well not be material in the consolidated QCI context. AT&T went on to reject the relevance of applying materiality even in a narrower context, however, citing the General Standard Procedures for Biennial Audits, which it said the Joint Federal/State Oversight Group has established. AT&T said that those procedures required all errors or discrepancies to be reported.

Proposed Conclusion: Underlying Qwest's main brief and its testimony were notions of materiality as it is defined in connection with the statements one typically sees from independent auditors in connection with the filing of required public disclosures of consolidated financial statements. Designed to give comfort to investors, such statements understandably and appropriately focus on overall results. They may well, as is likely the case here, be based on test procedures that resulted in the examination of none, let alone a representative example, of the transactions between QC and its §272 affiliate.

This feature of such statements makes them all but irrelevant in addressing the degree to which the transactions between QC and QCC or QLD comply with the requirements of §272(b)(2). What counts in addressing materiality is not QCI's entire universe, nor even QC's total universe, but the universe that consists of transactions between QC and QCC or QLD. AT&T is therefore correct to a substantial degree in its argument. It goes too far in dismissing materiality altogether, however.

That step has the effect of requiring perfection with respect to completeness, accuracy, and timeliness. It is self-evidently true that this standard could not be met in its own operations or, more importantly, in the operations of any wholesale supplier. Moreover, the standards that AT&T cited only relate to what must be reported in a biennial audit. The issue here is what should be considered material for determining pre-market entry compliance with §272(b)(2). The fact that something merely has to be included in a report of an audit for a different purpose hardly means that it would alone be grounds for a determination that market entry should be denied for non-compliance with §272(b)(2).

Thus, the concept of materiality should remain a part of evaluating compliance with §272(b)(2), but the universe to which the standard of materiality should be applied consists of the total transactions, in the time period in question, between QC and QCC or QLD.

3. Documentation

AT&T said that, as of January 2000, QC stopped providing information that is material to meeting the disclosure requirements of §272(b)(2). Until that time, postings to its web site included the following information:

- Service agreements
- Work and task orders issued under those agreements
- Details of specific transactions under the agreements and orders.

AT&T said that Qwest dropped the transaction details from the list of posted information. AT&T further argued that the failure to post QCC transactions prior to April 2001 demonstrates lack of an audit trail.[105]

Proposed Conclusion: As footnote 8 of AT&T's 272 brief indicates, this aspect of the AT&T argument depends upon the same failure to make timely accruals that AT&T cited to support its argument that Qwest does not comply with GAAP. The additional argument made here is that Qwest recently decided to remove from its Internet posting the details of particular transactions that take place under general agreements or work/task orders. That additional argument is misplaced. The point of public posting of transaction information is to permit a non-affiliated entity to decide if it wished to make use of the same services that are being provided to a Qwest affiliate.

An auditor may have reason to test actual compliance with posted terms and conditions, but that does not mean that the public posting should support audit requirements, as opposed to the need for making a decision about the value of services that a non-affiliate might be able to secure. Thus, the public posting issue, which is addressed more fully below, has nothing to do with the question here at issue, which is whether there exists somewhere the information necessary to allow a validation that the services actually being provided to affiliates are in accord with the posted agreements, work orders, and task orders upon which non-affiliates must rely in deciding whether to take service from Qwest.

That said, the issue raised by AT&T is not clearly severable from the accrual issue already raised and dealt with above. The examination recommended earlier in this report should test whether the posting of information is consistent not only with what the company says it provides for affiliates, but with what is actually provided. Therefore, if there is any difficulty in determining what is actually being provided and under what terms and conditions it is being provided, the examination required above will already address it. Therefore, no further action is necessary to address this aspect of AT&T's argument.

4. Internal Controls

AT&T also argued that its findings about the lack of timely accrual and billing for services demonstrated a lack of adequate controls at Qwest.[106]

Proposed Conclusion: Again, AT&T relied here upon the same factual basis as it used to argue that Qwest fails to follow GAAP. As noted under that issue, Qwest has cited many changes it has made to provide assurances that it is now complying with all applicable requirements. The examination recommended above was intended to determine whether those Qwest actions have produced sufficient assurances of such compliance. Therefore, this aspect of AT&T's concerns will be adequately addressed by that examination.

[105] AT&T 272 Brief at page 8.
[106] AT&T 272 Brief at page 9.

5. Separate Charts of Accounts

AT&T noted that it took several efforts before it could finally secure charts of accounts for QC, QCC, and QLD. AT&T acknowledged that it eventually secured them and that they satisfied the requirement that they be separate. AT&T argued that the failure to provide evidence of such separateness demonstrates a lack of diligence with respect to compliance with this requirement.[107]

Proposed Conclusion: The evidence of record demonstrates an acknowledgement by AT&T that the requirement about which it has expressed concern has in fact been met. The issue is not whether AT&T's examiner found them without effort, but whether they in fact existed. The record demonstrates that Qwest maintains separate charts of accounts for the entities involved.

6. Separate Accounting Software

AT&T said that it could find no evidence that QC and QLD were using separate accounting software. AT&T also said that it had found evidence that there had been a reversal of a billing to an affiliate, which called into question the Qwest assertion that it was not possible for one Qwest entity to enter a transaction by using any Qwest entity code other than its own. AT&T acknowledged that there is evidence that QC and QCC have separate accounting codes.

Proposed Conclusion: Much of AT&T's argument assumes that separate accounting software between the BOC and the 272 affiliate is required. However, AT&T has provided no legal support for that contention, which, in any event, runs counter to the FCC's recognition that inter-affiliate services represent an opportunity for economies of scale that should not be denied a company such as Qwest.

The real issue is whether the accounting function is separately performed and subject to adequate controls. AT&T acknowledges that the evidence now indicates that QC and QCC have different accounting software, which is more than sufficient to demonstrate separateness. As to the issue raised about QLD, citing a single instance of a reversal is not demonstrative of a systemic weakness or failure. Moreover, the fact that a reversal was made does not necessarily relate at all to the ability of one affiliate to make entries into the records of another affiliate. Stand-alone companies (i.e., those with no affiliates at all) reverse entries when they bill the wrong customer. That an entity can correct its own entry should not be in question; the issue is whether one entity can enter information as if it were another entity.

The evidence presented raises no substantial argument that Qwest fails to adequately separate the accounting of the BOC and the 272 affiliate.

D. Separate Officers, Directors, and Employees

AT&T asserted that Qwest's conduct to date demonstrates inadequate compliance:[108]

[107] AT&T 272 Brief at page 11.
[108] AT&T 272 Brief at pages 12 and 13.

- Employee transfers back and forth between QC and the 272 affiliate
- 100 percent usage by the 272 affiliate of many QC employees
- Participation of 272 affiliate employees in a QC award program
- Lack of comparison of payroll registers
- Lack of separate payroll administration[109]
- Officer Overlap

1. Routine Employee Transfers

Section 272(b)(3) says that the 272 affiliate "shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate." AT&T said that a "revolving door atmosphere" has produced movement back and forth between QC and the section 272 affiliate, which has "subverted" the purpose of this section of the Act.

Qwest argued that neither the Act nor the FCC precludes movement back and forth between QC and QCC. Specifically, Qwest said, what is prohibited is "simultaneous" employment by both.[110] Qwest also cited the fact that such transfers involve fewer than 100 employees.[111] Qwest also said that it has taken adequate steps to prohibit any inappropriate conduct that might result from such employment movement, including:[112]

- Requiring the return of 272-affiliate assets by an employee leaving the 272 affiliate
- Requiring employees leaving the 272 affiliate to account for documents in their possession
- Requiring employees leaving the 272 affiliate to acknowledge that they will no longer have access to that affiliate's information and that they may not disclose the affiliate's information
- Requiring such employees who take positions with another Qwest entity to sign a non-disclosure agreement that prevents the sharing of non-public information between the companies
- Instituting procedures training to ensure compliance with section 272
- Requiring employees to review annually the Code of Conduct that governs relationships among the QC affiliates
- Providing training for new employees
- Informing employees that violations may lead to disciplinary action that includes termination of employment
- Providing for physical separation of the offices of QC and QCC

[109] These last two elements of AT&T's argument came in its 272 Reply Brief, at pages 5 and 6.
[110] Qwest 272 Brief at pages 11 and 12.
[111] June 7, 2001 transcript at page 159.
[112] Qwest 272 Brief at pages 12 and 13.

- Providing color-coded badges to identify the 272 affiliate's employees.

Proposed Conclusion: Congress has not prohibited movement between affiliates; it requires instead independent operation and separate employees. AT&T's argument conflates the Congressional concern about operating independence and separation of employment. A "revolving door" policy could arguably compromise independent operation. However, transfers of fewer than 100 employees out of the thousands involved in the restructuring that Qwest did among QSC, QC and QCC do not establish that Qwest is using transfers back and forth in a way intended to or actually causing a compromise of operational independence. With the current level of transition in the communications business, such levels can hardly be expected even to exceed the number of displaced Qwest personnel who find employment with CLECs, let alone sufficient to raise immediate concerns about operational independence and the protection of information.

The steps that Qwest has taken to assure independent operation and protection of confidential information are adequate to establish a baseline mode of operations that gives current assurances that it will meet applicable requirements. The existence of such a baseline is all that is required for present purposes, given the monitoring and examination of employee transfers that will take place in the future, for example, as part of biennial auditing.

The record here supports a conclusion that Qwest maintains the required degree of employee separation, and that transfers to date, given the mitigation measures adopted by Qwest and not challenged as to sufficiency by any other party, do not rise to a level that suggests a compromise of operational independence.

2. 100 Percent Usage

AT&T argued that employment of "many" individuals by QC who have been assigned full-time to the work of the 272 affiliate, also subverts the purpose of section 272(b)(3).[113]

Qwest responded with the general argument that the FCC clearly does not prohibit service sharing, which presumably would require the assignment of some QC employee time to the 272 affiliate he or she serves. Qwest then went on to say that its policy is to limit such assignments to specific time periods, functions, and projects, which relate to services posted on the Internet, and which are available to non-affiliates.[114] QC and QCC also agreed to implement a new policy prohibiting such assignments for periods of more than four months out of any twelve.

Proposed Conclusion: We must begin by recognizing that the FCC allows shared services between a BOC and its 272 affiliate. We next must understand that if the BOC is providing such services, the recipient (the 272 affiliate) must pay for them. Thus, it should not be considered surprising or inappropriate to find a substantial percentage of a BOC employee's time being charged to the 272 affiliate over what looks to be a long period of time. In fact, if one considers the economies of scale that come from common

[113] AT&T 272 Brief at page 12.
[114] Qwest 272 Brief at page 14, citing the June 7, 2001 transcript at pages 300 and 301.

provision of services (which we must, given the FCC's recognition of both the value and propriety of common services) it would also not be surprising to find that what four employees can provide the 272 affiliate through one quarter of their time, one employee can provide more efficiently through 100 percent of his or her time. Accordingly, without knowing more, there is no reason to be immediately critical upon observing that an employee has assigned substantial time to the 272 affiliate on a long-term basis.

On the other hand, we can think of examples where 100 percent assignment of time to the 272 affiliate is more clearly troublesome. Take as an example the hypothetical case where the director of marketing for the 272 affiliate is a BOC employee who assigns all time to the 272 affiliate. Such a complete and long-lasting separation of nominal employment and actual responsibility should trigger questioning, because the use of long-term assignments of senior personnel to an affiliate can have the tendency to compromise the separate employment requirement. However, it is not possible to prescribe the exact conditions where such compromise would lead to a conclusion that there occurred a failure to meet the intent of that requirement.

Certainly, the commitment to limit full-time assignments to no more than four months of any twelve represents a good-faith effort to simplify what can become a murky, very judgmental question to address. That proposal is therefore acceptable for present purposes, recognizing that experience gained through ongoing monitoring efforts (such as those attendant to biennial auditing) will be the better judge of how long-term separations of employment and assignment affect the fulfillment of Section 272 objectives.

3. Award Program Participation

AT&T cited an award program that allowed the participation of both QC and QCC personnel, which, AT&T said, compromised the independent operation of the two entities. AT&T said that its witness's examination of Qwest records disclosed the payment of "team awards" to former employees of QLD who were later "rehired" by QC. It appeared from AT&T's examination that, after returning to Qwest, the former QLD employees received such awards. AT&T found that a terminated work order (RMLD099) listed on QLD's website described a program that rewarded employees for customer referrals and cost saving ideas; AT&T said that QLD employees were allowed to participate in this program.[115]

Qwest said that the FCC had already rejected a claim by AT&T that the FCC should, "prohibit the BOCs from using any compensation system that directly or indirectly bases any part of the compensation of BOC officers, directors, or employees on the performance of the affiliate, or vice versa."[116]

Proposed Conclusion: As a general matter, the FCC has already decided that at least the overall performance of the BOC can be considered in compensating 272 affiliate employees and vice versa. However, tying individual compensation to overall affiliate performance is not what is at issue here. The FCC should not be read as being indifferent to a compensation mechanism that specifically induces BOC or 272 affiliate employees

[115] Exhibit S7-ATT-CWS-1, at paragraph 30.
[116] Qwest 272 Reply Brief at footnote 69, citing paragraph 186 the *Non-Accounting Safeguards Order*.

to act in a manner that would promote inappropriate inducements for customers to change carriers. Therefore, if the compensation mechanism at issue can be read to create a clear inducement to misuse information or to act anti-competitively, a further inquiry would be in order.

A close reading of the exhibit relied upon by AT&T does not present any evidence of improper inducements. There is nothing wrong with inducing a QC or a QCC/QLD employee (whether or not a former employee of the other) for referring customers or offering cost saving suggestions for the benefit of their employer. Both have customers and both have costs. The primary incentive, not to mention the primary knowledge base and the primary concern of the employee's management, can be expected to be the business of the affiliate by whom the employee is currently employed. It is firfetched to project, as AT&T does, that such a program will have the effect of causing an employee to spend material time trying to refer customers or save costs for the other company, rather than for the one by whom it is currently employed.

Except in the case of a misuse of information (otherwise dealt with through conduct restrictions and training, as is elsewhere discussed in this report), there is no compromising of independent operation by virtue of the fact that there is a common customer referral and cost-saving reward system.[117] It is true that the record does not disclose all of the facts about the operation of this reward system. There has been no claimed shortage of discovery opportunity in these proceedings. Absent more from the proponent of this issue, therefore, it remains clear that there is no significant likelihood that running it to ground will bear significantly on Qwest's compliance with the independent operations requirements of section 272.

4. Comparing Payroll Registers

Qwest testified that it performed a comparison of the payroll registers of QC and the 272 affiliate, and that this comparison showed no overlap.[118] AT&T argued that the evidence demonstrated that such comparisons came about only recently, thus demonstrating that Qwest had failed to verify earlier that it complied with separate payroll requirements.[119] AT&T specifically said that it was clear that Qwest, before these proceedings, had never conducted a payroll register analysis for prior years.[120]

Proposed Conclusion: AT&T has cited no requirement that there be routine, cyclical payroll register comparisons for some period predating a 271 application. Thus, the issue of whether Qwest has performed them repeatedly in the past is not directly relevant. The primary issue is whether the evidence before us shows what the current practice is and how well it is implemented. The evidence of record demonstrates that there is not at present an overlap, that Qwest recognizes the obligation to preclude overlap, and that Qwest considers an examination of payroll registers to be an appropriate tool in assuring that the restriction against simultaneous employment is being met.

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[117] This conclusion stands even if (although it has not been proven that the program is intended to reward employees for actions intended to benefit QCI entities other than the one that employees them directly) the occasional impact of the program is to an employee of one affiliate for benefits to another affiliate.
[118] Qwest 272 Brief at page 10, citing its Exhibits S7-QWE-MES 1 and MES-3.
[119] AT&T 272 Brief at page 13, citing Exhibit S7-ATT-CWS-1, at paragraph 31(j).
[120] AT&T 272 Reply Brief at page 5.

Under these circumstances, we can conclude that the requirement is being met, that there is no basis in this record for concluding that it has not been met historically, and that we may be satisfied that the biennial audits will suffice to assure that the requirement continues to be met.

5. Separate Payroll Administration

AT&T argued that the performance of recruiting by QCC for QC and the lack of separate payroll administration between the two would undermine any conclusion that the companies maintain the operating independence required by section 272(b)(1).[121] Qwest noted that AT&T has conceded in testimony that separate payroll administration is not an FCC requirement, and it noted that the payroll administration function that QC provides for QCC is available as required to non-affiliates at posted rates, terms, and conditions.[122]

Proposed Conclusion: What AT&T essentially complains of, in both the cases of recruitment and payroll administration, is the provision of common services between the BOC and the 272 affiliate (i.e., between QC and QCC). The FCC has, however, specifically rejected the notion that common services should be prohibited as a means of encouraging "independence" as AT&T would define it. To the contrary, the FCC has endorsed common services, outside the network-related areas where they are specifically prohibited, as a means of capturing economies of scale.[123] This rule is particularly sound, as it allows Qwest to do no more than to exploit the same kinds of economies that are available to other efficient competitors in the marketplace.

Hamstringing the BOCs is not the goal; assuring that they do not unduly advantage themselves is. The conduct limits, simultaneous employment restrictions, biennial auditing, and other requirements are sufficient to mitigate the potential for such discrimination. There is no evidence here of any need to go further and remove those natural economies that, in a competitive marketplace, inure to the benefit of customers. Were we to eliminate these two areas of common service, there would be no end to the debate, short of prohibiting any at all, about which services should be permitted and which should not.

6. Officer Overlap

AT&T expressed concern about the independence of 272 affiliate employees, officers and directors.[124]

Qwest said that this individual has not been an officer of QCC since it became the 272 affiliate on March 26, 2001. From that time forward, according to Qwest, the individual has been an employee and officer of QSC and a director of QC (the BOC).[125]

Proposed Conclusion: The cited transcript pages contain no information from which it can be concluded that the employee whose status AT&T questioned simultaneously

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[121] AT&T 272 Reply Brief at pages 5 and 6.
[122] Qwest 272 Brief at page 15.
[123] Third Order on Reconsideration, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 14 FCC Rcd 16,299, ¶ 18 (1999).
[124] AT&T 272 Reply Brief (Confidential Version) at page 6.
[125] Qwest 272 Reply Brief at page 16, citing the June 7, 2001 transcript at page 265.

served the BOC and the 272 affiliate as an employee, officer, or director. In fact, there is no evidence that the employee was ever an employee or officer of QC, the BOC. The employee came from the Qwest side of the pre-merger house. The employee did become, according to the evidence, a director of the BOC, but after leaving employment with QCC. The evidence does not show that the employee ever was a director of QCC. When asked about whether AT&T's witness had any information that the employee served both QC and QCC simultaneously, he could not recall without reference to his notes. There was subsequently no testimony from AT&T regarding those notes.

The record fully supports the conclusion that there was no simultaneous service. Moreover, this employee made a clear break from the pre-merger Qwest side of the house before taking on a position as a director of QC. It is beyond unrealistic to expect no movement between companies such as Qwest and US WEST after a merger; more importantly, such movement is not improper. AT&T's suggestion that this one cited incident somehow casts doubt on the independence of the 272 affiliate's employees, officers, and directors is without a substantial factual basis, and is lacking a clear legal foundation.

E. Transaction Posting Completeness

Section 272(b)(5) requires the 272 affiliate to cause its transactions with its affiliated BOC to be "reduced to writing and available for public inspection." The FCC has set the standard for meeting this requirement in saying that:

> [T]*he description of the asset or service and the terms and conditions of the transactions should be sufficiently detailed to allow* [the FCC] *to evaluate any compliance with our accounting rules.*

AT&T claimed that Qwest failed to meet this standard in a number of ways:

- By deciding to stop posting the specific billed amounts necessary for AT&T to determine whether Qwest complied with FCC accounting rules
- By failing to post on a timely basis transactions with QCC from the time that it became a 272 affiliate
- By failing to provide service completion dates for some services
- By failing to provide the required verification of the accuracy of the publicly posted information.

1. Posting Billing Detail

AT&T objected to Qwest's decision, apparently effective as of January 1, 2000, to stop posting "billed amounts" under the transactions whose terms and conditions Qwest was making public. From that point, Qwest began to limit inspection of such information to on-site examinations by those who first executed protective agreements.[126] AT&T said

[126] AT&T 272 Brief at page 14.

that posting the agreements, work orders, and task orders is not sufficient, because non-affiliates need to see the transaction details in order to make an informed decision about whether to take the same services. AT&T would include in such required detail the actual service or items purchased and the amount actually paid for it. AT&T said that such detail was also required to verify that there was no discrimination against non-affiliates in providing the services or items at issue.[127]

Qwest said that its posting of Master Services Agreement, along with work orders thereunder, served to provide adequate notice of the details of the services provided, the dates of service commencement and completion, and the prices charged, with additional detail available to those willing to execute a nondisclosure agreement.[128] Qwest said that the FCC had already objected to the very same request for billing detail that AT&T made here. Specifically, according to Qwest, the FCC approved of SBC's postings, over AT&T's objections, even though they did not include "the billing details about individual occurrences of services provided pursuant to its agreements." Qwest also noted that it provided a monthly reconciliation of all transactions accrued and billed.[129]

Proposed Conclusion: The requirement for making transaction information available serves two purposes, which are distinct and which require distinct levels of information. The first purpose is to provide competitors with enough information to make a business decision, i.e., whether to avail themselves of their right to take services on the same terms and conditions as are provided by the BOC to its 272 affiliate. Serving that purpose does not necessarily require the posting of the individual transaction detail that AT&T seeks. Depending upon what they contain, the master agreements and work orders under them may be sufficient. It is correct that the information posted needs to describe the terms and conditions under which services were actually provided, should they differ from what the master agreements or work orders provided. However, the monthly posting of what Qwest calls "reconciliation" or what AT&T calls "true up" data can serve this need. The examination recommended under the preceding *Books and Records* discussion will address the sufficiency of the master agreements, work orders, and reconciliation data to provide competitors with an adequate specification of terms and conditions to allow rational decisions about taking services.

The second purpose for making transaction data available is to assure that audits or other formal examinations of transactions can take place. There is no sound reason why a public posting of such data is necessary to accomplish this purpose. There are, to the contrary, substantial reasons for not making such information publicly available. The nature and level of services that are provided inside Qwest are competitively sensitive. A competitor may get access to any service that a BOC provides for a 272 affiliate. There should not be free access to the exact level and timing of services that a BOC is providing. Therefore, requiring non-disclosure agreements and on-site examinations of such information constitute appropriate means for assuring that audit-related work can take place without allowing competitors to make competitive use of the information observed. In fact, if there are adequate means for regulatory review of such information,

[127] AT&T 272 Brief at page 20.
[128] Qwest 272 Reply Brief at page 12.
[129] Qwest 272 Reply Brief at page 13, citing paragraphs 405 and 407 of the *SBC Texas Order*.

it may be argued that access to such information could logically be denied to competitors altogether.

2. Initiation of the Posting of QCC Transactions

There was substantial debate about when QCC became, for purposes of transaction posting, subject to section 272 requirements. AT&T argued that Qwest's assertion that the initiation date was March 26, 2001 was undercut by Qwest's own evidence, which supported a date of January 1, 2001. Thus, according to AT&T, Qwest violated the posting requirements by failing to post transactions before late March of 2001. Moreover, AT&T said that QCC became, by operation of law, a section 272 affiliate as of the July 2000 US WEST/Qwest merger effective date.[130] AT&T continued by reciting many instances of "late" transaction postings, which generally correspond to the same cases of failure to follow GAAP or to provide sufficient internal controls (see the earlier discussion under *Books and Records*). AT&T also noted that the web site of the former 272 affiliate, QLD, was activated in September of 1998, close to two years after the effective date of the *Accounting Safeguards Order*, which established transaction posting requirements.[131]

Qwest responded that it is now providing timely transaction posting, that it should not be obliged to post transactions before an entity becomes a section 272 affiliate, that many of the cases cited by AT&T occurred during the unsettled period of the transition to QCC as the 272 affiliate during the first 3 months of 2001,[132] and that AT&T's arguments here essentially repeat what it termed elsewhere as a failure to follow GAAP, a lack of internal controls, impermissible discrimination, and a failure to follow accounting rules.[133]

Proposed Conclusion: In the first instance, AT&T begins from an illogical conception of what constitutes a section 272 affiliate. AT&T incorrectly argues that QCC became a 272 affiliate by operation of law when it became affiliated with a BOC through merger in July 2000. Not all BOC affiliates are necessarily section 272 affiliates; in fact, none may be, depending on the circumstances. Even an affiliate that provides out-of region InterLATA services is not automatically a 272 affiliate. That section only says that manufacturing, in-region InterLATA telecommunications, and InterLATA information services need to be provided through a separate affiliate. If no such services are being provided, then there is under the Act, no "272 affiliate." Moreover, the transaction posting (and other) requirements of section 272 only apply to "the separate affiliate required by" section 272.

Therefore, absent the provision of in-region, InterLATA services (the other two categories are not at issue here), it can be argued that there was and is, at least for some purposes, no "272 affiliate" within Qwest. Alternatively, if there were, then every QC affiliate would have to be so construed prior to the time that an election was made.

Thus, there is no inherent reason for concern about a decision to elect to provide what continues to be a future service offering through an affiliate different from the one earlier

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[130] AT&T 272 Brief at page 15.
[131] AT&T 272 Brief at pages 15 through 18.
[132] Qwest 272 Reply Brief at page 4.
[133] Qwest 272 Reply Brief at footnote 4.

expected to carry out that role. Nor is it necessarily wrong to allow a reasonable transition when such a change is made. Nor does it necessarily constitute an admission against interest to post transactions for an earlier period. AT&T's arguments to the contrary not only strain the plain language of federal law past the breaking point. They would impose a circular string of obligations that would make it impossible for a BOC to make and to revisit reasonable organizational and business decisions in the course of its preparations to meet requirements applicable to a business it has not yet even entered, but must prepare for if it is to meet the substantial public requirements associated with that business.

We have already addressed whether Qwest's traditional accounting practices and controls give sufficient confidence about its ability to meet 272 requirements after it may enter the business to which the section applies. AT&T has presented no sound argument or evidence that we should go further by addressing in this particular Qwest's historical compliance.[134] The recommendation under the earlier *Books and Records* discussion seeks an examination of the effectiveness of recent Qwest changes in systems, practices, and controls in giving assurances that it is committed and prepared to comply with section 272 requirements on a predictive basis. No more is required here.

3. Indefinite Service Completion Dates

AT&T argued that the FCC requires that transaction postings provide either the length of time or estimated completion date of any project. AT&T said that it found agreements between QC and QCC that have "indefinite" completion dates.[135] There was testimony that such examples exist because the services are provided under agreements of indefinite duration, which Qwest also said was the case in its brief.[136]

Proposed Conclusion: We need no evidence of record to state the self-evidently true conclusion that commercial contracts often provide for indefinite terms subject to the right of either party to terminate them by providing notice. There is no reason to believe that the FCC did or should have intended to restrict the ability of BOCs and their 272 affiliates to enter into such contracts. The requirement that completion dates or estimates be provided should not be construed as prohibiting what AT&T has objected to, which are "agreements" that have this common form of establishing duration. AT&T's position finds no support either in commercial practice or in the requirements of the FCC, which do not prohibit agreements of indefinite duration. Whether work and task orders under such agreements are sufficiently precise and complete is a different matter; it is not those, but the "agreements" under which they are issued that AT&T has addressed here.

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[134] Parenthetically, it is worth noting the confusion created by the lack of care that AT&T's testimony and briefs showed in making it clear that it was relying upon essentially the same factual circumstances to support what amounted to many different claimed violations. The value in mentioning this circumstance is to help prevent the impression that there are many more apparent, independent occurrences of alleged violations than actually existed. Given the way that AT&T chose to present its evidence and argument, it took a painstaking effort to determine which of the many AT&T arguments ultimately depended on the same instances.

[135] AT&T 272 Brief at page 18, citing paragraph 337 of the *Bell South Louisiana II Order*.

[136] June 8, 2001 transcript at pages 40, 41, and 45 and Qwest 272 Reply Brief at footnote 53..

4. Verifications

Paragraph 122 of the *Accounting Safeguards Order* requires that transaction information available for public inspection be accompanied by a certification declaring that:

> *An officer of the BOC has examined the submission and that to the best of the officer's knowledge all statements of fact contained in the submission are true and the submission is an accurate statement of the affairs of the BOC for the relevant period.*

AT&T presented evidence that it found no statements during its examinations in 1998 and in 1999; Qwest admitted that it filed none, because it construed the certification requirement as applying only after filing of a section 272 application.[137] AT&T later discovered certifications for QC and QCC, which were filed by the same officer. The signer was listed as an officer of QCC, but not of QC. AT&T argued that the failure of a QC officer to sign the QC certification constituted a violation of the *Accounting Safeguards Order*.

Qwest acknowledged that the signer for QC was no longer an officer of QC when she signed its certification. Qwest's testimony was that the controller position of QC was vacant at the time of the certification; therefore, the signer, who was also an officer of QC's parent, made the certification for QC. After AT&T's examination at Qwest's offices, Qwest replaced the certification with one signed by the person then serving as QC's controller.[138]

Proposed Conclusion: Fulfilling the requirement that an officer certify the accuracy of information such as that at issue here as an important element of providing a proper environment for controlling performance. It assures accountability at a level that is presumably sufficient to assure attention to accuracy. The record here shows that, whatever requirements may have applied in past periods when, as AT&T found, QC did not file certifications, QC does recognize the obligation to make such certifications. There is no basis for a predictive conclusion that QC is not likely to comply with applicable certification requirements.

The use of a QCC officer to sign the recent certification, since amended, is more questionable. It may be, given the vacancy in the QC controller position, that no other officer of QC had the requisite knowledge to make the certification, but Qwest did not testify to that, nor does it seem probable that such was the case. Even had it been, caution should have suggested that the certification signed by the QCC officer contain a disclosure regarding the reasons why a QC officer was unavailable to make the certification.

The primary significance of the evidence on this issue is that it tends to confirm the transitional nature of Qwest's handling of inter-affiliate relationships issues in the period in question (the certification in question was signed on March 20, 2001).[139] The effectiveness of the actions taken by Qwest during that transition would already be

[137] AT&T 272 Brief at page 22, citing the June 7, 2001 transcript at pages 253 and 254.
[138] June 7, 2001 transcript at pages 250 and 253.
[139] Exhibit S7-ATT-CWS-1, ¶ 61.

examined under a preceding recommendation of this report. That examination should confirm that QC continues to have adequate controls in place to assure that a QC officer who has the requisite knowledge provides the required certifications. Beyond this confirmation, this issue raises no other predictive concerns about Qwest compliance with the requirements of section 272.

F. Non-Discrimination

Section 272(c)(1) says that a BOC, when dealing with its section 272 affiliate:

> *May not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards*

Much of AT&T's argument about Qwest's non-compliance with this provision concerns the failure to make timely payments.[140] In addition, AT&T presented testimony asserting that Qwest has not addressed a number of items that the FCC considers in examining compliance with this requirement.[141] Those items were:

- Whether QCC will be informed of planned network outages before public notice is given
- Whether Qwest will continue to participate in public standard-setting bodies
- Whether Qwest has committed not to discriminate in establishing interconnection or interoperability standards
- Whether Qwest has stated that it would not discriminate in the processing of PIC orders
- Whether Qwest has stated that it would comply with the FCC's prohibition against the use of its Official Services Network to provide InterLATA services
- Whether employee transfers between the BOC and the 272 affiliate create a concern that there will be an improper flow of confidential information between the two entities
- Whether Qwest has proved that it will provide nondiscriminatory access to its OSS.

Qwest responded that its testimony contained commitments to comply with the non-discrimination requirements of sections 272(c) and (e).[142]

Proposed Conclusion: AT&T's list of items ignores that the general issue of discrimination was addressed in depth at the preceding workshops, at which many of the items on the list were the subjects of testimony. In addition, Qwest's testimony for this

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[140] AT&T 272 Brief at page 25.
[141] Exhibit S7-ATT-CWS-1, ¶ 81.
[142] Qwest 272 Reply Brief at footnote 6, citing Exhibits S7-QWE-MEW-1 at pages 5 and 6 and 29 and 30 and S7-QWE-JLB at page 23.

particular workshop did address a number of additional items on the list, e.g., OSS access. Finally, as was discussed above, the evidence here shows a moderate number of employee transfers to date, the existence of measures to protect against the improper use of sensitive information, and an ability to address future transfers and information use. Thus, the evidence before us shows that the kinds of issues AT&T says the FCC considers have been addressed, and that all participants have had an ample opportunity to present any evidence that bears upon the FCC's consideration of them.

G. Compliance With FCC Accounting Principles

AT&T's brief noted that the examples it testified to under issues relating to non-compliance with GAAP and the lack of internal controls also demonstrated a failure to comply with the section 272(c)(2) requirement that a BOC, in dealing with its 272 affiliate:

> *account for all transactions …in accordance with accounting principles designated or approved by the Commission.*

Proposed Conclusion: This issue has already been dealt with in the discussion of Books and Records, relating to compliance with GAAP. The application of the 272(c)(2) standard does not add materially to the considerations already made there.

V. Track A Requirements

A. Background

47 U.S.C. § 271(c)(1)(A) sets forth what are known as the Track A requirements. This section says:

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

The FCC phrased the questions involved in interpreting this provision as follows in § 271 proceedings involving Ameritech:[143]

> *In response, numerous parties argue that Ameritech has failed to satisfy various aspects of the section 271(c)(1)(A) requirement. In particular, these parties contest:*
>
> *(1) whether Ameritech has signed one or more binding agreements that have been approved under section 252;*
>
> *(2) whether Ameritech is providing access and interconnection to unaffiliated competing providers of telephone exchange service;*
>
> *(3) whether there are unaffiliated competing providers of telephone exchange service to residential and business customers; and*
>
> *(4) whether the unaffiliated competing providers offer telephone exchange service exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities*

[143] Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Record 20543, 20577-99 (1997) (Ameritech Michigan Order)¶¶ 62-104.

> *in combination with the resale of the telecommunications services of another carrier.*
>
> *We address these issues separately in order to determine whether Ameritech meets section 271(c)(1)(A).*

The workshop participants combined the testimony and briefing of Track A issues with their treatment of the public-interest standard. That standard is addressed at 47 U.S.C. § 271(d)(3)(C), which requires a conclusion that the requested authorization under § 271 "is consistent with the public interest, convenience, and necessity." Questions about the degree of local-exchange market entry by competitors arise here under both standards. However, the contexts for consideration of those questions differ somewhat. Moreover, we are addressing in separate workshops the question of the sufficiency of Qwest's plan for assuring that its markets remain open after its entry into in-region InterLATA service (that plan is called the QPAP). All participants agree that the QPAP is a central element of satisfying the public interest test of § 271(d)(3)(C). Therefore, it is premature to address the public interest test here. We will instead consider the public-interest aspects of market-share testimony and arguments combined here with Track A considerations when issuing the next workshop report, which will consider the QPAP.[144]

Qwest filed the testimony of David Teitzel on Track A and Public Interest on March 30, 2001 and the rebuttal testimony of this same witness on May 23, 2001. AT&T filed the Affidavit of Mary Jane Rasher on or about May 4, 2001. No other parties filed Track A testimony.

The following parties filed briefs that contained Track A arguments: AT&T, Sprint, WYCAS and Qwest. Both AT&T and Qwest filed reply briefs on this topic. The Iowa Office of Consumer Advocate filed a brief and reply brief on Public Interest, but some of the argument addressed Track A requirements. Similarly, the New Mexico Public Regulation Commission Staff submitted a brief on public interest that contained some Track A arguments.

This report examines the answers for the seven participating states to each of the four Track A questions framed by the FCC in the Ameritech Michigan Order.

B. Existence of Binding, Approved Interconnection Agreements

The FCC has stated that agreements approved under § 252 of the Act, relating to the negotiation and arbitration of interconnection agreements are considered binding for purposes of Track A, even if they contain interim prices, most-favored-nation clauses, or

[144] There are separate briefing requirements related to QPAP. There will be no further briefing of the public interest arguments already raised here; only the PAP will be addressed in subsequent briefs. Moreover, while the next report will comprehensively address the public-interest standard, it will separately address the sufficiency of the QPAP as it relates to that standard. This distinction is important for the states of Washington and Nebraska, whose commissions are participating in the QPAP portion of these workshops, but which are separately addressing the remaining elements of the public-interest standard, which have not been addressed on the record made here.

fail to include every possible checklist item. The FCC held that, for agreements to be binding, it is sufficient that they "specify the rates, terms, and conditions under which [the BOC] will provide access and interconnection to its network facilities."[145]

Qwest presented evidence demonstrating that, as of April 30, 2001, it had entered into 464 binding, approved interconnection agreements in the seven states, which Qwest summarized as follows:[146]

AGREEMENT TYPE	**STATE**							
	ID	**IA**	**MT**	**NM**	**ND**	**UT**	**WY**	**Total**
Wireline	33	44	28	35	21	39	22	222
Wireless, Paging, and EAS	19	27	10	26	9	14	11	116
Resale-Only	17	23	27	19	9	12	19	126
TOTALS	69	94	65	80	39	65	52	464

AT&T, while challenging other aspects of Qwest's satisfaction of the Track A requirements, did not contest the fact that Qwest has entered into these binding and approved agreements with competitive suppliers of local exchange services.[147] Moreover, while there was questioning about whether many of the listed CLECs remained in business in the claimed states, no other participant disputed the existence of a substantial number of interconnection agreements in each state, or otherwise challenged compliance with this element of Track A compliance.

Proposed Conclusion: Qwest has met the portion of the § 271(c)(1)(A) requirement that requires it to have signed one or more binding agreements that have been approved under section 252.

C. Provision of Access and Interconnection to Competitors

Satisfaction of this element of the Track A standard does not require that CLECs receiving access or interconnection have any given geographic service range in a state,[148] nor does it require that they have placed "a substantial commercial volume" of orders or achieved a minimum market share.[149] Qwest offered evidence that it is providing access

[145] Ameritech Michigan Order at paragraphs 72 and 73. Note, however, that interim prices may have relevance to satisfaction of the checklist requirements of § 271.
[146] Exhibit S8-QWE-DLT-9.
[147] Brief of AT&T Regarding Public Interest and Track A (AT&T Track A Brief), at page 24.
[148] Ameritech Michigan Order at paragraph 76.
[149] Ameritech Michigan Order at paragraph 77.

and interconnection in each of the seven states. Its testimony was that it had leased the following numbers of unbundled loops to the following numbers of CLECs in each state, as of April 30, 2001:[150]

STATE	ID	IA	MT	NM	ND	UT	WY
LOOPS	7,746	138,192	2,111	7,715	28,023	27,080	25,163
CLECs	11	14	11	10	12	20	6

AT&T, while challenging other aspects of Qwest's satisfaction of the Track A requirements, did not contest the fact that Qwest was providing access and interconnection to unaffiliated competing providers of telephone exchange service.[151] No other participant challenged compliance with this element of Track A compliance.

Proposed Conclusion: The § 271(c)(1)(A) requirement that requires Qwest to be providing access and interconnection to unaffiliated competing providers of telephone exchange service imposes neither geographic range, order volume number, nor market penetration requirements. Qwest's unrebutted evidence addressing unbundled loop leases demonstrates that it meets the requirement that it be providing access and interconnection to unaffiliated competing providers of telephone exchange service.

D. Existence of Competing Residential and Business Service Suppliers

The first two elements of the Track A test addressed the existence of agreements obligating Qwest to provide access and interconnection and the actual provision of services by Qwest to CLECs under those agreements. This element of the Track A test addresses whether the CLECs involved are actually providing telephone exchange services to residential and to business customers. The FCC has held that there need not be a CLEC that serves both residential and business customers. The test is whether collectively the CLECs in the state serve both customer types.[152]

1. Market Share of Competing Providers

The Ameritech Michigan Order made it clear that this element of the Track A test is satisfied where a competing carrier is serving more than a de minimis number of end users. However, it did not reach the question of what the result would be if the number of lines served by a competitor were de minimis. Neither did the FCC provide a quantitative indication of what would constitute more than a de minimis number of competitively served access lines. It had no need to address that question because Michigan had "three operational carriers, each of which is serving thousands of access

[150] Exhibit S8-QWE-DLT-9.
[151] Brief of AT&T Regarding Public Interest and Track A (AT&T Track A Brief), at page 24.
[152] Ameritech Michigan Order at paragraph 82.

lines in its service area."[153] The recent FCC Verizon Connecticut 271 Order does, however, suggest that the number of end users served by CLECs can be material to addressing the satisfaction of Track A requirements. In deciding that this aspect of the Track A standard was met, the FCC said:[154]

> *Our comparison of the record in the Kansas/Oklahoma application and the record in this proceeding indicates that residential customers served by competitive LECs on a facilities basis represents a somewhat greater proportion of all Verizon access lines in Connecticut than was the case for Southwestern Bell in Kansas.*

The SBC Kansas/Oklahoma Order cited BOC estimates that competitors served between 9.0 and 12.6 percent of total Kansas service-area access lines and between 5.5 and 9.0 percent of all Oklahoma service- Oklahoma access lines.[155]

AT&T cited the Ameritech Michigan Order as adopting the requirement that there be "an actual commercial alternative to the BOC" and as recognizing that "there may be situations where a new entrant may have a commercial presence that is so small that a new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a 'competing provider.'" AT&T said that even Qwest's own estimates demonstrate that CLECs are serving a miniscule number of residential customers in the seven states (0.3 percent overall). AT&T calculated this number by dividing Qwest's estimated number of CLEC-served residential access lines by the total state population numbers testified to by Qwest.[156]

Proposed Conclusion: The Ameritech Michigan Order's treatment of the question of the size of the market served by a BOC's competitors did not bear on the decision in that matter, because of the size of the customer base of the CLECs in that state. The FCC, in fact, said specifically in paragraph 77 of the order that "We also do not read section 271 (c)(1)(A) to require that a new entrant serve a specific market share in its service area to be considered a 'competing provider.'"

AT&T's calculation of the percentage of residential users served by CLECs is unsound. It merely divides access lines by population, which assumes that each person has an

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[153] Ameritech Michigan Order at paragraph 78. Paragraph 79 of this Order makes a distinction that is material here, given that this report addresses only Track A, preserving a discussion of the public interest to the subsequent report. The FCC held specifically in the Ameritech Michigan Order that a conclusion that the Track A requirement involving service to end users would not preclude it from considering "competitive conditions or geographic penetration" in its review of the public interest test. The next report's consideration of satisfaction of the public-interest standard will be similarly unconstrained.

[154] Memorandum Opinion and Order, *Application of Verizon New York, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc. and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Connecticut,* CC Docket No. 01-100 (Released July 20, 2001) (Verizon Connecticut Order), at paragraph 71.

[155] Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Kansas and Oklahoma*, CC Docket No. 0-217(Released January 22, 2001) (SBC Kansas/Oklahoma Order), at paragraphs 4 and 5.

[156] Reply Brief of AT&T Regarding Public Interest and Track A (AT&T Track A Reply Brief) at page 17, citing paragraph 75 and 77 of the Ameritech Michigan Order.

access line. The use of a more proper denominator, such as residential households, might alter the result, but it would certainly remain small. Yet, we know that the FCC has accepted small numbers of CLEC-served end users as satisfying the Track A test in Oklahoma, where the evidence was that competitors served as little as 5.5 percent (or as much as 9.0 percent) of the access lines in the BOC's serving area in that state.

The U.S. Census Bureau ranks Oklahoma as the 27th most populous state, which makes it significantly larger than each of the seven states participating here, with the exception of Iowa and Utah. As we will see below, the 90/10 method for allocating access lines between business and residential customers was similar to that accepted by the FCC in the SBC Kansas/Oklahoma Order. Therefore, we can conclude that, in a state more populous than all of the seven participating here and in some cases a number of times so, the FCC has already decided that the portion of the Track A test addressing competitive service to residential customers can be satisfied by numbers in the range of those that AT&T considered insufficient.

FCC information provided by the Iowa Office of Consumer Advocate shows that overall levels of local exchange competition across the country remain moderate, growing from 4.4 percent at the end of 1999 to 8.5 percent at the end of 2000.[157] That nationwide information includes states that are on average significantly more populous than those participating here. With the FCC having granted section 271 approval in so many states, there is not a sound basis for seeking here, effectively, to recast the test it has applied to this element of the Track A standard. We conclude that the decision on this aspect of the Track A test is not illuminated by the arguments that the number of residential customers being served by CLECs is small, or even "minimal." The FCC has already decided that it will not impose a market share test and it has deemed Track A to be satisfied at very low CLEC levels of penetration into the residential market. Therefore, in the event that Qwest can demonstrate that it is providing service at the levels shown in its testimony, it should be considered to meet this element of the Track A standard. The next paragraphs discuss that evidence.

2. Estimates of Bypass Lines

In addition to the amount of leased unbundled loops discussed above, Qwest presented estimates of end users, as of April 30, 2001, served through facility bypass, by state, divided between residential and business users. These estimates are summarized below:[158]

[157] Iowa OCA Brief at page 7.
[158] Confidential Exhibit S8-QWE-DLT-8.

STATE	ID	IA	MT	NM	ND	UT	WY
Bypass Lines	5,546	15,428	3,154	11,596	1,050	58,252	839
Residential	277	1,543	158	580	840	2,913	42
Business	5,269	13,885	2,996	11,016	210	55,339	797

Qwest argued that an estimating technique was necessary because it did not have access to confidential CLEC information about their market shares, and it could not secure the information through discovery against the many CLECs in the seven states who are not participants in these workshops.[159] Qwest estimated the total bypass lines shown in the preceding table by using the known number of lines that it ports to CLECs. Qwest testified that this method provided a reliable indicator of access lines served by competitors, because Qwest ports numbers to CLECs in only two cases: (a) where a CLEC serves a former Qwest customer with the same number but over the CLEC's own network, or (b) where a CLEC serves a former Qwest customer over a stand-alone loop leased from Qwest and connected to the CLEC's own switch.

The Qwest method for making the estimate (which also included subtracting out the lines already counted as CLEC UNES) was to divide ported numbers in half, on the assumption that CLECs might not be continuing to serve the customers whose numbers were ported to them.[160] Qwest said that two specific factors served to make its approach conservative: (a) this division of ported numbers, and (b) the decision not to consider in its estimate the fact that CLECs were serving customers through non-ported numbers. Qwest then generally split the resulting estimate into residential and business lines by assuming that 95 percent of the bypass lines served business customers; the factor was 90 percent for Iowa. Qwest also said its estimation method was much more conservative than the SBC method on which the FCC relied in the Kansas/Oklahoma proceeding. There, SBC estimated that there were 2.75 bypass lines for each CLEC interconnection trunk. Depending upon the state, Qwest said, estimates of bypass lines using the SBC method would be from 200 to 800 percent higher than the estimates that Qwest offered here under its alternate method.[161]

AT&T argued that there is no statistical basis for accepting the linkage that Qwest made between number porting and bypass lines. AT&T also said that the method Qwest used in Washington was demonstrably the same arithmetically, but that Qwest explained differently the steps involved in applying it. AT&T said that the differences in the explanation here produced "a needed air of mystery and obfuscation to an already questionable methodology."[162] AT&T also said that the SBC method fails to pass what it termed a "straight-face test, otherwise Qwest would have relied upon it to the exclusion of its own methodology." AT&T said that the correct inference to be drawn is that

[159] Qwest's Brief in Support of Its Compliance With the Track A Entry Requirements of 47 U.S.C. § 271(c)(1)(A) and the Public Interest Test of 47 U.S.C. § 271(d)(3)(C) (Qwest Track A Brief), at page28.
[160] Qwest Track A Brief at pages 29 and 30, citing numerous confidential exhibit and transcript references.
[161] Qwest Track A Brief at pages 30 through 33.
[162] AT&T Track A Brief at page 4.

competition in the seven states is "pathetically low" when compared to what existed in Kansas or Oklahoma.[163]

Qwest argued that AT&T merely concluded, without providing any supporting evidence or argument, that there is no relationship between number porting and the number of access lines being served by CLECs.[164]

The Staff of the New Mexico Public Regulation Commission filed a brief addressing public interest issues. That brief contained arguments relevant to Qwest's fulfillment of the Track A standard. The New Mexico Staff criticized the lack of actual numbers of end users served by competitors in the state, noting with some concern the timing and contestability of Qwest's proposal to secure firmer numbers through the service of data requests on CLECs by state commissions. The New Mexico Staff noted that Qwest has the burden of proof and that it has control over the timing of its section 271 application.[165]

Qwest responded that the FCC has relied upon estimates in every section 271 application that it has granted. Qwest said that it must use estimates of bypass lines because only CLECs, who have no motive to assist Qwest, know what self-provisioned facilities they have. Qwest said that it did use actual, not estimated, information for all facilities and services that CLECs take from it, limiting its estimates to bypass.[166]

In addition to criticizing generally the use of estimates, the New Mexico Staff also argued that Qwest's estimation methods were unsound. New Mexico Staff noted that Qwest used a different estimation method for North Dakota and Wyoming, because the method used elsewhere yielded "nonsensical" results for those two states. The New Mexico Staff also argued that Qwest witness Teitzel's claim that his estimates were conservative should be taken as an admission that they were inaccurate. New Mexico Staff also recited problems that existed in some arithmetic aspects of the original Qwest calculations and in underlying support data provided by Qwest in discovery.[167]

Qwest responded by noting that the problem with the data provided in discovery was the omission of a field (interim number portability quantities) that had actually been used in the calculations provided in testimony. Qwest also explained that some of what the New Mexico Staff called calculation errors were in fact recalculations based on updated information that was not available when the testimony calculations were made. Finally, Qwest noted that the mistakes cited were in the preparation of demonstrative exhibits, not in the underlying data or calculations.[168]

New Mexico Staff also cited testimony that it said proved that Qwest had no sound basis for assigning 10 percent of estimated bypass lines to residential customers, noting that Qwest supported the allocation by saying that it was in the range used in the SBC filing for Kansas and Oklahoma.[169] Qwest responded by noting that its method for allocating

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[163] AT&T Track A Reply Brief at page 20.
[164] Qwest Track A Reply Brief at page 4.
[165] Brief of New Mexico Staff on Public Interest Issues (New Mexico Staff Brief), at page 12.
[166] Qwest Track A Reply Brief at pages 5 and 6.
[167] New Mexico Staff Brief at pages 13 through 19.
[168] Qwest Track A Reply Brief at pages 9 and 10.
[169] New Mexico Staff Brief at page 20.

bypass lines between residential and business customers was consistent with that accepted by the FCC in the SBC Kansas/Oklahoma application.[170]

Proposed Conclusion: It must first be observed that Qwest does not use estimates for all counts of access lines served by competitors. It has substantial direct information about loops that CLECs secure as UNEs from Qwest, for example. Its need for estimation is in determining access line numbers in cases where CLECs bypass Qwest's network, thereby having no reason to divulge to Qwest information from which access line counts can be derived. The FCC is accustomed to using estimates of the number of bypass lines. It has in fact used methods that would have produced much higher counts (and in accord with a method that has withstood objection in prior FCC section 271 proceedings) than what Qwest proposes here.

Qwest has said that it chose to use ported numbers as its estimation base, because the reasons why CLECs have numbers ported bear a substantial relationship to the access lines that they serve. Qwest's explanation of the relationship was logical. More importantly, despite a broad claim by AT&T that there was no relationship, no participant provided any reason to dispute the Qwest evidence about why numbers are ported. There was no evidence or argument that numbers are not ported for each of the two reasons that Qwest cites, nor were other reasons for porting (particularly reasons that do not have a relationship to CLEC access lines) offered.

Qwest's approach produced results that were substantially less than what it could have claimed, had it chosen to use the interconnection trunk multiplier approach, which the FCC has already considered in its section 271 reviews. Moreover, Qwest's use of ported numbers applied two important additional limitations. First, it substantially discounted the resulting number to account for customers no longer served by the CLEC that initially made the porting request. Second, it did nothing to account for CLEC customers who took service under entirely different numbers, thus producing no ported numbers.

This method is certainly not perfect, but it is reasonable, and it has not been subjected to any but the most general and unpersuasive challenge. AT&T's criticism about obfuscation was particularly unfair. There is no mystery in the Qwest formula that middle-school algebra cannot unravel. AT&T, despite figuring out that $(N-2U)/2 = N/2 - U$ (the mathematical representation of the two different ways that Qwest explained its calculation), went on to criticize Qwest anyway. Equally unconvincing was the argument that Qwest's use of an estimation method more conservative than the SBC one shows that the SBC test cannot even be taken seriously. Suffice it to say that the FCC has taken it seriously. Finally with respect to AT&T's arguments, it also far overstates the case in saying that we can infer that competition is "pathetically low" by comparison to Kansas or Oklahoma. To the contrary, especially after considering population rankings, the levels of competition appear to be comparable.[171]

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[170] Qwest Track A Reply Brief at page 9, citing paragraph 42 and note 96 of the *SBC Kansas/Oklahoma Order*.

[171] AT&T's far over-the-top exaggeration on these three claims (arithmetic obfuscation, inanity of the SBC test, and pathetically lower levels of competition) ultimately did little to persuade. AT&T's contribution to these proceedings has been consistently material and positive; this stretching of the limits of proper advocacy was anomalous, but unfortunate.

The New Mexico Staff criticisms of the method and calculations also did not undercut its usefulness, particularly in the absence of any alternative. The criticism that the Qwest method's conservatism proved its inaccuracy actually highlighted not its failure, but only the need to be careful in the use of indirect estimation methods.

Similarly, the New Mexico Staff's criticisms of omissions and errors in Qwest's presentation of the results of its calculations were not persuasive. The problem with the data request ultimately was shown to be the result of a failure to include in the response information actually used in the calculations. This omission was clearly the reason why the calculations could not be recreated from the discovery response. Qwest corrected the omission after cross examination uncovered it and the parties were given time to study the correction and to cross examine again. The Qwest witness showed at this subsequent cross examination that the calculations worked to produce the testified to results when the information missing from the data request response was used. Moreover, Qwest's recalculations to account for new CLEC data (obtained after the calculations were originally performed) cannot be construed as demonstrating error in the original work.

Qwest's business/residential allocation was certainly unsophisticated, but it too has been used before by the FCC in the section 271 context. It will serve here, provided that there is other substantial evidence of record to support the conclusion that any residential service at all is being provided. Qwest's evidence, much of which came from CLEC responses to its data requests, shows that a substantial number of CLECs are providing only business services in those of the seven participating states where those CLECs operate. Given that fact, it would be presumptuous to apply an admittedly rough tool in any individual state unless other evidence supports the conclusion that there are competitors seeking and serving residential customers. In other words, we will not presume the existence of residential competition and merely use the method to determine what portion of it is for residential end users. Rather, we will require an independent showing that there is actual service to residential end users. Only after such a showing will the Qwest estimation method be used to provide a rough measure of its size.

Finally, had the Qwest formula produced results that stray far from actual circumstances, it would seem unusual that none of the CLECs here responded with evidence of their own. While theirs was certainly not the burden of proof, this was their opportunity to present contrary evidence to rebut Qwest's evidence. Only in the event that Qwest had not made a credible showing would there be significant merit in general argument unaccompanied by the presentation of any competing facts. Qwest did make such a showing, and it was one that, moreover, had a foundation in prior FCC decisions. Against that evidence, the general and in many cases outlandish arguments of AT&T cannot stand, unaccompanied as they are by no contrary evidence or any specific demonstration of why the use of ported numbers as an estimate base has no foundation.

4. Number of CLECs Serving End Users

In addition to its itemization of unbundled elements leased and its quantitative estimates of access lines served by competitors, Qwest presented qualitative information about competition. This latter evidence consisted predominately of a state list of the

competitors serving end users. AT&T did not address the individual CLECs cited by Qwest, but did argue that none of the competitors cited by Qwest could be considered a "commercial alternative" to Qwest until it can handle order volumes at commercial levels or until those competitors can provide service at the same level as Qwest can. AT&T said that Qwest had the evidence available to answer whether such competitors existed, but did not present any such evidence. Moreover, AT&T said that even Qwest's own method demonstrated that CLECs were serving only a de minimis number of residential customers.[172]

Qwest's state-by-state evidence, and the responsive testimony and arguments presented to respond to it, are summarized by state below:

CLEC	IDAHO[173] SERVICES BEING PROVIDED
Electric Lightwave, Inc.	Local, long distance, private network, advanced data, and Internet access focused on medium to large communications-intensive businesses
Time Warner Telecom	Local, long distance, data, and Internet services through its own facilities, after acquisition of GST Telecommunications in 2000
Project Mutual Telephone	Local cooperative services to residential and business customers in Burley; announced in 1998 plans to invest in a combined cable/telecom network
Avista Communications	Voice, data, and Internet services to businesses in Lewiston through its own switch and fiber optic network

CLEC	IOWA[174] SERVICES PROVIDED
McLeod USA	Acknowledged in data request responses service to residential and business customers
Cox Cable	Residential and business services in Council Bluffs, including residential service through its cable system
Hickory Tech	Facilities-based residential and business services in areas including Urbandale, Clive, Adel. And West Des Moines, overbuilding Qwest network in West Des Moines to provide local, long distance, and DSL services

[172] AT&T Track A Brief at page 26.
[173] Qwest Track A Brief at pages 10 through 12, citing a number of exhibit and transcript references.
[174] Qwest Track A Brief at pages 12 through 15.

Goldfield	Independent telco providing, as a CLEC, out of territory local, long distance, data, and Internet access service to business and residential customers in small exchanges in Goldfield, Eagle Grove, Clarion, and Humboldt
AT&T Broadband	Cable modem service, with plans to expand to telephony this year through a cable system in the western suburban Des Moines metropolitan area

The Iowa Office of Consumer Advocate (Iowa OCA) responded to Qwest's evidence about service in Iowa. The Iowa OCA noted that Qwest had provided evidence that there were 41 competitive local exchange companies in Iowa, and that Qwest later corrected that list to remove five companies and noted that two others had filed for Chapter 11 bankruptcy protection.[175] The Iowa OCA presented evidence that 21 of the companies listed by Qwest had no tariffs on file with the Iowa Utilities Board, thus meaning that they were not empowered to provide local exchange service in the state. The OCA testimony also indicated that 11 companies provided service in isolated, often geographically narrow areas, 3 provided service only to businesses, and 3 provided services only to high-risk customers.[176] Qwest conceded that it did not know how many of the companies on its list were actually providing local exchange service in Iowa.[177]

The Iowa OCA appears to have agreed, based on information that it presented, that Iowa actually has somewhat more than the national level of market penetration by CLECs; competitors held 10 percent of the local telephone lines in Iowa at of the end of 2000.[178] This figure compares to the 14.2 percent estimated by Qwest.[179] There is other evidence of competition in Iowa as well, with McLeod USA claiming that it has captured 46 percent of its "addressable market" in the state.[180] The Iowa OCA elicited evidence demonstrating that there is only one CLEC in Iowa that has as many as 10,000 lines.

The OCA placed significant emphasis on the 10,000-line measure, indicating that the FCC had established it, for reporting purposes, as the "level that we expect will allow us to detect emerging market participants when they achieve a fairly significant presence in a given market."[181] There was evidence from one competitor indicating that it provided many times more than this number of both residential and business lines. Qwest's testimony claimed far less than this number of residential customers as being served by all competitors combined.[182]

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[175] Exhibit S8-QWE-DLT-8.
[176] Exhibit S7-IOCA-DSH-2, at page 7.
[177] June 26, 2001 transcript, at pages 276 through 280.
[178] *Local Telephone Competition at the New Millennium* (summarizing December 31, 1999 data from Forms 477 and 499-A), Federal Communications Commission, August 2000, Table 4. "Local Telephone Competition: Status as of December 31, 2000", Federal Communications Commission, May 2001, Table 1. These reports can be found at http://www.fcc.gov/ccb/local_competition/welcome.html.
[179] Opening Brief: Public Interest, Office of Consumer Advocate ("OCA") Iowa Department of Justice, (Iowa OCA Public Interest Brief) at page 8, citing Qwest's Confidential Exhibit S8-QWE-DLT-8.
[180] Teitzel Direct Testimony, Confidential Qwest Exhibit S7-QWE-DLT-7, at page 19; Exhibit S7-IOCA-DSH-4; Exhibit S7-IOCA-DSH-4.
[181] *In the Matter of Local Competition and Broadband Reporting*, at paragraph 42.
[182] Confidential Exhibits S8-QWE-DLT-25 and 26; Confidential Exhibit S8-QWE-DLT-8.

CLEC	MONTANA[183] SERVICES PROVIDED
Touch America	As subsidiary of major state electric company, purchased Qwest pre-merger long distance operations; providing long distance, Internet access, private line, data, and wireless service; entered contract to allow Electric Lightwave to provide competitive private line and other telecommunications services across its network in Montana
Mid-Rivers	Telecom cooperative providing services as a CLEC outside its region; overbuilt Qwest network in Terry, offering business and residential customers local, long distance, data, and Internet access services; expanded recently to other cities, such as Glendive, Wibaux, Sidney, and Fairview
Blackfoot Communications	Providing business and residences with local, long distance, paging, and Internet access services outside its territory in Missoula, using its own facilities and services leased from Qwest
Avista Communications	Providing business customers in Bilings with local, data, and Internet services

NEW MEXICO[184]	
CLEC	SERVICES PROVIDED
Confidential	Confidential
Confidential	Confidential
e.spire	Service in Albuquerque
Time Warner Telecom	Service in Albuquerque

The New Mexico Staff brief argued that: (a) Qwest had listed as New Mexico competitors a number of companies (other than the ones identified in the immediately preceding table) that were not in fact operating in New Mexico, (b) Qwest had conceded that it had no evidence of competition outside Albuquerque, and (c) the competitors listed as confidential above were providing service only to business customers.[185]

	NORTH DAKOTA[186]

[183] Qwest Track A Brief at pages 15 through 17, citing a number of exhibit and transcript references.
[184] Qwest Track A Brief at pages 17 through 19, citing a number of exhibit and transcript references.
[185] New Mexico Staff Brief at pages 9 through 11.
[186] Qwest Track A Brief at pages 19 through 21, citing a number of exhibit and transcript references.

CLEC	SERVICES PROVIDED
Halstad Telephone	Rural cooperative providing residential and business service through an overbuild of Qwest's network in Halstead, a community of 1,500
Confidential	Confidential
Consolidated Communications	Provision of residential and business service through an overbuild of Qwest's network in a community with approximately 10,000 access lines
Dakota Central Telecom	Subsidiary of a telephone cooperative providing high-speed Internet services to customers in Jamestown and Valley City
Idea 1	Service in the Fargo area through its own digital switch and fiber facilities
McLeod USA	Residential and business local, long distance, data, and Internet access services in a number of communities
Dakota Carrier Network	Consortium of 15 independent telcos that serve in 85 percent of the state's exchanges

CLEC	UTAH[187] SERVICES PROVIDED
AT&T	Service to residential and business customers through TCG and the purchase of TCI, with a cable system passing 600,000 of Utah's 728,000 households; serving in Salt Lake City, Ogden, and Provo/Orem
Confidential	Confidential
Electric Lightwave, Inc.	Local, long distance, private network, advanced data, and Internet access focused on medium to large communications-intensive businesses through its own fiber network
XO Utah	Service to small-medium businesses, with residential services in selected areas

CLEC	WYOMING[188] SERVICES PROVIDED
Silver Star	Service to residential and business customers in Afton and Jackson with its own facilities
Confidential	Confidential

[187] Qwest Track A Brief at pages 22 through 24, citing a number of exhibit and transcript references.
[188] Qwest Track A Brief at pages 22 through 24, citing a number of exhibit and transcript references.

McLeod USA	Services to residential and business customers in Casper and Cheyenne

Qwest noted that the preceding state-by-state list constituted a "small sampling" of the competitive markets in the seven states, stating again that its efforts to secure data were hampered by the "few" responses it received to its data requests to CLECs.

Proposed Conclusion: There was much questioning and some substantial criticism of the state-by-state list of CLECs that Qwest presented. However, the list cited above generally excludes those CLECs whose continuing existence or empowerment to serve in a given state was questioned or criticized. There was no argument that the CLECs listed here do not provide the services claimed. Those services, based upon a strict reading of Qwest's brief, include the provision of facilities-based business and residential services by CLECs in all but two states: Idaho and New Mexico. In the other five states, the Qwest evidence demonstrates that at least two CLECs are providing residential service.

The record supports a conclusion that the Track A requirement that service be provided to residential customers is established in Iowa, Montana, North Dakota, Utah, and Wyoming. It is not established for Idaho and New Mexico.

Therefore, Qwest's estimates of residential access lines served by competitors may be accepted for all states except for New Mexico and Idaho. In those states, Qwest should be found not to have met Track A standards, for reason of its failure to provide substantial evidence that competitors are serving residential end users.

D. Existence of Facilities-Based Competitors

We have addressed the first three questions raised by the test established in the Ameritech Michigan Order, which are the existence of agreements, the provision of services under those agreements, and the provision of service to business and residential customers. We reach now the last question, which is whether competing telephone exchange service is being provided: (a) exclusively over CLEC telephone facilities, or (b) predominantly over such facilities in combination with the resale of the telecommunications services of another carrier. The FCC has held that a CLEC's "own" facilities include UNEs that it leases from the incumbent provider.[189]

Qwest's estimation of access lines served by CLECs and its survey of services provided by CLECs in each state also addressed the question of what facilities were being used. The responsive testimony and argument focused on the issue of the estimated total numbers and on the allocation of those numbers of access lines between residential and business customers. That testimony and argument did not address the facilities issue.

Proposed Conclusion: Because of the commonality of the evidence presented and the lack of specific challenge to what facilities were being used, the proposed conclusion set

[189] Ameritech Michigan Order at paragraph 99.

forth under the preceding issue, *Existence of Competing Providers of Residential and Business Service*, is equally applicable here.