OAH Docket No. 12-2500-15429-4
MPUC Docket No. P442,421/IC-03-759

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Petition of AT&T Communications of the Midwest, Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. §252(b)

ARBITRATORS' REPORT

The above-entitled matter was arbitrated by Administrative Law Judges Steve M. Mihalchick and Kathleen D. Sheehy on July 14-15, 2003, in the Large Hearing Room of the Public Utilities Commission in St. Paul, Minnesota. The record closed on August 1, 2003 upon receipt of reply briefs.

Mary Rose Hughes, Esq., and Elizabeth A. Woodcock, Esq., Perkins Coie, LLP, 607 14th Street NW, Washington, D.C. 20005; and Jason Topp, Esq., Qwest Corporation, 200 South Fifth Street, Room 395, Minneapolis, Minnesota 55402, appeared for Qwest Corporation (Qwest).

Steven Weigler, Esq., Mitchell Menezes, Esq., and Letty Friesen, Esq., 1875 Lawrence Street, 15th Floor, Denver, Colorado 80202, appeared for AT&T Communications of the Midwest, Inc. and TCG Minnesota, Inc. (collectively AT&T).

Priti R. Patel, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103, appeared for the Department of Commerce (the Department).

Jeanne M. Cochran, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101, appeared for the Office of the Attorney General, Residential and Small Business Utilities Division (OAG).

Kevin O'Grady appeared for the staff of the Public Utilities Commission.

Procedural History

1. AT&T and Qwest first entered into an interconnection agreement on March 17, 1997. That agreement expired by its own terms on March 17, 2002; however, AT&T and Qwest agreed to conduct business under that agreement until they completed the negotiation of a successor agreement. Although the parties have been negotiating a new agreement for some time, for purposes of this arbitration they have

agreed that negotiations began on December 19, 2002.[1] AT&T filed a petition for arbitration of the unresolved issues on May 27, 2003, along with a Joint Issues List that identifies the issues by number, describes the nature of the dispute, and contains the contract language proposed by each party.[2] Pursuant to 47 U.S.C. § 252(b)(4)(C), the arbitrators' report is due August 15, 2003, and the Commission must make a final decision concerning this arbitration by September 19, 2003.[3]

2. The Department and the OAG petitioned to intervene as parties, and their petitions were granted pursuant to Minn. R. 7811.1700, subp. 10. In addition, the following parties were granted status as observers[4] in this arbitration: Onvoy, MCI, the Minnesota Independent Coalition (MIC), Sprint, the CLEC Coalition, and Time Warner Telecom of Minnesota, LLC.[5] Observers were allowed to participate in prehearing conferences, receive electronic copies of prefiled testimony, attend the hearing, and file written comments, but not to present evidence or question witnesses. Observers may request the opportunity for oral argument.

Arbitrators' Authority

3. The Commission has jurisdiction over this proceeding under § 252(b) of the Telecommunications Act of 1996 (Act) and Minn. Stat. §§ 237.16 and 216A.05. Section 252(b) of the Act provides for state commission arbitration of unresolved issues related to negotiations for interconnection, resale and access to unbundled network elements. Specifically, it authorizes the Commission to "resolve each issue set forth in [an arbitration] petition and the response, if any, by imposing appropriate conditions . . .." [6] In resolving the open issues and imposing appropriate conditions, the commission must ensure that the resolution meets the requirements of section 251, including the regulations adopted pursuant to section 251; must establish any rates for interconnection, services, or network elements according to subsection d; and must provide a schedule for implementation of the terms and conditions by the parties to the agreement.

4. The Act specifically permits a state commission to establish or enforce other requirements of state law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements,[7] as long as state requirements are consistent with the Act and the FCC's

[1] Petition of AT&T for Arbitration of Intercarrier Negotiations with Qwest Under the Telecommunications Act of 1996, May 23, 2003, at 6.
[2] *Id.*; Ex. C.
[3] *See also* Minn. R. 7812.1700, subps. 19 and 20.
[4] Minn. R. 7811.1700, subp. 10.
[5] Prehearing Order, June 20, 2003; Second Prehearing Order, June 23, 2003; Fourth Prehearing Order, July 11, 2003.
[6] 47 U.S.C. § 252(b)(4)(C).
[7] 47 U.S.C. § 252(e)(3).

implementing rules.[8] State law similarly requires that issues submitted for arbitration be resolved in a manner that is consistent with the public interest, to ensure compliance with the requirements of sections 251 and 252(d) of the Act, applicable FCC regulations, and applicable state law, including rules and orders of the commission.[9]

Burden of Proof

5. The burden of proof in this interconnection arbitration proceeding is on Qwest to prove all issues of material fact by a preponderance of the evidence.[10] In addition, the arbitrator may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute. The arbitrator may also shift the burden of proof as necessary to comply with applicable FCC regulations regarding burden of proof, such as rules placing the burden on the incumbent to demonstrate the technical infeasibility of a CLEC's request for interconnection or unbundled access and rules requiring an incumbent to prove by clear and convincing evidence any claim that it cannot satisfy such a request because of adverse network reliability impacts.[11]

Remaining Disputed Issues

6. AT&T and Qwest continued to negotiate after the filing of the petition for arbitration and resolved approximately one-third of the outstanding issues. As of July 28, 2003, the remaining issues in dispute are: 1, 2, 3, 5, 8, 9, 14, 15, 16, 17, 19, 21, 22, 23, 24, 26, 27, 30, 33, 34, and 35 (only sections 22.1, 22.4, and 22.5).

Issue No. 1: CLEC's Ability To Obtain Services From Agreement Or Tariff

A. Issue

7. The dispute here involves cases where a service is offered under both a tariff and under the interconnection agreement. The parties agree that AT&T may order services under either, but disagree on the process to be required.

B. Position of Parties

8. The parties have agreed on language that would allow AT&T, at its discretion, to substitute the rates, terms, and conditions from a tariff under the process for adopting terms of other interconnection agreements established by the interconnection agreement. Qwest originally argued that AT&T would have to use this

[8] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket Nos. 96-98, First Report and Order, 11 FCC Rcd 15499 (Aug. 8, 1996) ("*Local Competition Order*") ¶¶ 66, 54, 58; *see also US West Communications, Inc. v. MPUC*, Memorandum Opinion and Order, File No. Civ. 97-913 (March 30, 1999) at 23.
[9] Minn. R. 7811.1700, 7812.1700; *see also* Minn. Stat. §§ 237.011, 237.16, subd. 1(a).
[10] Minn. R. 7812.1700, subp. 23.
[11] 47 C.F.R. §§ 51.5 and 51.321(d).

process to order services provided by a tariff. Because of the delays and complications the process can cause, AT&T wants its right to order directly from a tariff unrestricted and proposed to include language that would ensure that right. In response to Qwest concerns that it would have difficulty distinguishing tariff orders from interconnection agreement orders, AT&T proposed language at the hearing that would require the parties to agree to a process by which the orders can be distinguished.[12] Qwest now says it will agree to include all the AT&T language if additional language of its own is included that requires the process to include advance written notice that AT&T will be ordering from the tariff and that the tariff terms would apply to all subsequent orders.[13] AT&T objects to that language.[14]

C. Applicable Law

9. No federal rule or court case has been cited that directly addresses this specific issue. *U S WEST Communications, Inc. v. Sprint Communications Company, L.P.*[15], cited by AT&T, held that a requesting carrier with an interconnection agreement could opt into tariff provisions.[16] Qwest does not dispute that particular point.[17] In *Verizon North, Inc. v. Strand*[18] the court considered the lawfulness of the state commission's rule *requiring* the ILEC to publish interconnection tariffs.[19] That is not an issue here. The cases do imply that the right to opt into tariff provisions should not be encumbered.

10. Minnesota law requires the Commission to "encourage fair and reasonable competition in a competitively neutral regulatory manner."[20] Allowing certain CLECs to order Qwest services through a tariff and requiring others to go through additional steps to obtain the same services under the same terms and conditions is not competitively neutral. The Commission has general authority under the Act to arbitrate specific unresolved issues and to order terms consistent with the terms of the Act,[21] and the authority to prescribe the terms and conditions of service delivery, for the purpose of bringing about fair and reasonable competition for local exchange telephone services.[22]

D. Decision

11. AT&T's original proposal was:

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[12] Ex. 2 (Hydock) at 5-6.
[13] Qwest Initial Brief at 4.
[14] AT&T Reply Brief On Disputed Issues at 2-3.
[15] 275 F.3d 1241 (10th Cir. 2002).
[16] *Id.* at 1247-48, 1250-51.
[17] *See, e.g.,* Ex. 29 (Brotherson) at 3-4**.**
[18] 309 F.3d 935 (6th Cir. 2002), *cert. denied*, __ U.S. __, 123 S. Ct. 1649 (2003).
[19] *See Verizon North*, 309 F.3d. at 939-40.
[20] Minn. Stat. § 237.011.
[21] 47 U.S.C. § 252 (b).
[22] Minn. Stat. § 237.16, subd. 1(a).

> Separate from such adoption, CLEC may choose to place orders from a Qwest Tariff. If CLEC does so, but does not choose to incorporate such Tariff terms into this Agreement, such orders shall be governed by the Tariff terms and conditions.

12. It then offered to add:

> When ordering from a Qwest Tariff, if the ordering process used by CLEC and the information contained in the order are both the same as for orders placed under this Agreement, Qwest may not be able to recognize that the order is made under a Qwest Tariff. If Qwest is not able to recognize this distinction, CLEC and Qwest will mutually agree to a process by which CLEC orders placed under a Qwest Tariff can be distinguished by Qwest as being placed under a Qwest Tariff rather than under this Agreement.

13. Qwest responded by adding:

> Such process will include advanced written notice from CLEC to allow Qwest reasonable time to implement the change. The Tariff rate, terms and conditions shall apply to all such CLEC orders on a going forward basis until such time as CLEC elects to no longer use the Tariffs, and chooses another option for the same product or service pursuant to Sections 1.8 and 1.9 of this Agreement.

14. Qwest claims it needs this additional language to address its legitimate need to know which source (the tariff or the agreement) AT&T is using (and, thus, which terms, conditions, and prices apply) when placing an order for such services.[23]

15. Qwest's proposal should not be adopted. It is not needed because there is already a simple and effective ordering process in use by which Qwest can distinguish between services ordered out of a tariff and services ordered out of an interconnection agreement.[24] Under that process, a CLEC simply uses its CLEC code to order services from the interconnection agreement and another code to order from a tariff. Qwest witness Brotherson testified that CLECs routinely order services out of Qwest tariffs using this process.[25] Onvoy pointed out in its comments that it orders services from Qwest via its interconnection agreement (Onvoy opted into the AT&T interconnection agreement) using the code name "MSK" and orders services via the FCC tariff using the code name "MEN." Onvoy finds the system works well and opposes any language change that would alter it.

16. Qwest argues that its proposal is plainly "competitively neutral" because "AT&T remains free to order from either a tariff or the parties' agreement and the parties are able to avoid future disputes regarding terms and conditions that could result from

[23] Qwest Initial Brief at 3; Ex. 29 (Brotherson) at 5-8.
[24] Ex. 29 (Brotherson) at 6.
[25] *Id.*

confusion as to the source of AT&T's order (tariff or interconnection agreement) by AT&T's simple act of providing written notice of its intent to purchase out of the tariff."[26] It is not competitively neutral because it requires AT&T to elect whether, on an ongoing basis, it will be ordering from the interconnection agreement or the tariff and then give written notice to Qwest if it changes from the way it ordered the previous time. That is significantly more time consuming than inserting a code name in an order. Qwest's process encumbers AT&T's right, on each order it places, to choose from the interconnection agreement or the tariff.

17. Even the additional language proposed by AT&T at the hearing is unnecessary. All that is required is that Qwest have advance knowledge of the code name or names AT&T will be using for orders from tariffs. To ensure that the codes are unique, Qwest should be allowed to assign them. The code assignments would be permanent and used for all subsequent orders from AT&T from each particular tariff. Thus, Section 1.9.1 should read:

> 1.9.1 Separate from such adoption, CLEC may choose to place orders from a Qwest Tariff. If CLEC does so, but does not choose to incorporate such Tariff terms into this Agreement, such orders shall be governed by the Tariff terms and conditions. When ordering from a Qwest Tariff, CLEC shall use a code other than its CLEC code to identify the Tariff and distinguish the order from an order placed under this Agreement. Qwest shall assign a permanent code or codes to CLEC for such purpose within three days of request by CLEC.

Issue No. 2: Change in Law Incorporated into Agreement

A. Issue

18. In Section 2.2, AT&T and Qwest have largely agreed on an amendment process for incorporating changes in the law (rules, regulations, statutes, interpretations) into the interconnection agreement, including using the interconnection agreement's dispute resolution process if there is no agreement within 60 days. Two details remain disputed: how to incorporate changes resulting specifically from generic proceedings by the Commission (Qwest says it should be allowed to "correct" the interconnection agreement unless AT&T requests the amendment process, and AT&T says it should be by amendment unless it notifies Qwest that amendment is not required); and two, whether an "interim operating agreement" should be the first matter determined and implemented when an amendment process to implement a legally binding order gets to the dispute resolution step (Qwest supports, AT&T opposes.)

B. Position of Parties

Correcting for Minor Changes

[26] Qwest Reply Brief at 2.

19. Qwest testified that it does not seek to "unilaterally" make changes to the interconnection agreement and that, under its proposal, the parties have the option of correcting the agreement without the administrative burden and associated expense of a formal amendment, *unless* either of the parties requests an amendment.[27] Further, Qwest claims its language makes it clear that a CLEC may request at any time a formal amendment via negotiations. Qwest seeks to provide an option, not a mandate, to simplify contract amendments and to avoid the requirement for negotiation over even the most minor changes absent written notification from AT&T.[28] Under AT&T's prior agreement, routine Commission orders changing prices or other administrative matters have consistently been handled by a letter to the opt-in CLECs advising them of the change, with few, if any, complaints from the CLECs.[29]

20. AT&T calls giving Qwest the ability to unilaterally amend the interconnection agreement to include its interpretation of the outcome of generic proceedings inequitable and contrary to the Act, which requires a scheme of negotiation and Commission approval for interconnection agreement creations and changes. AT&T proposes what is calls a more equitable and legally appropriate solution, which is to apply the amendment process. Under that process, simple issues can be resolved simply and quickly, if the parties agree.[30] If they don't, the dispute resolution process is followed.

21. DOC recommends the language proposed by AT&T on incorporating changes from generic proceedings because Qwest's language creates the possibility of a term being changed by Qwest before the CLEC has any opportunity to object and because changes to the interconnection agreement should be through a process that involves both parties, not just one party.[31]

Interim Operating Agreement

22. Qwest has proposed the interim operating agreement language to provide a predictable, efficient, and timely mechanism for addressing legally binding[32] changes in the law.[33] Without such a provision, it would be possible for a party to delay implementation of a Commission order by forcing ongoing negotiations and dispute resolution using the amendment process. Qwest notes that the Utah Public Service Commission approved Qwest's proposal there for that reason,[34] and that Commissions

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[27] *See* Ex. 29 (Brotherson) at 12.
[28] Qwest Initial Brief at 5-6.
[29] *Id.*
[30] Ex. 2 (Hydock) at 7.
[31] DOC Brief at 9.
[32] For purposes of the agreement, the term "legally binding" means "that the legal ruling has not been stayed, no request for a stay is pending, and any deadline for requesting a stay designated by statute or regulation, has passed." *See* AT&T Petition for Arbitration, Ex. B, § 2.2.
[33] Qwest Initial Brief at 6-7.
[34] Report and Order, *Application of Qwest Corporation, (f/k/a U S WEST Communications, Inc.) for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B)*, Docket No. 00-049-08 (Utah P.S.C. Jan. 28, 2002) ("*Utah GTC Order*") at 10-11.

in Idaho, Iowa, Montana, Nebraska, New Mexico, North Dakota, Oregon, Utah, and Wyoming [a consortium using Liberty Consulting] have all adopted Qwest's version of Section 2.2 that includes the interim operating agreement provisions at issue here.[35] Qwest argues that there are some changes in law that cannot be effectively redressed if unduly delayed, such as if the FCC were to determine that Qwest is not obligated under the Act to provide a service that current law and the parties' interconnection agreement requires, claiming that no form of "true-up" would compensate it for an that undue delay.[36]

23. AT&T objects to Qwest's interim operating agreement proposal because it would allow Qwest the option to cease performing under the interconnection agreement after sixty days regardless of any legitimate dispute resolution in process and because the final resolution might be different from the interim operating agreement, which would require another set of changes.[37] AT&T believes its proposed language would be more efficient for the parties by allowing the arbitrator to focus on an expedited resolution of the issues once, while leaving the terms of the interconnection agreement intact during the process.[38]

24. AT&T points out that every party must negotiate and litigate in good faith both under the Act and the law. AT&T argues that the proposal is one-sided because

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[35] *See also* SGAT Approved In Part (Group 5 Report), *Qwest Corporation Seeking Approval of Its Revised Statement of Generally Available Terms (SGAT) Pursuant to Section 252(f) of the 1996 Telecommunications Act*, Application No. C-2537 (Neb. P.S.C. Jan. 8, 2002) ("*Nebraska GTC Order*") at ¶¶ 43-45. *See* Commission Decision on Qwest Corporation's Compliance with Section 271, Public Interest, and Track A Requirements and Section 272 Standards, *U S WEST Communications, Inc.'s Motion for an Alternative Procedure to Manage Its Section 271 Application*, Case No. USW-T-00-3, at 5 (Idaho P.U.C. April 19, 2002) (approving SGAT general terms and conditions); Conditional Statement Regarding General Terms and Conditions and Order Regarding Change Management Process Comments, *In Re: U S WEST Communications, Inc., n/k/a Qwest Corporation*, Docket Nos. INU-00-2, SPU-00-11 (Iowa Utlils. Bd. March 12, 2002) ("*Iowa GTC Order*") at 18-21; Final Report on SGAT General Terms & Conditions and Responses to Comments Received on Preliminary Report, *Investigation Into Qwest Corporation's Compliance With Section 271 of the Telecommunications Act of 1996*, Docket No. D2000.5.70 (Mont. P.S.C. Dec. 20, 2001) ("*Montana GTC Order*") at 13-14; SGAT Approved In Part (Group 5 Report), *Nebraska GTC Order* at ¶¶ 43-45; Order Regarding SGAT General Terms and Conditions, *Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, Utility Case No. 3269 (N.M. P.R.C. Dec. 18, 2001) ("*New Mexico GTC Order*") at ¶¶ 38-42; Consultative Report of the North Dakota Public Service Comm'n, *U S WEST Communications, Inc. Section 271 Compliance Investigation*, Case No. PU-314-97-193 (N.D. P.S.C. July 1, 2002) ("*North Dakota GTC Order*") at 160-61; Workshop 4 Part 2 Findings and Recommendation Report of the Commission and Procedural Ruling, *Investigation into the Entry of Qwest Corporation, formerly known as U S WEST Communications, Inc., into In-Region InterLATA Services under Section 271 of the Telecommunications Act of 1996*, Dkt. No. UM 823 (Ore. P.U.C. June 3, 2002) ("*Oregon GTC Order*") at 18-20; *Utah GTC Order* at 9-11; Order on Group 5 Workshop Items: Section 272, Track A, and General SGAT Terms and Conditions, *Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming's Participation in a Multi-State Section 271 Process, and Approval of It's Statement of Generally Available Terms*, Docket No. 70000-TA-00-599, at 10-11 (Wyo. P.S.C. June 19, 2002) (approving SGAT general terms and conditions).

[36] Qwest Initial Reply at 5-6.

[37] Ex. 2 (Hydock) at 8-9.

[38] *Id.* at 9-10.

after sixty days Qwest can apply its interpretation of an order and cease or alter its performance under the interconnection agreement, while AT&T, as the CLEC, is the purchaser and has no such leverage when there is a change of law in its favor.

25. AT&T identified the states agreeing and disagreeing with its view:

> The Arizona Commission, through its staff, found that "(a)n interim operating agreement is unnecessary."[39] The Colorado Public Utilities Commission found "Qwest's proposal is acceptable with the exception of the interim operating agreement requirement. Qwest's language requiring the implementation of the operating agreement within the first 15 days is excessive."[40] The Washington Utilities and Transportation Commission found "Qwest's proposal for the dispute resolution arbitrator to first determine an interim operating agreement would insert an unnecessary step into the process."[41] On the other hand, the Oregon Commission and Liberty Consulting report both allowed the "interim operating provision." The Oregon Commission found that §2.2. in its totality "satisfies the practical and equitable requirements for negotiation & dispute resolution pending implementation of new FCC, Court or (Oregon) Commission decisions."[42] Liberty Consulting indicated "Qwest's proposed language adequately addresses AT&T's objections."[43]

26. Finally, AT&T points out that if a party uses these terms to game the process, the other party or the Department can bring the matter in front of the Commission, as occurred in Docket No. P-421/C-01-391.[44]

27. DOC agrees with AT&T that an interim operating agreement provision is unnecessary because the parties can and should perform under the terms of the existing interconnection agreement until they have agreed upon a change, because the proposal simply inserts an unnecessary step into the process, and because it may be prejudicial for the same arbitrator to rule on an interim agreement while he or she is then considering further evidence in order to make a final decision on the disputed issues.

28. Onvoy commented that an interim solution drains scarce resources from the parties and disproportionately from the smaller party so as to impede competition. Further, it drains resources from agency staffs that would be better spent on other matters.

C. Applicable Law

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[39] *Arizona Order* at ¶ 578.
[40] *Colorado Order* at ¶¶ 1-2.
[41] *Washington Order* at ¶¶ 331, 721.
[42] *Oregon Order* at 19-20 (emphasis added).
[43] Liberty Consulting Order at ¶ 2.
[44] AT&T's Closing Brief on Disputed Issues at 11.

29. The Telecommunications Act does not specifically address these issues. The Commission has general authority under the Act to arbitrate specific unresolved issues and to order terms consistent with the terms of the Act,[45] and the authority to prescribe the terms and conditions of service delivery, for the purpose of bringing about fair and reasonable competition for local exchange telephone services.[46]

D. Decision

30. The parties have demonstrated that they often disagree on the meaning of even simple sentences. Qwest claims that it does not seek to unilaterally impose its interpretation of minor Commission determinations, then proposes language that does precisely that because it provides for no prior notice or opportunity for AT&T to object prior to implementation. Qwest would have us look to other language for the right that "always" exists to seek amendment of the interconnection agreement.[47] But then it might be argued that the specific controls the general. If the issue is something that the parties agree to, it can be handled relatively quickly and simply under the amendment process without excluding one party from the process. AT&T's proposal deleting the language allowing Qwest to make corrections should be adopted.

31. Requiring an interim operating agreement to be the first item of dispute resolution is a good idea where the order is absolutely clear and expressly requires immediate implementation. But if it is clear enough for an arbitrator to rule on an interim basis, the parties should be able to agree on an interim operating agreement themselves, and it will likely be clear enough to be resolved fairly promptly on a permanent basis. In actuality, few rulings and orders are free of ambiguity, so legitimate issues exist. The AT&T proposal of maintaining the status quo during resolution is the more equitable one and should be adopted.

Issue No. 3: Definition of "Tandem Office Switch"

A. Issue

32. This issue concerns the definition of a tandem office switch, which will determine the rate at which Qwest will compensate AT&T for traffic that AT&T terminates on behalf of Qwest. In the 1997 arbitration between AT&T and Qwest, the Commission required Qwest to pay tandem rates for any CLEC switch that "has the capability of serving" the same geographic area as Qwest's tandem.[48]

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[45] 47 U.S.C. § 252 (b).
[46] Minn. Stat. § 237.16, subd. 1(a).
[47] Qwest Reply Brief at 5-6.
[48] *In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communication Company for Arbitration with U S WEST Communications, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, Order Resolving Arbitration Issues, Docket Nos. P-442,421/M-96-855, P-5321,421/M-96-909, P-3167,421/M-96-729 (Dec. 2, 1996) at 71-72.

B. Position of Parties

33. AT&T proposes language that would require Qwest to pay the tandem interconnection rate if its switches are "capable of serving" a geographic area comparable to that served by Qwest's tandem. AT&T's network consists of fewer switches than Qwest's, but they are linked by fiber optic and radio rings that make the switches capable of serving a geographic area comparable to that of Qwest's tandem switches.[49] Qwest proposes that AT&T be required to demonstrate that it actually serves a comparable geographic area before it could charge Qwest the tandem rate for termination of Qwest's traffic. The parties have agreed to language that requires a "fact based consideration of geography" in determining whether a switch meets the definition of a tandem switch.

C. Applicable Law

34. The applicable regulation provides as follows:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.[50]

35. In the *Local Competition Order*, the FCC stated:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (*e.g.,* fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. *Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate*.[51]

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[49] Tr. 2:54; Ex. 13 (Schell) at 9 & Exs. JS-1 through JS-4; Exs. 14 & 15. Contrary to the arguments made by Qwest, AT&T has not contended in this proceeding that it can demonstrate its switches are capable of serving a comparable geographic area merely by showing that the NXX codes assigned to the AT&T switch could be locally dialed from many exchanges.

[50] 47 C.F.R. § 51.711(a)(3).

[51] *Local Competition Order* at ¶ 1090 (emphasis added).

36. In the *Intercarrier Compensation NPRM*, the Commission clarified that in order to receive the tandem rate under section 51.711(a)(3), a competitive LEC need only demonstrate that it serves a geographic area comparable to that of the incumbent LEC; it need not establish functional equivalency of the switches.[52]

37. In addition, the FCC has directly addressed the issue whether a CLEC must demonstrate that its switches are actually serving comparable geographic areas. In the *Verizon Arbitration Order,* the FCC rejected this argument, finding that "the requisite comparison under the tandem rate rule is whether the competitive LEC's switch is capable of serving a geographic area that is comparable to the architecture served by the incumbent LEC's tandem switch."[53] The tandem rate rule recognizes that new entrants may adopt network architecture different from those deployed by the incumbent; it does not depend on how successful the competitive LEC has been in capturing a geographically dispersed share of the incumbent LEC's customers.[54]

D. Decision

38. Although Qwest's proposed language literally is consistent with 47 C.F.R. § 51.711(a)(3), Qwest's interpretation of this language to mean that AT&T must actually serve customers in those geographic areas is not consistent with the rule as interpreted by the FCC. In the *Verizon Arbitration Order* the FCC approved the language proposed by AT&T as being consistent with the rule and the FCC's orders clarifying it. Qwest attempts to limit the significance of this decision by arguing that it does not constitute industry-wide rulemaking and should be viewed only as the resolution of an issue based on evidence presented in that case. While the *Verizon Arbitration* Order does not impose requirements on the industry as a whole, the FCC's interpretation of its own rule in that proceeding provides valuable insight into the weight to be given to policy arguments about what it means to "serve" a certain geographic area. The only evidentiary conclusion drawn in the *Verizon Arbitration Order* was that AT&T's switches were in fact capable of serving areas geographically comparable to those served by Verizon's tandems.

39. AT&T's proposed language is consistent with 47 C.F.R. § 51.711(a)(3), with the *Intercarrier Compensation NPRM,* the *Verizon Arbitration Order*, and the

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[52] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rule Making, FCC Docket No. 01-92, at ¶ 105 (rel. April 27, 2001) ("*Intercarrier Compensation NPRM*").
[53] *In the Matter of the Petition of AT&T Communications of Virginia, Inc., pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc*., Memorandum Opinion and Order, FCC Docket No. 00-251 (rel. July 17, 2002) ("*FCC Verizon Arbitration Order*") at ¶ 309.
[54] *Id*.

Commission's order in the 1997 arbitration. AT&T's language should be adopted in the interconnection agreement.[55]

Issue No. 5: Definition of Extended Area/Local Traffic

A. Issue

40. This issue concerns the definition of "Exchange Service" or "Extended Area Service" (EAS). The definitions proposed by the Parties hinge on whether the nature of (i.e., whether a call is considered "local" or "long distance") and compensation for (i.e., whether reciprocal compensation or switched access charges appropriately apply) a call should be based upon the geographical end points of the call, or based upon the NPA/NXX of the calling and called parties, regardless of their physical locations.

B. Positions of Parties

41. NPA/NXX is a designation used throughout the telephone industry to indicate the area code (NPA or numbering plan area) and the second three digits, or "prefix," following the area code in a party's telephone number. NXX codes are assigned to particular central offices or rate centers within the state,[56] and are associated with specific geographic areas or exchanges.[57] A rate center is a vertical and horizontal coordinate established roughly at the geographical center of an exchange or group of exchanges to determine the point from which to calculate the mileage used to determine the appropriate rate for a long distance toll call.[58] Competitive local exchange carriers wishing to provide local service in multiple exchanges must have a separate NXX code for each rate center.[59] Customers with the same NXX have their calls rated the same way. Calls from a customer with a particular NXX to another customer with the same NXX would thus have a geographic distance of zero, so no long distance charges would apply.

42. Historically, the jurisdictional distinction between "local" and "toll" calling has been premised on determining the points of origination and termination of the telephone call.[60] As AT&T states,[61] AT&T and Qwest as well as other

[55] The Administrative Law Judges do not find it significant that no one challenged Qwest's SGAT language, which is the same as that proposed here, during the 271 proceedings. AT&T is not precluded from raising issues in an arbitration proceeding that were not addressed in the 271 proceedings. Furthermore, as noted above, in the 1997 arbitration the Commission required Qwest to pay the tandem rate for calls terminated on CLEC switches that are capable of serving a comparable geographic area. The party seeking to change this requirement is Qwest, not AT&T.
[56] Tr. 2:110.
[57] "Exchange" is defined in Minn. R. 7810.0100, subp. 14, as "a unit established by a telephone utility for which a separate local rate schedule is provided. It may consist of one or more central offices together with associated plant facilities used in furnishing telecommunication services in that area."
[58] Ex. 4 (Freeburg) at Ex. TRF-2.
[59] Tr. 2:110.
[60] *Id.*
[61] Ex. 13 (Schell) at 21.

telecommunications carriers in Minnesota have historically used, and continue to use, the NPA/NXXs of the calling and called parties to determine whether a call is rated as a local or as a toll call, and whether reciprocal compensation or switched access charges apply to any given call. Until recently, NPA/NXXs have been the appropriate way to determine local/ toll compensation largely because they have been presumed by the telecommunications industry to align with the geographic calling and called areas.[62] However, because of new technology and capabilities in switches and other equipment, such alignment is no longer necessary. Thus, in the case of Qwest's FX service and the offering of FX-like or VNXX services by CLECs like AT&T, the NPA/NXX does not necessarily reflect a physical presence in a particular rate center.

43. Incumbent local exchange carriers, such as Qwest, have for many years offered FX service[63] which, for an additional monthly fee, provides customers served out of one rate center with numbers from an NPA-NXX assigned to another rate center, so that calls can be placed to and from the FX-subscriber, to and from customers in the "foreign" rate center, without incurring intraLATA toll charges.[64] A "Virtual NXX" or "FX-like" service occurs when a competitive local exchange carrier, such as AT&T, assigns an NPA-NXX to a customer physically located outside of the rate center or exchange with which that NPA-NXX is associated.[65] For example, a customer physically located in Marshall, Minnesota might order a telephone number from a CLEC with a Rochester NPA-NXX. Calls between that Marshall customer's telephone and other Rochester area customers would be treated as if they were local calls, despite the fact that Marshall and Rochester are in different rate centers.[66] Conversely, calls between that Marshall customer and other Marshall area customers (with Marshall NPA-NXXs) would be long distance calls to which time and distance-sensitive intraLATA toll charges would apply.[67] Both FX service and VNXX services, although dependent upon differing network architecture,[68] have the effect of expanding the local calling area for that particular customer. Both services permit customers in one exchange or rate center to have a telephone number in another exchange or rate center.[69]

44. Qwest proposes the following definition:

> "Exchange Service" or "Extended Area Service (EAS)/Local Traffic" means traffic that is originated and terminated within the same local calling area as determined for Qwest by the Commission.[70]

45. Qwest's proposed definition tracks the Commission's longstanding rules defining a local call, which focus on the physical locations and boundaries of

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[62] Tr. 2:110.
[63] AT&T's Petition for Arbitration, Ex. 8, Qwest Exchange and Network Services Tariff.
[64] Tr. 2:19-20.
[65] *Id.* at 20-21.
[66] *Id.* at 113-114.
[67] *Id.* at 109.
[68] *Id.* at 62.
[69] *Id.* at 18-23.
[70] Disputed Issues List at 8.

exchanges, exchange service areas, and local calling areas.[71] Similarly, Qwest notes, "local exchange service" is "telecommunication service provided *within local exchange service areas*, "[72] and "long distance telecommunications service" is "that part of the total communication service rendered by a utility which is furnished *between customers in different local service areas* . . . . "[73]

46. Qwest's position is that the compensation for the calls should be determined by the geographical end points of the call. Calls that originate and terminate within the ILEC's tariffed local exchange area, according to Qwest, should be rated as local calls.[74] Calls that are routed to a point of interface with the purpose of terminating outside of the ILEC local calling area should be rated as interexchange calls regardless of their NPA/NXXs.[75]

47. Qwest contends that AT&T's use of its Virtual NXX (VNXX) product (in which AT&T upon request will assign an NPA/NXX of a distant calling area to a customer) "undermines the structure of switched access charges [by allowing] a CLEC to offer toll-free interexchange service and avoid switched access charges," and requires the originating LEC (i.e. Qwest) to pay the terminating LEC reciprocal compensation because the interexchange call is falsely treated as a local call.[76] Qwest's position is that VNXX "schemes" by CLECs constitute "misuse of NXX's," and are nothing more than a way to avoid access charges.[77] Qwest points out that most states have declined to classify VNXX traffic as traditional local traffic.[78]

48. AT&T's proposed definition is as follows:

> "Exchange Service" or "Extended Area Service (EAS)/Local Traffic" means traffic that is originated and terminated within the same local calling area as determined by the calling and called NPA/NXXs.[79]

49. As described by AT&T, the long-standing industry practice is to determine the nature and compensation of a call based upon the NPA-NXX of the originating and

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[71] Minn. R. 7810.0100, subps. 14, 15, and 22.
[72] Minn. R. 7810.0100, subp. 23 (emphasis added). Ex. 8 is an excerpt from Qwest's Exchange and Network Services Tariff that defines local exchange service consistently with Qwest's proposed definition of "Exchange Service" for its interconnection agreement with AT&T. That is, local exchange service in Qwest's tariff is also designated as intraexchange between customers within the boundaries on Qwest's exchange boundary maps. Ex. 8 includes letters from the Commission approving the predecessors of Qwest's exchange area boundaries as contained *in the maps* provided by Qwest's predecessors. One such letter from the Commission included in Ex. 8 emphasizes the importance of "secure and definite exchange service area boundaries" and requires all carriers operating in the state to submit exchange boundary maps.
[73] Minn. R. 7810.0100, subp. 27 (emphasis added).
[74] Tr. 2:14.
[75] *Id.* at 13.
[76] Ex. 4 (Freeburg) at Ex. TRF-2.
[77] *Id.*
[78] Qwest Initial Brief at 9-18.
[79] Tr. 2:11.

terminating telephone numbers, not the physical location of the customers.[80] Today, Qwest itself employs the NPA-NXX to rate calls as local or toll, not the customer's physical location.[81]

50. AT&T's position is that its "FX-like" or "VNXX" service is a competitive offering directly comparable to Qwest's currently offered foreign exchange (FX) service.[82] AT&T claims its definition does not, as Qwest suggests, lead to LATA-wide reciprocal compensation; rather, it ensures that Qwest maintains the industry practice of rating calls by NPA-NXX and allows for competition with Qwest's FX service by treating it like FX service, which is not rated as a toll call. To do otherwise creates a competitive advantage for Qwest.[83]

51. For the purposes of this arbitration proceeding, the Department supports Qwest's proposed language because, while AT&T's proposed language is consistent with current industry practice, the Department believes that Qwest's narrower definition is consistent with current Federal and state law defining local exchange service and local calling area and with long-established industry assumptions regarding the relationship between NPA/NXXs and the geographic rate centers to which they are assigned.[84]

52. The Department takes no position at this time regarding the appropriate compensation for or validity of VNXX, FX-like, and FX offerings in general. While the Department generally favors policies which allow carriers to distinguish themselves from one another by marketing competitively different local calling areas, the use of and compensation for Virtual NXX, FX-like, and FX services raise significant policy issues that must be resolved in a context more broadly defined than that of a single arbitrated interconnection agreement between two carriers. The Department believes that the resolution of these complex issues will have wide-ranging material impacts on all telecommunications carriers in the State of Minnesota, including the rating of calls by, and compensation to, other carriers that have not yet participated in the decision to deploy such prefixes. Public interest issues that must be addressed include E911 routing, numbering resource conservation issues, and local number portability. The Department recommends that a generic docket be opened to explore the appropriate treatment of FX, VNXX, and FX-like offerings, in which all interested and impacted parties may participate.[85]

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[80] Ex. 13 (Schell) at 23-28; *see also FCC Verizon Arbitration Order* at ¶ 301 ("Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide. The parties all agree that rating calls by their geographical starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time.").
[81] Ex. 13 (Schell) at 25; Tr. 2:25 (Qwest employs NPA-NXXs); *see also* Tr. 2:30 (use of NPA-NXX).
[82] Tr. 2:20-21.
[83] AT&T's Closing Brief On Certain Definitions at 8.
[84] DOC Brief at 19-20.
[85] *Id.*

53. At this time, the OAG supports Qwest's position as it applies to voice traffic,[86] because AT&T's language would impermissibly encourage and facilitate the unauthorized expansion of local calling areas and because Qwest's language best serves the public interest at this point in time. However, the OAG recognizes that the dispute over the definition of "exchange service" has brought to light a number of complicated and important legal and policy issues with practical concerns including whether and under what circumstances Virtual NXX service and FX service should be allowed and under what circumstances local calling areas should be expanded. The OAG also recommends that the Commission open a separate generic docket to consider the numerous, unanswered and important policy and legal questions surrounding virtual NXX service and the expansion of local calling areas.

54. In its comments, Onvoy stated that the issue in dispute is, in fact, an issue of the application of reciprocal compensation rates or access charges. That issue, Onvoy believes, is inextricably intertwined with the issue of local calling scope and is best addressed in a forum where all affected entities may be heard. Onvoy recommends that the Commission adopt Qwest's position and not allow VNXX to be considered local traffic until the local calling scope issue has been resolved.

55. In its comments, MIC agreed with the Department, OAG, and Onvoy that the Qwest proposal should be adopted because of the possible impact on other ILECs. MIC stated:

> It is not clear that the Commission would be able to maintain one approach for Qwest and AT&T and another approach for other ILECs. Rather, it is very possible that a radical, new approach adopted for Qwest and AT&T may be extended to other carriers and have broad application and substantial implications for both customers and carriers. (OAG Brief at 17; DOC Brief at 20; Qwest Brief at 39-40). This arbitration proceeding has not allowed development of a record that includes facts pertaining to other carriers and customers, and the Commission should not adopt a radial, new approach without an understanding of those issues.[87]

C. Applicable Law

56. Section 251 (g) of the Act states:

> Continued Enforcement of Exchange Access and Interconnection Requirements. —On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the

[86] With regard to ISP bound traffic, the OAG agrees with AT&T that the FCC has asserted exclusive jurisdiction over ISP bound traffic and has determined that ISP bound traffic is subject to the FCC's intercarrier compensation mechanism. *See* Ex. 13 (Schell) at 37-38. As AT&T recognizes, the Minnesota Public Utilities Commission retains jurisdiction over intrastate voice traffic. *Id.* at 38. The OAG disagrees, however, that virtual NXX traffic and similar services should be subject to reciprocal compensation as advocated by AT&T.

[87] MIC Reply Brief at 5.

extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and non-discriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation , order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

57. Minnesota Rules 7810.0100, subps. 14, 15, 22, and 23 define, respectively, “exchange," “exchange service area,” “local calling area,” and “local exchange service” as follows:

> "Exchange" means a unit established by a telephone utility for which a separate local rate schedule is provided. It may consist of one or more central offices together with associated plant facilities used in furnishing telecommunication services in that area.
>
> "Exchange service area" means the *geographical* territory served by an exchange, usually embracing a city, town, or village and its environs (emphasis added).
>
> "Local calling area" means the area within which telecommunication service is furnished customers under a specific schedule or exchange rates. A local calling area may include one or more exchange service areas or portions of exchange service areas.
>
> "Local exchange service" means telecommunication service provided within local exchange service areas in accordance *with the tariffs*. It includes the use of exchange facilities required to establish connections between stations within the exchange and between stations and the toll facilities serving the exchange (emphasis added).

D. Decision

58. Qwest's proposed definition is consistent with existing Minnesota rules, while AT&T's is not. AT&T’s proposal is more consistent with developing technology and marketing concepts, but would have impacts beyond this arbitration. Thus, Qwest’s proposal should be adopted until the issues and impacts can be considered in greater depth and with broader participation.

Issue No. 8: Limitation of Liability

A. Issue

59. The issue is whether liability limitations between the parties should be modified to increase liability exposure in four ways: (1) by including amounts owed to it by Qwest under the Wholesale Service Standards,[88] (2) by adding "gross negligence" to the exceptions to the agreed-to limitations on liability, (3) by adding "bodily injury" and "death" to those exceptions, and (4) by deleting the requirement that the damage be caused "solely" by the parties from those exceptions.

B. Position of Parties

Wholesale Service Standards

60. Section 5.8.1 as agreed to first limits liability for failure to perform to the amount that would have been charged. For other losses, the parties agree to limit liability to the total amounts charged to CLEC under the interconnection agreement during the contract year in which the cause accrues or arises. AT&T proposes to add to that total any amounts due and owing under the Wholesale Service Standards. Section 5.8.2 as agreed to excludes liability to each other for indirect, consequential, or special damages, but states that shall not exclude amounts due and owing under any Performance Assurance Plan or penalties under Docket No. P421/AM-01-1376. AT&T proposes to add amounts due and owing under the Wholesale Service Standards as a further exception.

61. Qwest argues that AT&T's language should not be adopted because Wholesale Service Quality Standards have not yet been established in Minnesota and would improperly expand Qwest's liability caps under the agreement by reference to matters outside the agreement.[89]

62. The purpose of AT&T's proposal is to assure that the limitation of liability provision not undermine the payment amounts that Qwest is required to make under the Wholesale Service Quality Standards, separate and apart from Qwest's other liability under the interconnection agreement. In response to Qwest testimony that it is not appropriate to "rais[e] the maximum liability through inclusion of penalties under the service quality standards,"[90] AT&T proposed the following modification to Section 5.8.1:

> 5.8.1 Each Party's liability to the other Party for any loss relating to or arising out of any act or omission in its performance under this Agreement, whether in contract, warranty, strict liability, or tort, including (without limitation) negligence of any kind, shall be limited to the total amount that

[88] *In the Matter of Qwest's Wholesale Service Quality Standards*, MPUC Docket No. P421/AM-00-849, Order Adopting Wholesale Service Quality Standards, July 3, 2003, ("*MN WHSQ Order*").
[89] Ex. 29 (Brotherson) at 18.
[90] *Id.*

is or would have been charged to the other Party by such breaching Party for the service(s) or function(s) not performed or improperly performed. Each Party's liability to the other Party for any other losses shall be limited to the total amounts charged to CLEC under this Agreement during the contract year in which the cause accrues or arises., ~~plus a~~ Any amounts due and owing to CLEC under the Wholesale Service Quality Standards described in Section 20 shall not be limited by this Section 5.8.1.[91]

63. The Department recommends adopting AT&T's proposed language because, failure to do so could erode the goal of the Wholesale Service Quality Standards which is to improve and maintain performance.

64. In its comments, Onvoy stated that if Qwest is allowed to prevent a Commission order from taking effect for AT&T, there would be no stopping Qwest from preventing implementation of any Commission order and urged adoption of the AT&T proposal.

Exceptions to Liability Limitations

65. Section 5.8.4, with the AT&T proposals struck through or underlined, reads 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 (including gross negligence) or (ii) bodily injury, death or damage to tangible real or Personal property proximately caused ~~solely~~ by such ~~Parties'~~ Party's negligent act or omission or that of their respective agents, subcontractors or employees.

66. According to AT&T witness Hydock, some conduct and some harms are of such a severe nature that a party's liability for that conduct or harm should not be limited by contract.[92] Qwest opposes the inclusion of such language and cites to various jurisdictions that have refused to adopt language similar to that proposed by AT&T here.[93] Qwest's opposes the inclusion of "gross negligence" because there is no commercially reasonable basis for this type of liability, no clear definition, and because it is contrary to accepted industry practice.[94]

67. AT&T did not provide any rationale for deleting "solely." Qwest opposed it. No comment were made about the change to "Party's."

C. Applicable Law

[91] AT&T's Closing Brief on Disputed Issues at 13.
[92] Ex. 2 (Hydock) at 13.
[93] Ex. 29 (Brotherson) at 19-22.
[94] *Id.* at 19.

68. The Telecommunications Act does not specifically address these issues. Minn. Stat. § 237.16, subd. 1 (a), authorizes the Minnesota Commission to prescribe the terms and conditions of service delivery, for the purpose of bringing about fair and reasonable competition for local exchange telephone services.

69. In its *1997 US WEST Arbitration Reconsideration Order*, the Commission addressed limitation of liability language in dispute between the parties.[95] In general, the Commission found that:

> [c]ontracts typically and appropriately create exceptions to limitations of liability for intentional or grossly negligent acts. Such exceptions are considered good public policy, as they encourage management to deter such actions. The Commission finds that the exception for acts subject to DMOQs is also appropriate, since the DMOQ concept brings its own measures of liability.[96]

D. Decision

70. The AT&T proposals for Sections 5.8.1 and 5.8.2, as modified by AT&T in its brief, should be adopted. If the Wholesale Service Quality Standards are finally adopted, it would be contrary to public policy to limit their impact by limiting the penalty provisions. Under Issue No. 26, provision is made for the possibility that they will not become effective.

71. In Minnesota, gross negligence is culpable conduct that is very close to intentional conduct. Because the conduct is so culpable, it is appropriate and common to include it with intentional conduct in liability exclusions. It should be included in Section 5.8.4 for the reasons stated by the Commission in its *1997 US WEST Arbitration Reconsideration Order*. There are several Minnesota cases explaining the meaning of gross negligence, but that does not make the term too confusing to use. There are also many cases examining the meaning of many liability terms, including "willful" and "intentional."

72. Some usage changes would be appropriate. Under Issue No. 9, Qwest appropriately objects to adding "or intentional" to "willful." The words generally mean the same thing.[97] Since "willful misconduct" is the industry standard terminology, it should be used. Similarly, while gross negligence indicates a very high level of culpability very near willful misconduct, it is not willful misconduct, so it is incorrect to

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[95] *AT&T Communications of the Midwest, Inc., MCI Metro Access Transmission Services, Inc., MFS Communications Company, US West Communications Company, US West Communications, Inc*., Order Resolving Issues After Reconsideration and Approving Contract, OAH Docket No. 9-2500-10697-2; MPUC Docket Nos. P-442,421/M-96-855; P-5321,421/M-96-909; P-3167,421/M-96-729, at 59-60 (March 17, 1997) ("1997 *US WEST Arbitration Reconsideration Order*").

[96] *Id.* at 60.

[97] *State v. Cyrette*, 636 N.W.2d 343, 347 (Minn. Ct. App. 2001), *review denied* (Minn. Feb. 19, 2002) (holding that the term "willfully" means "intentionally" in Minn. Stat. § 609.378).

say “willful misconduct (including gross negligence).” The phrase adopted here should be, “willful misconduct or gross negligence.”

73. AT&T’s proposal to include bodily injury and death should not be adopted. Section 5.8.4 deals with injuries to the parties, not others, and bodily injury and death do not apply to corporations.[98] AT&T’s reliance on the doctrine of *respondeat superior*[99] is misplaced. That doctrine makes the employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency. It does not provide the basis for a party to sue on behalf of the party's injured employee, agent or subcontractor.

74. The word “solely” should not be deleted. AT&T provided no support for this proposal. Moreover, the purpose of Section 5.8.4 appears to be to remove the otherwise applicable limitations on liability in cases of egregious conduct. It is most consistent with that purpose to impose the limitations on liability on claims of negligent damage to property except in cases were one party is solely responsible.

75. Changing “Parties’” to “Party’s” seems to be an appropriate grammatical correction, but the word “their” should also be changed to “its” to be consistent.

Issue No. 9: Indemnity Obligations

A. Issue

76. The dispute here involves the description of items to which indemnification should apply.

B. Position of Parties

77. AT&T proposes several changes to the indemnity provisions in Section 5.9.1. to reduce Qwest’s ability to limit the liability AT&T believes it should bear. Because AT&T must rely heavily on Qwest’s performance for AT&T to provide local services in direct competition with Qwest, Qwest’s actions or inactions have the potential to harm AT&T’s relationships with its customers.[100] Conversely, Qwest opposes AT&T’s changes to the indemnity sections because they expand Qwest's exposure under the agreement. It argues that the proposals should be rejected because they conflict with accepted industry standards, contravene the basic framework of the indemnification regime embodied by the agreed-to language, and conflict with other provisions of the agreement.[101]

78. Section 5.9.1, with the AT&T proposals struck through or underlined, reads:

[98] *See, e.g.,* Ex. 29 (Brotherson) at Ex. LBB-2 at 31.
[99] AT&T’s Closing Brief on Disputed Issues at 15.
[100] *Id.* at 16-17.
[101] Qwest Initial Brief at 44.

5.9.1 The Parties agree that unless otherwise specifically set forth in this Agreement the following constitute the sole indemnification obligations between and among the Parties:

5.9.1.1 Except as otherwise provided in Section 5.10, each of the Parties agrees to release, indemnify, defend and hold harmless the other Party and each of its officers, directors, employees and agents (each an Indemnitee) from and against and in respect of any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any nature or kind, known or unknown, liquidated or unliquidated including, but not limited to, reasonable costs and expenses (~~including~~ attorneys' fees, accounting fees, or other), whether suffered, made, instituted, or asserted by any other Party or Person ~~or entity~~, for (i) invasion of privacy, (ii) Personal ~~bodily~~ injury to or death of any Person or Persons, or for loss, damage to, or destruction of ~~tangible~~ property, whether or not owned by others, resulting from the Indemnifying Party's performance, breach of Applicable Law, or status of its employees, agents and subcontractors, (iii) for breach of or failure to perform under this Agreement, regardless of the form of action, ~~whether in contract, warranty, strict liability, or tort including (without limitation) negligence of any kind~~ or (iv) for actual or alleged infringement of any patent, copyright, trademark, service mark, trade name, trade dress, trade secret or any other intellectual property right, now known or later developed, to the extent that such claim or action arises from CLEC or CLEC's Customer's use of the services provided under this Agreement.

5.9.1.2 In the case of claims or loss alleged or incurred by an End User Customer of either Party arising out of or in connection with services provided to the End User Customer by the Party, the Party whose End User Customer alleged or incurred such claims or loss (the Indemnifying Party) shall defend and indemnify the other Party and each of its officers, directors, employees and agents (collectively the Indemnified Party) against any and all such claims or loss by the Indemnifying Party's End User Customers regardless of whether the underlying service was provided or unbundled element was provisioned by the Indemnified Party, unless the loss was caused by the willful or intentional misconduct (including gross negligence) of the Indemnified Party. The obligation to indemnify with respect to claims of the Indemnifying Party's End User Customers shall not extend to any claims ~~for physical bodily injury 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 Indemnified Party.

79. AT&T seeks indemnification for both parties for personal injury claims because personal injury is broader than bodily injury. Under Qwest's proposal, if Qwest

causes personal injury to a third party that brings a claim against AT&T, Qwest will only indemnify AT&T for that portion of the harm that is considered bodily injury (e.g., harm to the body). AT&T argues that if there is a harm caused by Qwest for which a claim is brought against AT&T by a third party, Qwest should be fully responsible for the harm it causes.[102]

80. AT&T's proposal regarding infringement of intellectual property rights in Section 5.9.1.1 is intended to clarify that indemnification is applicable in the case of actual or alleged infringement of intellectual property rights of a third party, subject to the specific provisions regarding intellectual property indemnification in Section 5.10, and to ensure there is no gap and that all potential infringement claims are addressed in Sections 5.9 or 5.10.[103]

81. AT&T's proposal to define "reasonable costs and expenses" to include accounting fees and other items instead of just attorney's fees was intended simply to provide examples of various categories of costs and expenses.[104]

82. AT&T's proposal for indemnification "based on injury resulting from the Indemnifying Party's performance, breach of Applicable Law, or status of its employees, agents and subcontractors," was a further broadening of Qwest's exposure consistent with AT&T's position that a party be held responsible for its acts and omissions that could prompt a third party claim.[105]

83. Section 5.9.1.2 begins by making each party responsible for the claims of its own end users by requiring that party to indemnify the other for such claims. However, it excludes indemnification of a party whose "willful misconduct" caused the loss. AT&T proposes to add "intentional misconduct" and "gross negligence," arguing that a party whose gross negligence or intentional misconduct caused a loss should not enjoy the benefits of indemnification either.[106]

84. Section 5.9.1.2 as proposed by Qwest excludes indemnification for certain types of claims (namely, physical bodily injury, death, and damage to tangible property) caused by the indemnified party through its employees, contractors, agents, or other representatives. AT&T's purpose in deleting the language identifying those types of claims is to make the exclusion applicable to all claims for loss caused by the indemnified party, again consistent with AT&T's position that each party should be fully responsible for its conduct.[107]

85. The deletion of "tangible" is not explained, but is also consistent with AT&T's intent to broaden responsibility for conduct as much as possible.

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[102] AT&T's Closing Brief on Disputed Issues at 17.
[103] *Id.* at 18.
[104] *Id.* at 18-19.
[105] *Id.* at 19.
[106] *Id.* at 19-20. As Qwest is the provider of most services under the interconnection agreement, it will usually be the indemnifying party and most likely benefit from such a provision.
[107] *Id.* at 20-21.

86. Qwest notes that AT&T fails to define the term “personal injury” and that the potential universe of "personal" injuries is vastly larger than that associated with "bodily" injury. In Qwest's opinion, its language more appropriately addresses instances where the parties could reasonably expect to be called upon to indemnify each other.[108]

87. Qwest argues that AT&T’s new language addressing indemnification for intellectual property matters should be rejected because it addresses issues covered by other sections of the parties' agreement and does not adequately address the issue of intellectual property on its own.[109] It calls AT&T's proposed language in Section 5.9 in some respects duplicative of, and in others at odds with, the agreed-to language in Section 5.10.[110]

88. Qwest objects to AT&T’s "accounting fees, or other" language as an inappropriate and unnecessary addition to widely accepted standard language.[111] It claims that AT&T's approach would require the recovery of such costs and thus remove from the finder of fact the ability to apportion such costs based on the facts of the case.[112]

89. Qwest objects to AT&T’s proposed revisions to Section 5.9.1.1 to expand the parties' obligations to indemnify each other for "breach of Applicable Law, or status of its employees, agents, and subcontractors," because they are wholly unrelated to the interconnection agreement. In Qwest’s view, contractual indemnification obligations under the parties' agreement should only arise for breach of or failure to perform under the agreement.[113] In addition, "status of employees" is not defined.[114]

90. Qwest believes that the indemnification exclusion should be only for willful misconduct because AT&T’s own tariffs and agreements with end users except only willful misconduct from the cap on AT&T's exposure.[115] AT&T's proposed language would create a different and broader standard under which Qwest must indemnify AT&T from claims from AT&T customers. Qwest claims that since the overall intent of Section 5.9.1.2 is for each party to be responsible for claims of its own customers, the failure of AT&T to match the indemnity language to its own tariff limitation of liability creates ambiguity and exposes Qwest to unknown indemnification obligations.[116] Qwest also states that the industry-accepted term is “willful misconduct,” and notes that AT&T does not explain the difference between "willful" and "intentional" misconduct.[117]

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[108] Ex. 29 (Brotherson) at 27.
[109] *Id.* at 25-26.
[110] Qwest Initial Brief at 44-45.
[111] Ex. 29 (Brotherson) at 26-27.
[112] Qwest Initial Brief at 45-46.
[113] Ex. 29 (Brotherson) at 27-28.
[114] Qwest Initial Brief at 47.
[115] Ex. 29 (Brotherson) at 29 and Ex. LBB-1.
[116] *Id.* at 29.
[117] Qwest Initial Brief at 48.

91. Qwest argues that it makes good economic and policy sense for the exception to the end user-based indemnification for damage caused by the indemnified party to be limited to bodily injury, death, or destruction of tangible personal property rather than all claims. That position has been adopted by the Facilitator in the Multi-State workshop process and some state commissions.[118] Qwest fears that without a mechanism requiring each party to indemnify the other for any claims brought by their end user customers, AT&T could, as a marketing tool, offer to not exclude liability for consequential damages resulting from service outages because it would be able to shift that liability to Qwest.[119]

92. DOC notes that AT&T has not provided any discussion about the parameters of "personal injury" and, therefore, finds the term vague and agrees with Qwest that the potential universe of "personal" injuries could be unnecessarily expansive. DOC recommends Qwest's proposed language.[120]

93. DOC has reviewed section 5.10 of the interconnection agreement addressing intellectual property and finds that AT&T's proposed language in 5.9.1.1 does not unnecessarily expand the parties' obligations, but rather clarifies them. DOC recommends adoption of AT&T's language.[121]

94. Regarding "accounting fees, or other," DOC argues that the language Qwest has already agreed to ("reasonable costs and expense") can be interpreted to include accounting fees, so including the phrase does not unnecessarily expand the parties' obligations. Rather, DOC concludes it clarifies them by describing the types of costs and expenses that may be recoverable. DOC recommends adoption of AT&T's language.[122]

95. With regard to AT&T's inclusion of "gross negligence" and "intentional misconduct" as reasons for indemnification, DOC recommends adoption of AT&T's language for all the reasons it discussed in Issue No. 8.

C. Applicable Law

96. The Telecommunications Act does not specifically address this issue. However, the Commission has general authority under the Act to arbitrate specific unresolved issues and to order terms consistent with the terms of the Act. *See* 47 U.S.C. § 252 (b). Further, Minn. Stat. § 237.16, subd. 1 (a) authorizes the Commission to prescribe the terms and conditions of service delivery, for the purpose of bringing about fair and reasonable competition for local exchange telephone services.

D. Decision

[118] Ex. 29 (Brotherson) at Ex. LBB-2 at 33-34; *Iowa GTC Order* at 30; *Montana GTC Order* at 16-17; *Nebraska GTC Order* at ¶¶ 53-60; *North Dakota GTC Order* at 163-64.
[119] Ex. 29 (Brotherson) at 30-31.
[120] DOC Brief at 27-28.
[121] *Id.* at 28.
[122] *Id.* at 27.

97. Both AT&T and Qwest legitimately seek to minimize their exposure to claims through favorable indemnification language. Apportioning liability must consider and balance several factors, including not just causation of the harm, but business practices, customer relations, and the other factors discussed by the parties.

98. AT&T's "personal injury" language should not be adopted because it is not defined. Clearly it is broader than "bodily injury," but there should be some limits to the parties' exposure. Courts have wrestled with the term, one calling it "problematic under the case law."[123] Insurance policies that cover personal injury always define the term. If it is used in the interconnection agreement, it must be defined. Likewise, "tangible" should not be deleted, because it would expand liability to intangible property and perhaps other undefined property interests.

99. AT&T's language regarding indemnification for infringement of intellectual property rights of a third party should be adopted because it reasonably clarifies the parties' obligations.

100. AT&T's "accounting fees, or other" language should not be adopted because it is unnecessary and could be confusing. It is necessary for a reasonable costs and expenses clause to state "including attorneys fees," if that is what is intended, because American courts normally do not award attorneys fees unless they are authorized by statute, rule, or contract. That is why it is standard language. On the other hand, courts do award "accounting fees" and "other." Adding the words adds no substance and changing the standard language creates confusion as to the intent.

101. AT&T's "performance, breach of Applicable Law, or status of its employees, agents and subcontractors, (iii) for" language should not be adopted because it does not relate to obligations under the interconnection agreement.

102. AT&T's proposal to change "willful misconduct" to "willful or intentional misconduct" should not be adopted. "Willful" and "intentional" mean the same thing,[124] so the phrase is redundant. Since "willful misconduct" is the industry standard terminology, it should be used.

103. AT&T's proposal to add "(including gross negligence)" should be adopted, but in slightly different form. Gross negligence indicates a very high level of culpability very near willful misconduct, so indemnification of such conduct should be excluded. However, it is not willful misconduct, so it is incorrect to say "willful misconduct (including gross negligence)." The phrase should be, "willful misconduct or gross negligence."

[123] *Manteuffel v. City of North St. Paul*, 570 N.W.2d 807, 811 n. 5 (Minn. Ct. App. 1997).
[124] *State v. Cyrette*, 636 N.W.2d 343, 347 (Minn. Ct. App. 2001), *review denied* (Minn. Feb. 19, 2002) (holding that the term "willfully" means "intentionally" in Minn. Stat. § 609.378).

Issue No. 14: How to Terminate EAS/Local Traffic

A. Issue

104. There are two issues associated with Issue 14: (1) whether, under Section 7.2.2.9.6, Qwest may request that AT&T establish a direct trunk to a Qwest end office switch when AT&T has a DS-1's worth of traffic running between AT&T's switch through Qwest' tandem to the particular Qwest end office that subtends the tandem, rather than delivering the traffic to AT&T's point of interconnection ("POI") at the tandem; and (2) whether, under Section 7.2.2.9.6.1, Qwest may deny interconnection at the access tandem due to exhaust and under what circumstances such denial may be appropriate. The current interconnection agreement provides that the parties:

> shall install and retain direct end office trunking sufficient to handle actually or reasonably forecasted traffic volumes, whichever is greater, between an AT&T switching center and a USWC end office where the local traffic exceeds or is forecasted to exceed 512 CCS at the busy hour.[125]

105. Over AT&T's objection, Qwest's language for both sections 7.2.2.9.6 and 7.2.2.9.6.1 (contained in its SGAT) was approved by the Administrative Law Judge during the 271 proceedings.[126]

B. Position of Parties

106. With regard to section 7.2.2.9.6, Qwest argues that it should be able to request that AT&T establish a direct trunk group between a Qwest end office switch and AT&T's switch when the traffic between AT&T's switch and the Qwest end office switch reaches a CCS busy hour equivalent of one DS-1 level of traffic, i.e., 512 BHCCS (Busy Hour Centi Call Seconds.) It generally is less expensive to direct trunk low volumes of traffic to the end office than to route this volume through the tandem.[127] Qwest's proposal would permit AT&T to object to this request by demonstrating that "compliance will impose upon it a material adverse economic or operations impact."[128] AT&T objects to Qwest's proposed language, maintaining it is contrary to AT&T's right to select the location and method it uses to interconnect with Qwest's network under the Act.

107. With regard to section 7.2.2.9.6.1, AT&T proposes that if Qwest declines interconnection due to exhaust, it may require interconnection at a local tandem if traffic volume is sufficient, but such connection must be at the same cost as interconnection at the access tandem. Under AT&T's proposal, if the issue of volume arises, the parties

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[125] Ex. 4 (Freeberg) at 30 n. 44.
[126] Findings of Fact, Conclusions of Law, and Recommendation, *Commission Investigation into Qwest's Compliance with Section 271(c)(2)(B) of the Telecommunications Act of 1996; Checklist Items 1, 2, 3, 4, 5, 6, 11, 13, and 14*, PUC Docket No. P-421/CI-01-1371 ¶ 45 ("*Docket 1371 ALJ Report*").
[127] Ex. 4 (Freeberg) at 30.
[128] Disputed Issues List, Qwest Language, Issue 14.

should discuss the circumstances to determine what volume makes interconnection to the local tandem economically feasible for AT&T. In contrast, Qwest proposes to allow AT&T to connect at the access tandem for the exchange of local traffic if requested, but does not address the rates it will charge to AT&T for this service.

C. Applicable Law

108. The law provides that new entrants may interconnect at any technically feasible point. Specifically, 47 C.F.R. § 51.305(a)(2) obligates Qwest to allow interconnection by a CLEC at any technically feasible point. In its *Local Competition Order*, the FCC explained:

> The interconnection obligation of section 251(c)(2), discussed in this section, allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers' costs of, among other things, transport and termination of traffic.[129]

109. This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA.[130]

D. Decision

110. Qwest's language would not "require" AT&T to interconnect at multiple points within a LATA in violation of its right to choose the point of interconnection. Qwest's language simply allows Qwest to request that if certain traffic levels exist, AT&T consider a direct trunk group to the end office. If such an arrangement would be economically or operationally unsound, AT&T has the option to decline the request. Qwest's language was drafted by John Antonuk, the facilitator of the 271 workshops in seven of Qwest's states, and was approved in the recent 271 proceedings.

111. AT&T and the Department maintain that Qwest's proposed language should be rejected because it would allow Qwest to treat a CLEC differently by imposing administrative burdens on CLECs that are not imposed on other interconnecting carriers.[131] Although these carriers purchase interconnection facilities from Qwest, including DS-1 services, Qwest does not currently require these carriers to use direct trunk transport to connect to Qwest end offices when traffic levels justify them.[132] Even Qwest does not always direct trunk traffic to its own end offices when the traffic levels reach the equivalent of a DS-1.[133]

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[129] *Local Competition Order* at ¶ 172.
[130] *Intercarrier Compensation NPRM,* 16 FCC Rcd at 9634, 9650, ¶¶ 72, 112.
[131] Ex. 22 (Grinager) at 3.
[132] *Id.* at 4.
[133] *Id.*

112. AT&T and the Department have misstated Qwest's position and have overstated the administrative burden required by the Qwest language. Qwest maintains, and AT&T does not dispute, that Qwest has always accepted any objection made by AT&T to direct trunking under the terms of the current interconnection agreement.[134] Although the contractual provisions for AT&T and other interconnecting carriers may be different, they do not appear to be discriminatory, because AT&T would be able to determine for itself whether direct trunking would be more economically efficient at a particular traffic level.

113. AT&T also relies on the *FCC Virginia Arbitration Order*, maintaining that the FCC rejected Qwest's approach in that case. There, however, Verizon proposed language that would "require" the establishment of direct end office trunks when traffic to a particular Verizon end office exceeds a DS-1 level.[135] In this proceeding, Qwest does not propose language that would "require" such trunking arrangements; its proposed language would simply allow it to make the request, which AT&T could decline based on its own determination as to cost or impact on its network. Qwest's language should be adopted for Issue No. 14.

Issue Nos. 15 (partial) and 16: Whether the Rate for Private Line Transport Service Should Include a Relative Use Factor

A. Issue

114. Qwest and AT&T can connect their networks through various methods, including the use of private lines. Generally, AT&T purchases private lines, many of which are two-way circuits, out of the Qwest tariff. Lines that are not fully utilized to carry long- distance traffic can also be used to carry local traffic.[136] The issue with section 7.3.1.1.2 of the interconnection agreement is whether, when Qwest uses private lines to send its own traffic to AT&T, Qwest should be obligated to share the cost of those facilities.

B. Position of Parties

115. AT&T and Qwest have generally agreed that when a party to the interconnection agreement provides dedicated transport facilities supporting the two-way trunk group between the parties, the parties will share the cost associated with such facilities based on their relative use.[137] When AT&T has purchased a private line facility from a Qwest tariff, and the parties use the facility to exchange local traffic, Qwest will not agree to share the cost of the private line with AT&T. Qwest contends that because AT&T does not pay an extra charge to carry local traffic on these lines,

[134] Ex. 4 (Freeberg) at 30.
[135] *FCC Verizon Arbitration Order* at ¶ 88.
[136] Ex. 22 (Grinager) at 5.
[137] Ex. 13 (Schell) at 58; Ex. 4 (Freeberg) at 32.

Qwest should be able to use them without paying AT&T for doing so.[138] AT&T proposes language that would obligate Qwest to share the cost of using private lines based on the parties' relative use.[139]

C. Applicable Law

116. The law generally provides that parties share the cost of flat-rated interconnection facilities:

> The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.[140]

117. In its *Local Competition Order*, the FCC said:

> The amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility. For example, if the providing carrier provides one-way trunks that the inter-connecting carrier uses exclusively for sending terminating traffic to the providing carrier, then the inter-connecting carrier is to pay the providing carrier a rate that recovers the full forward-looking economic cost of those trunks. The inter-connecting carrier, however, should not be required to pay the providing carrier for one-way trunks in the opposite direction, which the providing carrier owns and uses to send its own traffic to the inter-connecting carrier. Under an alternative scenario, *if the providing carrier provides two-way trunks between its network and the interconnecting carrier's network, then the interconnecting carrier should not have to pay the providing carrier a rate that recovers the full cost of those trunks. These two-way trunks are used by the providing carrier to send terminating traffic to the interconnecting carrier, as well as by the inter-connecting carrier to send terminating traffic to the providing carrier. Rather, the interconnecting carrier shall pay the providing carrier a rate that reflects only the proportion of the trunk capacity that the inter-connecting carrier uses to send terminating traffic to the providing carrier.*[141]

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[138] Ex. 4 (Freeberg) at 34.
[139] Ex. 13 (Schell) at 58.
[140] 47 C.F.R. § 51.709(b).
[141] *Local Competition Order* ¶ 1062 (Emphasis added).

D. Decision

118. The issue here is what happens when the parties use spare capacity in a private line to exchange local traffic. Qwest seeks to use the private line to exchange local traffic without paying for use of the facility, reasoning that because there are no incremental costs to AT&T associated with using these trunks to exchange local traffic, as opposed to using them only for long-distance traffic, there are no costs to be shared.[142] This assumption is unfounded. When AT&T purchases a private line from Qwest's tariff, the line becomes, for all relevant purposes, AT&T's. If Qwest sends traffic over the line, it reduces the capacity of the trunk that is available to AT&T, and AT&T would incur costs to replace that capacity. AT&T should be able to charge Qwest if Qwest uses the line, and a charge based on relative use is as fair a method as any, since Qwest sets the price of the line in its tariff. It is also more consistent with 47 C.F.R. § 51.709(b), which requires that costs for interconnection facilities be borne in proportion to the use by each carrier, than is Qwest's proposal to free ride.

119. Qwest has also made a number of arguments based on the fact that private lines are sold from its tariff and not pursuant to an interconnection agreement. For example, Qwest argues that it should not have to pay a tariffed, "non-TELRIC" rate to exchange local traffic. This argument simply does not square with the facts. Qwest's tariffed rate *is* AT&T's cost for these lines. AT&T simply proposes that Qwest pay a share of that cost if it chooses to use the line to exchange local traffic. Charging Qwest a prorated portion of the tariffed price based on its relative use of a private line is in fact a cost-based rate.

120. Furthermore, the fact that this product is sold from Qwest's tariff does not mean that AT&T is precluded from renting the line back to Qwest when Qwest uses it to exchange local traffic. Nor does it mean that an interconnection agreement should not address cost sharing when the tariffed product is used as a means of interconnection for the exchange of local traffic; the interconnection agreement would address only the situation in which AT&T, having purchased the private line from Qwest's tariff, desires to charge Qwest back for Qwest's use of the line to exchange local traffic. Qwest can charge whatever price it deems appropriate for a private line, and no change in the terms or conditions of any tariff would be required. For these reasons, AT&T's language should be adopted.[143]

Issue No. 17: Whether Costs for Two-Way Trunking Should be Shared, and If So, How?

A. Issue

121. The dispute is whether the costs of interconnection facilities used to carry traffic bound for the Internet should be apportioned based on relative use, in the same

[142] Ex. 4 (Freeberg) at 34-35.
[143] *Id.*

way a relative use factor is applied to the costs of interconnection facilities used to exchange local traffic.

B. Position of Parties

122. AT&T proposes language that would include minutes of use from Internet-bound traffic when calculating a cost-sharing formula for flat-rated interconnection facilities. Qwest opposes the inclusion of Internet-bound traffic in the formula and instead would limit the traffic used in the cost sharing formula to that associated with voice transmission. The Commission recently addressed this same issue and required inclusion of Internet-bound traffic in the formula.[144]

C. Applicable Law

123. Generally, the law provides that each party is responsible for carrying traffic that originates on its network to the point of interconnection with the other party's network:

> A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that *originates* on the LEC's network.[145]

124. The FCC has determined that this general principle is applicable to both reciprocal compensation and interconnection facilities used to deliver LEC-originated traffic.[146]

125. In addition, 47 C.F.R. § 51.709(b) provides that:

> The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.

126. Although the FCC has made it clear that Internet-bound traffic is no longer subject to reciprocal compensation under § 251(b)(5), most recently on the theory that Internet-bound traffic is "information access" as opposed to

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[144] *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C 252(b),* Order Accepting the Arbitrator's Recommendation and Requiring Filed Interconnection Agreement, MPUC Docket P-5733,421/IC-02-1372, at 6 (December 23, 2002).

[145] 47 C.F.R. § 51.703(b) (emphasis added).

[146] Memorandum Opinion and Order, *In the Matter of TSR Wireless, LLC v. U S WEST Communications, Inc.,*15 FCC Rcd at 1116 (June 21, 2000), *aff'd sub nom., Qwest Corp. v. FCC*, 252 F.3d 462 (D.C.Cir. 2001).

telecommunications traffic,[147] the FCC has not yet addressed the issue of how Internet-bound traffic should be treated in apportioning the costs of interconnection facilities.[148] In Minnesota, the Commission has determined, in an arbitration between Qwest and Level 3 Communications, that Internet-bound traffic should be included in the formula used to allocate the costs of interconnection facilities. Commissions in the states of New Mexico and Washington have agreed with this position.

D. Decision

127. The Commission has fully considered the issue whether Internet traffic should be included in the relative use formula to allocate the cost of flat-rated interconnection facilities. Although Qwest argues that the issue here is different because of AT&T's initial efforts to redefine "exchange service," which have been either dropped from this proceeding or rejected in Issue No. 5, the issue is the same. AT&T's proposed language is consistent with FCC precedent and the Level 3 decision and should be adopted.

Issue No. 19: Calculating the Ratio of Terminating To Originating Traffic

A. Issue

128. In negotiations, Qwest and AT&T agreed on the presumption that traffic delivered in excess of a 3:1 ratio of terminating to originating traffic is ISP-bound traffic that is subject to the transitional compensation mechanism in the *ISP Remand Order,*[149] as opposed to other traffic that is subject to reciprocal compensation rules. The presumption does away with the difficult task of identifying and separating ISP-bound traffic from voice traffic on an individual trunk group. The parties have agreed that either of them may rebut the presumption by providing factual evidence to the Commission. The parties' dispute centers on AT&T's demand to include UNE-P minutes in the 3:1 ratio.

B. Position of Parties

129. AT&T's position is that UNE-P originating and terminating minutes of use should be included in the 3:1 ratio. Qwest contends that UNE-P traffic should be excluded from the 3:1 ratio because it is not necessarily local, it does not necessarily

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[147] Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic,* CC Docket Nos. 96-98 & 99-68, FCC-01-131 at ¶¶ 33-34 (rel. Apr. 27, 2001)*, remanded sub nom., WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*ISP Remand Order*")*.*

[148] Memorandum Opinion and Order, *Application of Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, FCC No. 02-332, 17 FCC Rcd 26303 at ¶ 324 (2002) ("*Qwest Nine-State Order*")*.*

[149] *See ISP Remand Order* at ¶ 79.

traverse an interconnection trunk, and because inclusion of UNE-P minutes in the ratio will "artificially inflate" the amount of local traffic exchanged. In addition, Qwest maintains that it intends to use a mechanized approach to identify ISP-bound traffic in order to rebut the 3:1 presumption and that its approach is more appropriate because it will encourage the parties to work together on a mechanized means of identifying this traffic.

C. Applicable Law

130. In the *ISP Remand Order,* the FCC developed a hybrid mechanism (low per-minute rates, with a cap on total volume) as an interim approach to resolve problems associated with paying reciprocal compensation for ISP-bound traffic. The FCC further stated:

> We understand that some carriers are unable to identify ISP-bound traffic. In order to limit disputes and avoid costly efforts to identify this traffic, we adopt a rebuttable presumption that traffic delivered to a carrier, pursuant to a particular contract, that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic that is subject to the compensation mechanism set forth in this Order. Using a rebuttable presumption in this context is consistent with the approach that numerous states have adopted to identify ISP-bound traffic or "convergent" traffic (including ISP traffic) that is subject to a lower reciprocal compensation rate. A carrier may rebut the presumption, for example, by demonstrating to the appropriate state commission that traffic above the 3:1 ratio is in fact local traffic delivered to non-ISP customers. In that case, the state commission will order payment of the state-approved or state-arbitrated reciprocal compensation rates for that traffic. Conversely, if a carrier can demonstrate to the state commission that traffic it delivers to another carrier is ISP-bound traffic, even though it does not exceed the 3:1 ratio, the state commission will relieve the originating carrier of reciprocal compensation payments for that traffic, which is subject instead to the compensation regime set forth in this Order. During the pendency of any such proceedings, LECs remain obligated to pay the presumptive rates. . . subject to true-up upon the conclusion of state commission proceedings.[150]

131. In the *FCC Verizon Arbitration Order,* the FCC addressed the specific issue raised here and determined that UNE-P minutes should be included in the ratio because the rebuttable presumption described in the *ISP Remand Order* does not distinguish between UNE-platform traffic and originating interconnection trunk traffic.[151]

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[150] *Id.*

[151] *FCC Verizon Arbitration Order* at ¶ 267.

D. Decision

132. The presumption established in the *ISP Remand Order* is simply a proxy for identifying ISP-bound traffic. It is applied to "traffic" delivered to a carrier, and it is not based on any rationale that the traffic must be facilities-based as opposed to UNE-P traffic. AT&T's language is consistent with the *ISP Remand Order* and the *FCC Verizon Arbitration Order.* AT&T's proposed language should be adopted.

Issue No. 21: Billing Calls With No Calling Party Number (CPN)

A. Issue

133. Calling Party Number (CPN) is data attached to a call transmission using the SS7 signaling network that identifies the originating caller. CPN is used for Caller ID purposes; however, when CPN is available, the parties also can use it to determine the jurisdiction and appropriate compensation rate of the call by examining the calling number and the called number. Neither Qwest nor AT&T has complete control over the ability to send CPN with all calls. AT&T and Qwest disagree on how to determine the jurisdiction, and ultimately the appropriate compensation rate, for traffic sent without CPN information, and what threshold of missing CPN is tolerable.

B. Position of Parties

134. AT&T proposes that the percentage of calls passed without CPN should be limited to 10%. To bill for that 10% of calls, the parties would use a percentage local usage (PLU) factor that reflects the proportion of local vs. toll traffic in the calls with CPN. Thus, if 80% of the traffic with CPN is local, and 20% is toll, then 80% of the traffic without CPN would be billed as reciprocal compensation and 20% would be billed as switched access.[152]

135. Qwest proposes that the percentage of calls passed without CPN should be limited to 5%, and that all traffic lacking CPN should be billed as switched access. Qwest maintains that AT&T and other Minnesota CLECs meet this 5% threshold now and that there is no basis for increasing the percentage of calls that must be estimated. It further maintains that AT&T's proposal to prorate the local vs. toll traffic is overly complex and burdensome.[153]

C. Applicable Law

136. In the *FCC Verizon Arbitration Order,* Verizon and WorldCom agreed to a 10% threshold but disagreed about how to bill that 10% of calls. Verizon proposed to charge access charges for all of it; WorldCom proposed that the parties use the PLU factors to jurisdictionalize the traffic. The FCC determined:

[152] Ex. 13 (Schell) at 72.
[153] Ex. 4 (Freeberg) at 42.

> We adopt WorldCom's proposal because it offers a reasonable solution to address those situations in which the parties are unable to pass CPN on 90% of their exchanged traffic. Other than indicating concern about unnamed competitive LECs "stripping off" CPN to receive reciprocal compensation for a call subject to access charges, Verizon offers no real criticism of WorldCom's proposal. However sympathetic we may be to Verizon's concerns, we note that less drastic measures are available to it (i.e., filing a complaint with the Virginia Commission.) We decline to burden WorldCom merely because of the potential for unlawful behavior by other competitive LECs.[154]

D. Decision

137. AT&T is currently able to meet Qwest's proposed standard,[155] and AT&T has provided no evidence demonstrating why it would not be able to continue to operate within this limit. It will benefit both parties to minimize the percentage of calls that lack CPN. Qwest's proposal to limit calls lacking CPN to 5% of traffic should be adopted.

138. With regard to how the parties should charge for this 5% of calls, Qwest's proposal to bill it all as switched access appears to sacrifice accuracy for expensive administrative convenience. It is not likely that all of this traffic consists exclusively of access minutes.[156] AT&T's proposal to use a PLU factor is likely to more accurately estimate the nature of the traffic and should be adopted.

Issue No. 22: Qwest Handling of Equipment or Property Abandoned by AT&T

A. Issue

139. The interconnection agreement contains agreed-upon provisions for decommissioning collocation sites and for transferring responsibility for the collocation to another CLEC. The purpose of section 8.2.1.31 of the interconnection agreement is to create a process for dealing with CLEC equipment that has been abandoned at collocation sites on Qwest property. The disputes concern Qwest's authority to unilaterally determine whether property is considered "abandoned," and Qwest's obligation to mitigate damages.

B. Position of Parties

140. AT&T has never abandoned equipment at a Qwest collocation. Qwest, on the other hand, has faced a variety of situations in which CLECs have abandoned equipment and gone out of business. Accordingly, Qwest proposes to add new language to the interconnection agreement in order to establish a predictable,

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[154] *FCC Verizon Arbitration Order* at ¶190.
[155] Ex. 22 (Grinager) at JFG-1 (AT&T's supplemental response to Department IR 131); AT&T Response to Qwest IR 18 (98.8% of AT&T's local traffic contains CPN).
[156] Ex. 13 (Schell) at 73; 47 C.F.R. § 64.1601(d).

enforceable, and efficient process for ensuring that abandoned collocation space is made available to Qwest and other CLECs that need the space to serve customers. Qwest's proposed language was approved in Michigan.[157]

141. Under Qwest's proposal, Qwest would determine, in its sole discretion, that equipment or property of a CLEC had been abandoned at a collocation site. Qwest would then notify the CLEC in writing of its determination, and the CLEC would have 30 days from the date of the notice to either remove the equipment or file a dispute resolution request. If the equipment in question is not removed by the CLEC within 30 days after the notification is sent to the CLEC, and if no dispute resolution request is filed by the CLEC, then the equipment would be deemed to have been deeded to Qwest, and Qwest would have the sole discretion to sell, destroy or dispose of the equipment. Even if a dispute resolution request is filed, Qwest may still sell, destroy or dispose of the equipment if the CLEC does not begin dispute resolution proceedings within 30 days after delivery of such a dispute resolution request. Qwest's proposed language does not provide for reimbursing CLECs for the net value of equipment that has been sold, because, "in Qwest's experience . . . the equipment CLECs abandon has virtually no market value."[158] The CLEC would be required to reimburse Qwest for all reasonable expenses incurred in connection with the storage or disposition of the equipment.[159]

142. AT&T is concerned that the language proposed by Qwest provides Qwest the ability, at any time, to put the burden on AT&T to demonstrate that any given collocation site has not been abandoned when Qwest has applied no standard in the first instance to allege abandonment. Qwest would then have the right to force AT&T into an arbitration proceeding at any time, whether the circumstances warranted such a process or not.[160]

143. AT&T's proposed language would require the CLEC to manifest an element of intent to abandon its equipment and not to return to a collocation site. AT&T's proposed language would give the CLEC 30 days advance notice to remove abandoned equipment, but the language does not give Qwest the sole discretion in determining that the equipment has been abandoned. AT&T's language would also require Qwest to stop applying recurring charges at the end of the second 30 day period after the initial notification of abandonment has been sent to the CLEC. AT&T's language essentially would require Qwest to wait 60 days before it can dispose of abandoned equipment. The CLEC would be required to reimburse Qwest for "all reasonable expenses" incurred in connection with the storage or disposition of the equipment, but Qwest would be required to make "reasonable efforts to mitigate such expenses." If Qwest appropriates or sells the equipment in question, the value of the equipment would have to offset the expenses. Qwest would also be required to provide

[157] Qwest Response to DOC IR 109A, attached as DOC Brief Ex. 2.
[158] Ex. 27 (Linse) at 9.
[159] In cases of abandonment that is not tied to a bankruptcy proceeding, Qwest stops charging the collocation recurring charges 30 days after the abandonment notification, unless the CLEC invokes the dispute resolution process. *See* Qwest Response to DOC IR 137(E).
[160] Ex. 2 (Hydock) at 23.

the CLEC with a detailed accounting of all expenses Qwest seeks to recover from the CLEC.[161]

C. Applicable Law

144. The Telecommunications Act does not specifically address this issue. The Commission has general authority under the Act, however, to arbitrate specific unresolved issues and to order terms consistent with the terms of the Act.[162] In addition, Minn. Stat. § 237.16, subd. 1 (a), authorizes the Commission to prescribe the terms and conditions of service delivery, for the purpose of bringing about fair and reasonable competition for local exchange telephone services.

D. Decision

145. The first issue is who determines whether property is considered "abandoned." Qwest's language makes it clear that Qwest initially determines whether or not CLEC property is considered abandoned. While AT&T objects to Qwest being the sole judge, AT&T's language is not useful because it does not make it clear who has this responsibility or what the criteria should be for making such a determination.

146. The second issue is the notification and resolution process. Both Qwest and AT&T are proposing language that would require Qwest to wait until 30 days after notifying the affected CLEC before beginning disposal of abandoned equipment. Under Qwest's language, a procedure is available for CLECs who wish to decommission equipment or to transfer equipment.[163] CLECs who wish to dispute Qwest's designation of certain equipment as having been abandoned have a procedure for disputing the abandonment designation made by Qwest.

147. The third issue relates to mitigation of damages. AT&T's proposed language would require Qwest to make reasonable efforts to mitigate damages, would prohibit Qwest from requesting reimbursement for expenses in the event that it appropriates abandoned equipment for its own use, and would require Qwest to reimburse the affected CLEC for any positive net value derived from the sale of abandoned equipment after expenses have been deducted. Qwest's proposal includes no such requirement, but would allow CLECs to commence a dispute resolution proceeding wherein the affected CLEC could make such a request. Qwest contends that special language relating to mitigation of damages is not necessary, because, in actual practice, there is no positive net value derived from the sale of equipment in cases of abandonment.[164] In Qwest's experience, a CLEC abandons equipment when it has determined that the equipment has little or no value and that it is more cost effective for the CLEC to leave the property than to arrange for its disposal.[165] Qwest

[161] *Id.* at 24.
[162] 47 U.S.C. § 252 (b).
[163] Ex. 27 (Linse) at 4; Qwest response to DOC IR 137B and E, attached as DOC Brief Ex. 3.
[164] Ex. 27 (Linse) at 8-9.
[165] Qwest Response to DOC IR 1E, attached as DOC Brief Ex. 4.

supported this contention with information showing that, in its experience in dealing with abandonment situations, Qwest has not removed and sold abandoned CLEC equipment for more than the cost to remove abandoned equipment.[166]

148. Qwest's proposed language does not place a deadline on the time at which Qwest must stop applying recurring charges to a site where equipment has been abandoned, as does the language proposed by AT&T. AT&T's proposal would force Qwest to wait 30 days after providing notice of an abandonment situation to a CLEC, so as to give the CLEC an opportunity to deal with the situation. AT&T's proposal would then force Qwest to cease applying recurring charges associated with collocation site no later than the end of the next 30-day period. The Department does not believe that AT&T's proposal that Qwest stop applying recurring charges after the end of the second 30-day period is reasonable, considering that Qwest's proposed language establishes a dispute resolution forum in which CLECs may contest the application of such recurring charges.

149. The fourth issue is whether Qwest should be required to provide a detailed accounting of all expenses Qwest seeks to recover from the CLEC. AT&T proposes to require that Qwest perform such an accounting in all cases irrespective of whether a CLEC has made such a request. The Department does not believe that Qwest should be required to conduct a detailed accounting for all cases involving abandoned property given Qwest's evidence suggesting that many CLECs who abandon may not want such an accounting and the expense of conducting such an accounting would be wasted with respect to these CLECs. Any CLEC wanting a detailed accounting for cases involving abandoned property could seek such an accounting by filing a request for dispute resolution with the Commission.

150. Qwest's proposed language is reasonable and is based on its practical experience in dealing with this problem. Qwest's language on this issue should be adopted.

Issue No. 23: Loop Audits

A. Issue

151. CLECs seeking to obtain loops in order to provide DSL service require certain information regarding the makeup of the loop in order to determine if the loop is capable of providing DSL. In section 9.2.2.8, Qwest and AT&T agree that a CLEC may request an audit of Qwest's records and databases pertaining to loop information pursuant to Section 18 of the Agreement. This is the language that Qwest agreed to during the recent 271 proceedings.[167] AT&T seeks additional language that would specifically define an audit as including a review of loop information, and establishes

[166] Qwest Response to DOC IR 109B, attached as DOC Brief Ex. 2.

[167] *Docket 1371 ALJ Report at* ¶ 167 (noting Qwest agreement to incorporate language permitting CLECs to request an audit of company records, back office systems, and databases pertaining to loop qualification information as required by state commissions in Washington and New Mexico).

that it could request up to two audits per twelve month period beginning with the effective date of the agreement.

B. Position of Parties

152. AT&T proposes that "up to two audits per 12-month period commencing with the effective date of this Agreement" should be permitted. AT&T justifies this frequency by pointing out that the agreement permits twice-yearly audits of directory assistance listings, DA list information, and billing processes. It argues that audits of loop qualification information should also be permitted twice a year.

153. Qwest contends that pursuant to Section 18 of the agreement, CLECs could request two audits per year (total) of either billing processes or loop qualification information. Qwest objects to AT&T's proposal of two audits per year of loop qualification information on the basis that this type of audit is markedly different from audits of directory assistance, DA list information, and billing processes; loop databases are not CLEC-specific, customer-specific, or even state-specific.[168] Furthermore, the Arizona Commission has already directed Qwest to conduct an audit of its loop qualification databases within 18 months of the FCC's approval of Qwest's Section 271 application in Arizona, and to conduct periodic audits, no more than every 18 months, upon request and demonstration of need by a CLEC providing DSL service.[169] Qwest contends that this obligation, in conjunction with the twice-yearly audits sought by AT&T, would expose it to multiple, burdensome audits every year.

B. Applicable Law

154. The FCC requires ILECs, such as Qwest, to provide access to information necessary to qualify a loop for xDSL (Digital Subscriber Line) services, including information about the characteristics of the loop. In its *UNE Remand Order*, the FCC clarified that:

> pursuant to [its] existing rules, an incumbent LEC must provide the requesting carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent, so that the requesting carrier can make an independent judgment about whether the loop is capable of supporting the advanced services the requesting carrier intends to install.[170]

155. In addition, loop qualification information should not be limited to information that is available to the ILEC's retail operations; rather, the CLEC is

[168] Ex. 26 (Brohl) at 4.
[169] *Id.* at 8.
[170] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 15 FCC 3696, ¶ 427 (November 5, 1999) ("*UNE Remand Order*").

entitled to know whether such information exists anywhere within the incumbent's back office and can be accessed by any of the incumbent LEC's personnel.[171]

156. As noted above, in the Minnesota 271 proceedings, Qwest agreed to incorporate into section 9.2.2.8 of its SGAT the language permitting audits of loop qualification databases pursuant to section 18 of the interconnection agreement, which is the section addressing the audit process. The problem is that section 18 is different in Washington and Minnesota. In Washington, section 18 of the SGAT permits up to two audits per year of "books, records, and other documents used in providing services under this agreement." The reviews of the billing process are treated separately as "examinations," not as audits, and examinations are permitted to occur as frequently "as either party deems necessary." In Minnesota, section 18 of the SGAT refers to audits of billing processes only, and up to two audits per year are permitted.

D. Decision

157. Section 18.1.1 of the proposed interconnection agreement defines an audit as, "the comprehensive review of the books, records, and other documents used in the Billing process for services performed, including, without limitation reciprocal compensation and facilities provided under this Agreement."[172] This definition does not encompass an audit of loop qualification information, and AT&T's proposal to define it specifically in section 9.2.2.8 has merit.

158. The Department agrees that AT&T's proposal to allow two audits of these databases per year could potentially subject Qwest to burdensome, multiple audit requests. The Department proposed language to the effect that AT&T be allowed to request one audit of the databases pertaining to loop qualification in a year as a matter of course. If Qwest can demonstrate that it has already performed such an audit in the past twelve months, and that the results were satisfactory, AT&T would need to demonstrate specific need for a further audit before an additional audit would be required. In its Reply Brief Qwest agreed to this compromise language, provided that it is clear that the requesting party is to pay for the audit, as it would for a section 18 audit.

159. AT&T objects to this compromise language, maintaining that Qwest has provided misleading information about the nature of the loop qualification databases and that Qwest is attempting to avoid the commitment it made in the 271 proceedings by requiring CLECs to choose between billing and loop audits. The Administrative Law Judge concludes that Qwest, more accurately, is seeking to take advantage of an issue *not* raised in the 271 proceedings, which is the impact of the differing language in Washington and Minnesota concerning the scope of the section 18 audit process.

160. The compromise language suggested by the Department and agreed to by Qwest is a reasonable and balanced approach that addresses AT&T's concerns:

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[171] *Id.* at ¶ 430.
[172] AT&T Petition for Arbitration, Ex. B, Proposed Interconnection Agreement, Section 18.1.1.

> As used herein, "Audit" shall mean a comprehensive review of Qwest's company records, backoffice systems and databases pertaining to Loop information. CLEC may perform, at its expense, one audit per 12-month period commencing with the effective Date of this Agreement. If Qwest can demonstrate that it has conducted an audit as defined herein within the last 12 months and that the results are satisfactory, the CLEC may request an audit only upon demonstration of need.

161. If an audit done in Arizona or elsewhere does not adequately demonstrate the adequacy of the loop qualification database for Minnesota, AT&T will be able to demonstrate that the results are not "satisfactory" or that another audit is needed. The compromise language above should be used in section 9.2.2.8 of the agreement, or the parties should be directed to draft similar language to the same effect.

Issue No. 24: Qwest's Obligation to Construct UNE Facilities for AT&T

A. Issue

162. The issue is whether Qwest must construct UNEs for a CLEC "in the same manner that it assess whether to build for itself or an end-user customer."

B. Position of Parties

163. In Section 9.19, Qwest proposes to conduct an individual financial assessment of any request that requires construction. When construction occurs, Qwest proposes to charge the CLEC for the construction through non-recurring charges and a term agreement for the recurring charge. Qwest's proposed language in Section 19.2 provides that "all necessary construction will be undertaken at the discretion of Qwest, consistent with budgetary responsibilities, consideration for the impact on the general body of End User Customers and without discrimination among the various carriers."[173] Qwest's language was approved in the recent 271 proceedings.[174]

164. AT&T disagrees with Qwest's language because it does not indicate any of the parameters Qwest will use to evaluate whether that construction will be undertaken. [175] AT&T proposes language that includes a commitment that when Qwest is not obligated by its Provider of Last Resort Obligations, Qwest will evaluate construction requests from CLECs in the same manner and using the same criteria that it uses for its own retail customers.

C. Applicable Law

[173] *Id.*
[174] *Docket 1371 ALJ Report* at ¶¶ 80-81.
[175] Ex. 2 (Hydock) at 27.

165. The Telecommunications Act of 1996 requires incumbents to provide "nondiscriminatory access to network elements on an unbundled basis."[176] In its Rules implementing the Act, the FCC required that "where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself."[177]

166. Subsequently, the Eighth Court of Appeals found that "subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network – not to a yet unbuilt superior one."[178] In its *UNE Remand Order*, the FCC limited the incumbent's obligation to build interoffice facilities stating, "we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use."[179]

D. Decision

167. The Department and AT&T contend that AT&T's language should be adopted to prevent Qwest from discriminating against competitors. They contend that other state commissions, including Colorado ("Qwest will assess whether to build for CLEC in the same manner that it assess whether to build for itself")[180] and Arizona ("Qwest shall treat CLEC orders the same as it would treat its own orders for new or additional service")[181] have required similar provisions.

168. The Department also contends that AT&T's language should be adopted because similar provisions are contained in the Minnesota Wholesale Service Quality Plan (MN WHSQ Plan), adopted by the Minnesota Commission in its *MN WHSQ Order.* The MN WHSQ Plan specifically states that, for the purposes of determining OP-3, Installation Commitments Met, and its attendant remedies, Qwest will meet the OP-3 installation intervals when no facilities are available, "unless the order is for facilities to a customer location that has not been previously served on a retail or wholesale basis with Qwest facilities."[182] When a customer location has not been previously served by Qwest facilities, if no facilities are available Qwest may place the order in "project status" and offer a due date "no later than the expected availability date for installation for Qwest's own retail customers at the location in question."[183] This is different than

[176] 47 U.S.C. § 251(c)(3).
[177] 47 C.F.R. § 51.307.
[178] *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 813 (8th Cir. 1997).
[179] *UNE Remand Order* at ¶ 324.
[180] Colorado SGAT, Section 9.19, at http://www.qwest.com/wholesale/downloads/2003/030314/Colorado-SGAT-3-4-03.doc.
[181] Arizona SGAT, Section 9.19, at http://www.qwest.com/wholesale/downloads/2002/020708/Arizona_SGAT_6-28-2002.doc.
[182] Ex. 25 (Peirce) at 6 and Ex. SLP-2.
[183] *Id.*

the AT&T language, because the MN WHSQ Plan provisions require Qwest to offer a due date when it expects to build for its own customers "at the location in question." At that point, it would be discriminatory to refuse to provide facilities to a competitor. The AT&T language is not limited in this way, however, and would require Qwest to construct new facilities if it "would construct facilities for itself or an end user customer under the same or substantially similar circumstances." The AT&T language would also subject Qwest to penalties if it failed to complete orders for service related to such construction "within the applicable service interval" once construction is completed.

169. Qwest's obligation to unbundle its network extends, as noted above, to its existing network. The language proposed by AT&T is substantially different than that contained in the MN WHSQ Plan or in the SGAT provisions cited above. Qwest's language, on the other hand, was recently approved in the 271 proceedings. Qwest's language on this issue should be adopted.

Issue No. 26: Wholesale Service Quality Standards to be Included in the Agreement

A. Issue

170. This issue concerns whether changes to Performance Indicator Definitions (PIDs) made by the Regional Oversight Committee (ROC) are to be incorporated by reference, as advocated by Qwest, or whether changes made by the ROC and approved by the Commission are to be incorporated by reference, as advocated by AT&T. In addition, AT&T proposes to adopt the Minnesota Wholesale Service Quality Standards approved by the Commission in its *MN WHSQ Order*, whereas Qwest proposes use of the Qwest Minnesota Performance Assurance Plan (MPAP).

B. Position of Parties

171. With regard to the first issue, Qwest maintains that it is not reasonable to burden the Commission with approving PID changes the ROC finds to be acceptable. AT&T wants the Commission to retain its oversight authority over changes made to the PIDs.

172. With regard to the second issue, Qwest contends that agreement should not reference the *MN WHSQ Order* because of its pending motion for reconsideration and the possibility of an appeal. AT&T seeks to adopt the Minnesota Wholesale Service Quality Plan approved by the Commission in the *MN WHSQ Order*.

C. Applicable Law

173. The Minnesota Public Utilities Commission adopted the Minnesota Performance Assurance Plan, or MPAP in its Order of November 26, 2002, in docket No. P421/CI-01-1376, and amended it slightly at an April 8, 2003 Commission hearing.

174. As part of its Merger Stipulation with the Department and the Office of the Attorney General at the time of its merger with US WEST Communications, Qwest

agreed to the development of wholesale service quality standards to measure its provision of service to CLECs.[184] The purpose of the wholesale service quality docket was to develop minimum service quality standards to replace the existing Direct Measures of Quality (DMOQs) contained in the existing AT&T/Qwest Interconnection Agreement.[185] The MN WHSQ Plan mirrors much of the MPAP with some exceptions – the most significant being that it seeks to ensure wholesale service quality by including specific minimum benchmark standards for approximately eight of the Performance Indicator Definitions (PIDs).[186] The MN WHSQ Plan was adopted by the Commission in its July 3, 2003 *MN WHSQ Order*.

D. Decision

175. The Commission should retain its oversight authority and approve any changes made to PIDs by the ROC before the changes are considered to be incorporated by reference into the agreement. This portion of AT&T's language should be adopted.

176. With regard to the second issue, AT&T's language does not address the potential difficulties in implementation if Qwest chooses to appeal the Commission's order. The Department proposes language that would establish a means for maintaining service quality coverage under the MPAP, in the event that the MN WHSQ Plan is stayed pending appeal, or is otherwise not in effect. As already noted, the MN WHSQ Plan mirrors the MPAP with the exception of minimum performance benchmarks. The Department proposes the following language:

> Section 20.2 The Parties hereby incorporate the Minnesota Wholesale Service Quality Plan, including all applicable remedies, found in Exhibit K of this Agreement, into this ICA. In the event that, for whatever reason, the MN WHSQ Plan is not effective (due to stay upon appeal etc.), the Parties agree to abide by the MPAP, including all applicable remedies, until the MN WHSQ Plan becomes effective, and the CLEC readopts the MN WHSQ Plan into the ICA.[187]

177. The parties should include this language or draft something similar to ensure that there will be some effective service quality standards in the interconnection agreement.[188]

Issue No. 27: Format for the Submission of Bills to Each Other

A. Issue

[184] *Id.* at 7.
[185] *Id.*
[186] *Id.* at 9.
[187] *Id.* at 11-12.
[188] *Id.* at 10-12.

178. This issue involves the format of the bills issued by Qwest to AT&T for the purchase of unbundled network elements. On August 6, 2003, Qwest and AT&T notified the ALJs that they had resolved several previously disputed issues and agreed to language for Sections 21.1.1.1 and 21.1.1.1.2, and Appendix 1 to Section 21. The remaining issue is whether certain listed billing differences should be prohibited or whether Qwest should be allowed to work with AT&T to address the items using its Change Management Process. AT&T's proposed language for Section 2.1.1.1.1 and Qwest counter-proposal read as follows:

AT&T PROPOSED LANGUAGE	**QWEST PROPOSED LANGUAGE**
21.1.1.1.1 Differences and deficiencies in CABS Billing that are not permitted under this Agreement include, but are not limited to, the following: (i) Qwest's failure to process bill data and CSRs on the same date; (ii) Qwest's failure to perform all standard CABS BOS edits on the UNE bills; (iii) Qwest failure to populate activity date with the date of the activity associated with the charges; (iv) Qwest's failure to populate the adjustment thru date with the date through which the adjustment applies; (v) Qwest's failure to populate adjustment from the date with the date from which the adjustment applies; (vi) Qwest's failure to populate an audit number with the reference number provided by AT&T, which a reference number is included in the transaction; (vii) Qwest's failure to populate recurring/non-recurring charge indicator with a value of "1" for monthly recurring access charges and a value of "2" for non-recurring charges; (viii) Qwest's failure to populate service established dates with the date on which service was established; (ix) Qwest's failure to separate taxes and surcharges and populate on the appropriate records per the CABS guidelines; (x) Qwest's failure to establish and use more descriptive local use phrase codes for UNE charges and adjustments.	21.1.1.1.1 Subject to Qwest's Change Management Process (CMP), Qwest will work with CLEC to address the following CABS format billing items: (i) to process bill data and CSRs on the same date; (ii) Qwest's failure to perform all standard CABS BOS edits on the UNE bills; (iii) to populate activity date with the date of the activity associated with the charges; (iv) to populate the adjustment thru date with the date through which the adjustment applies; (v) to populate adjustment from the date with the date from which the adjustment applies; (vi) to populate an audit number with the reference number provided by AT&T, which a reference number is included in the transaction; (vii) to populate recurring/non-recurring charge indicator with a value of "1" for monthly recurring access charges and a value of "2" for non-recurring charges; (viii) to populate service established dates with the date on which service was established; (ix) to separate taxes and surcharges and populate on the appropriate records per the CABS guidelines; (x) to establish and use more descriptive local use phrase codes for UNE charges and adjustments.

179. CABS billing is an industry standard developed by the Ordering and Billing Forum, an industry group.[189] New versions of CABS are issued biannually.[190] Companies maintain differences lists identifying the ways in which their billing formats differ from the industry guidelines.[191] AT&T and Qwest have now agreed in Section 21.1.1.1 that the billing party may request elimination of any differences that "impair the billed Party's processing of the CABS bill" and that either party may pursue resolution of any such dispute through the Dispute Resolution process.

B. Position of Parties

180. AT&T proposes language that identifies ten specific deficiencies in its CABS billing that would not be permitted under the interconnection agreement. This issue is particularly frustrating to AT&T because Qwest is "way behind" the industry in providing electronic CABS compliant bills that do not significantly deviate from the CABS standard in numerous fundamental aspects.[192] The primary problem with Qwest's CABS billing is related to Qwest's argument that because the industry allows a difference list, Qwest can basically deviate in whatever way it wants.[193] AT&T believes it has merely proffered language that would memorialize the most basic requirements of CABS billing. AT&T believes the CMP process is insufficient because it has no ramifications for non-compliance.[194]

181. Qwest objects to setting out billing deficiencies in the interconnection agreement, arguing that the proper place for such deficiencies to be identified is through the Change Management Process (CMP).[195] Qwest notes that AT&T has submitted the same items as change requests ("CRs") through Qwest's Change Management Process ("CMP"). Qwest argues that its CMP was specifically designed to track and provide timely resolution of issues, that both the FCC and Commission have found that CMP satisfies those objectives, and that CMP is a better-suited and more appropriate forum for dealing with these technical details than the interconnection agreement.

182. DOC argues that because the change requests are currently being addressed by the Change Management Process, including them in the interconnection agreement will not have much effect on their ultimate resolution.[196] AT&T responded that, because Qwest failed to act on AT&T's request regarding CABS in the CMP process until the arbitration process put pressure on Qwest to do so, and because there are no ramifications for missing or ignoring a deadline in the CMP process, AT&T

[189] Hearing Transcript, Vol. 1, p. 190.
[190] *Id.* at 180.
[191] Hearing Ex. 6 (Huff), p. 19.
[192] Ex. 7 (Hayes) at 8-11.
[193] Tr. 1:145-146.
[194] Tr. 1:143-144.
[195] Ex. 6 (Huff) at 22; Tr. 1:130.
[196] DOC Brief at 65-66.

cannot merely rely on the CMP process to assure that the most basic parameters of CABS billing are met.[197]

C. Applicable Law

183. Section 251(c)(3) of the Act requires ILECs to provide nondiscriminatory access to network elements on an unbundled basis. The FCC has determined that this obligation includes nondiscriminatory access to the billing systems necessary for CLECs to provide accurate and timely bills to their end users.[198]

D. Decision

184. Qwest's language for Section 21.1.1.1.1 should be adopted. Qwest is making progress now in the CMP on AT&T's issues. CMP appears to be the appropriate process for resolving these issues because several CLECs are involved.

Issue No. 30: Billing for Traffic Without Carrier Identification Codes

A. Issue

185. The issue here is whether parties that terminate traffic onto the network of another carrier should be held responsible to provide the CIC code (Carrier Identification Code) for long distance traffic or OCN (Operating Company Number) for local traffic. This information is used by the carrier receiving the traffic to bill the originating carrier. When this information is not provided, there is a question regarding whether the party terminating the traffic should have to pay for the traffic that is terminated.

B. Position of Parties

186. The terminating carrier, be it AT&T or Qwest, needs the CIC or OCN to bill access charges to the IXC or originating carrier.[199] Without the CIC code or the transmitting carrier providing alternative trunk group information, the terminating carrier has no way to identify what IXC the call came from.[200] Without the OCN code or the transmitting carrier providing alternative trunk group information, the terminating carrier has to compare the NPA/NXX to the LRN or LERG database to ascertain the proper originating carrier.[201]

187. AT&T seeks a mutual obligation of the parties to provide CICs that involve routing from Interexchange Carriers ("IXCs") and OCNs on local/intraLATA toll calls.[202] AT&T also seeks a requirement that the party who has access to such information

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[197] AT&T Reply Brief on Disputed Issues at 26-28.
[198] *Qwest Nine-State Order* at ¶ 114.
[199] *Ex. 2 (Hydock) at 31; Tr. 1:107-08.*
[200] *Tr. 1:108.*
[201] *Id.* at 116-17.
[202] Ex. 2 (Hydock) at 30.

should either assist the other party in obtaining such information or pay the intercarrier compensation charges that the terminating carrier would otherwise bill to the IXC or originating carrier if the CIC or OCN had been provided.[203] Because AT&T is the terminating carrier more often than Qwest, the proposal would tend to benefit AT&T economically.

188. AT&T notes that it has already expended monies to do anything technically possible to provide access information where there is no OCN or CIC code and argues that it is reasonable that Qwest do the same, "or if it does not want to expend any monies or effort, pay AT&T the access charges AT&T would not be losing if Qwest would expend the efforts required to populate the CIC or OCN fields."[204]

189. Qwest opposes the AT&T's proposed language for a number of reasons. First, Qwest maintains this provision is unnecessary because it addresses a relatively rare circumstance; less than two percent of the interconnection traffic terminated by Minnesota CLECs lacks a calling party number.[205] Second, the provision relates principally to transit traffic that originates on the network of another carrier, traverses Qwest's network, perhaps from another transit carrier, and terminates on AT&T's network. Qwest opposes paying for traffic that it transits to AT&T.[206] Third, Qwest already passes on all signaling information that it receives from other carriers when Qwest serves as the transit carrier.[207] Fourth, because Qwest does not necessarily receive the traffic from the originating carrier,[208] Qwest cannot always identify the originating carrier. Fifth, AT&T should not be charging Qwest for local traffic where it can identify OCN through its mechanized process.[209] Sixth, the lack of carrier-identifying information is an industry problem that requires an industry solution.[210]

190. Qwest also argues that AT&T already has a solution to this problem that does not require an expensive systems solution or a manual fix. It can establish interconnection arrangements with the other carriers who originate this traffic.[211] AT&T has entered into such traffic exchange agreements when traffic volume warranted.[212] Because AT&T has a solution to obtain the OCN and CIC of originating carriers, Qwest argues that it should not be required to serve as the "intermediary" and under Section 252(d)(2) cannot be required to pay for traffic it does not originate.[213]

191. DOC believes, at this time, that requiring the parties to provide the CIC or OCN on unidentified traffic will undoubtedly impose costs on Qwest and notes that

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[203] *Id.*
[204] AT&T's Closing Brief on Disputed Issues at 46.
[205] Ex. 4 (Freeberg) at 45 and Ex. TRF-12.
[206] Qwest Initial Brief at 107-08.
[207] Tr. 1:113.
[208] *Id.* at 110.
[209] Qwest Initial Brief at 108.
[210] Tr. 1:93-94.
[211] 47 U.S.C. §§ 251(a), 251(b).
[212] Tr. 1:111.
[213] Qwest Initial Brief at 108-09.

AT&T is not willing to assist Qwest to meet those costs. Because the amount of unidentified traffic, though not insignificant, is relatively small and AT&T appears on the verge of rolling out a system to provide the information to itself, DOC recommends that the Commission adopt Qwest's position, which is to adopt no language regarding this issue.[214]

192. The CLEC Coalition,[215] acting as an observer, submitted a comment supporting AT&T's proposed language. First, it argues that AT&T's proposal continues requirements approved in the prior arbitration proceeding, and, because of the advent of local number portability and the ability of carriers to terminate both toll and local traffic over a local interconnection trunk, the need for these provisions is even greater today. Second, the CPN no longer identifies the originator of local traffic because of local number portability, and it provides no useful information for identifying the carrier of toll traffic. Third, Qwest, as the tandem operator, is in a position to obtain all of the information needed to identify both the carrier terminating the traffic and whether the call is local or toll. Fourth, because Qwest recovers tandem switching fees from IXCs, CMRS providers, and CLECs that request transit service from Qwest, Qwest should be required in return to fulfill all of the associated tandem functions, including recording and reporting traffic to the CLECs that subtend the tandem. Fifth, if Qwest does not provide the information needed to allow CLECs to properly bill for traffic terminating to them, Qwest will receive an unfair competitive advantage because it will be able to bill carriers for all traffic terminated to it while CLECs will not have that ability.

C. Applicable Law

193. The FCC's recent decision in the *FCC Verizon Arbitration Proceeding* addressed this disputed issue and may provide some guidance. In that proceeding, the FCC addressed a proposal similar to that of AT&T, made by WorldCom, and held:

> We also reject WorldCom's proposal to Verizon. Like AT&T's proposed language, WorldCom's proposal would require Verizon to provide transit service at TELRIC rates without limitation. WorldCom's proposal would also require Verizon to serve as a billing intermediary between WorldCom and third-party carriers with which it exchanges traffic transiting Verizon's network. We cannot find any clear precedent or Commission rule requiring Verizon to perform such a function. Although WorldCom states that Verizon has provided such a function in the past, this alone cannot create a continuing duty for Verizon to serve as a billing intermediary for the petitioners' transit traffic. We are not persuaded by WorldCom's arguments that Verizon should incur the burdens of negotiating interconnection and compensation arrangements with third-party carriers.

[214] DOC Brief at 68-69.

[215] Ace Telephone Association; HomeTown Solutions, LLC; Hutchinson Telephone; Mainstreet Communications; NorthStar Access, LLC; Otter Tail Telcom, LLC; Paul Bunyan Rural Telephone Company; Tekstar Communications; Unitel Communications; U.S. Link, Inc.; and VAL-ED Joint Venture, LLP d/b/a 702 Communications.

Instead, we agree with Verizon that interconnection and reciprocal compensation are the duties of all local exchange carriers, including competitive entrants. *See* Verizon NA Brief at 34, 39-40. Accordingly, we decline to adopt WorldCom's proposal for this issue.[216]

D. Decision

194. AT&T's proposal should not be adopted. AT&T has not identified any legal requirement for the transiting carrier to obtain and report the codes or for originating carriers to provide that information. The industry needs to solve the problem.

Issue No. 33: Compensation for Alternatively Billed Calls

A. Issue

195. Alternatively billed calls are calls that are billed as collect calls, billed to a third number, or billed to a credit card.[217] A typical alternatively billed calling scenario occurs when a prisoner places a collect call to an AT&T subscriber on a pay phone provided by an operator services provider and the OSP wishes to collect its revenue from that call. Neither Qwest or AT&T are providing the service: it is the OSP, a third party.[218] Qwest and AT&T agree that, for alternatively billed calls other than UNEs or resale, the terms for any arrangement, including compensation arrangements, should be the subject of a separate agreement. However, they disagree at to how billing should be handled for calls where a CLEC's UNE or resale customer is the billed-to party. AT&T supports doing it by separate agreement as well. Qwest believes these cases should be billed directly to AT&T and proposes the following language to do so: "UNEs and Resale are billed directly to the provider and do not employ CMDS."[219]

B. Position of Parties

196. AT&T's position is that billing is a complex matter traditionally addressed by a detailed billing and collection agreement separately negotiated between the parties.[220] Such agreements may run to 100 pages, including exhibits.[221] There are several ways that parties such as AT&T can bill and collect from the third party for alternatively billed calls.[222] AT&T's business units, based on recent experience in the market place, are seeking more detail around the provisioning and billing of these services.[223] AT&T is ready and willing to enter into negotiations regarding various third party billing scenarios to be handled outside the confines of the tight timeframe and

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[216] *FCC Verizon Arbitration Order* at ¶19.
[217] This issue relates only to collect calls and calls billed to third parties. Because Qwest does not resell its credit cards, calls billed to credit cards are not subject to the interconnection agreement.
[218] Tr. 1:62-63; Ex. 3.
[219] Ex. 1 (Easton) at 9.
[220] Tr. 1:64.
[221] *Id.* at 66.
[222] *Id.* at 43, 64
[223] *Id* at 62, 65.

relatively unequal bargaining position that an ILEC/CLEC relationship affords under the Telecommunications Act of 1996.[224]

197. AT&T calls the Qwest proposal unwarranted because it passes the billing and collection of third party provider calls exclusively to AT&T in situations where the call passes through a Qwest switch.[225] Despite standard SGAT language in the interconnection agreement that allows it, AT&T does not use the resale platform to provide services in Qwest's territory.[226] Thus, AT&T cannot be adequately compensated through the resale discount as Qwest claims.[227]

198. With regard to UNE-P customers, AT&T believes that it is unfair to require it to be bound to the terms of Qwest's agreements with third parties because AT&T has little recourse against its local service customers. Thus, in AT&T's view, Qwest's proposal would provide a ready source of funds from AT&T for Qwest's relationship with the OSP, and export the billing and collection costs and risk to AT&T.[228]

199. AT&T also argues that billing and collection agreements for retail services provided by third parties are not subject to the arbitration requirement of Section 252 of the Act and should not be in the interconnection agreement for that reason as well. AT&T requests that if the Commission does not make this finding, it be given a reasonable period of time to negotiate the terms of such an arrangement with Qwest.[229]

200. Qwest argues that for UNEs and resale, alternatively billed calls should be billed directly to AT&T as they have been for more than five years[230] and that they should be addressed as a part of the interconnection agreement because resale and UNE products are addressed in the interconnection agreement.[231]

201. Usage information for alternatively billed calls to AT&T's UNE customers is sent from the third party provider to the Centralized Message Distribution System (CMDS), which forwards the record on to Qwest because Qwest owns the NPA-NXX code assignment for the billed-to number according to information contained in an industry prefix database.[232] CMDS typically allows a $0.05 per message billing fee. Industry databases do not identify which particular lines within a given prefix are unbundled or resold lines through which a CLEC, rather than Qwest, provides service to the end user.[233] Qwest calls this system unworkable.[234] Currently, Qwest passes the

[224] AT&T Closing Brief on Disputed Issues at 47.
[225] Tr. 1:43.
[226] *Id.* at 62.
[227] *Id.* at 33-34.
[228] Ex. 2 (Hydock) at 36.
[229] *Id.* at 37.
[230] Tr. 1:33.
[231] Qwest Initial Brief at 110.
[232] Ex. 1 (Easton) at 10-11; Qwest Response to DOC IR 110(A).
[233] Ex. 1 (Easton) at 11.
[234] *Id.*

call usage information to AT&T on the Daily Usage File, which allows AT&T to bill its end-user customer. Qwest then bills AT&T for the call on its interconnection bill.[235]

202. Qwest also suggests that AT&T could order call blocking, a free service that CLECs can order from Qwest on unbundled and resold lines for both prison facility calls and other calls (*i.e.*, payphone, hotel, etc.) so that no alternatively billed calls would be placed to AT&T's customers.[236] That, according to Qwest would resolve AT&T's collection cost issue.[237]

203. Finally, Qwest indicated some concern at AT&T's refusal to propose a solution at this time. Qwest is concerned that "without an agreement as to how these charges will be handled, Qwest and other originating carriers will possibly be left without compensation for handling these calls."[238]

204. DOC suggests that directing AT&T and Qwest to resolve their issues through a separate billing and collection agreement would provide the parties with the forum for resolving the cost and other issues raised by AT&T, but would also provide the forum for resolving other related issues raised by AT&T.[239]

C. Applicable Law

205. The Minnesota Commission has the authority to regulate billing and collection services.[240] In *In the Matter of a Summary Investigation into IntraLATA Toll Access Compensation for Local Exchange Carriers Providing Telephone Service within the State of Minnesota,* the Minnesota Commission held:

> Billing and collection services and operator functions are hereby detariffed. Traffic recording and identification functions shall remain under the uniform tariffed rates. All ancillary services, including the detariffed services, shall remain subject to regulatory oversight through the Commission's powers under Minn. Stat., Section 237.081.[241]

206. The FCC's rules and regulations are silent with respect to how billing should be handled for alternatively billed calls billed to UNE and resale customers.[242]

D. Decision

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[235] Qwest Response to DOC IR 2(B).
[236] Qwest Response to DOC IR 110(J).
[237] Qwest Initial Brief at 114-15.
[238] Ex. 1 (Easton) at 13.
[239] DOC Brief at 74.
[240] *In the Matter of a Summary Investigation into Intralata Toll Access Compensation for Local Exchange Carriers Providing Telephone Service within the State of Minnesota*, Findings of Fact, Conclusions of Law and Order, PUC Docket No. P999/CI-85-582 (November 2, 1987) ("*Minnesota IntraLATA Toll Access Compensation Order*").
[241] *Id.* at 61.
[242] Qwest Response to DOC IR 110E, attached as DOC Brief Ex. 9.

207. A separate billing and collection agreement for alternatively billed calls for UNEs and resale should be negotiated by AT&T and Qwest. AT&T could, if it desired, make the current system work better by negotiating agreements with the third party providers of collect and third-number billed calls. But the issues are complex and need to be addressed in detail. The interconnection agreement does not do so. Qwest's proposal does not do so and can be considered an interim solution at best. Resale needs to be addressed because AT&T may use resale in the future and other CLECs may do so under this agreement. Qwest appears willing to negotiate an agreement, but reasonably needs to have a workable process in place now. Therefore, Section 21.2.4 should be modified by adding language to the effect that the parties shall use their best efforts to develop a separate billing and collection agreement for alternatively billed calls for UNEs and resale, and that, until the agreement is adopted, UNEs and resale shall continue to be billed directly to the provider and not employ CMDS.

Issue No. 34: How Should Qwest, as the Local PIC, Bill for IntraLATA Tolls?

A. Issue

208. This issue involves billing for intraLATA toll calls when an AT&T local customer selects Qwest as the local Primary Interexchange Carrier (LPIC). There are very few such customers, about 35 now, because customers switching to CLECs for local service usually obtain their intraLATA toll service from the CLEC as well.[243] That number is likely to decrease when Qwest's 272 affiliate becomes a facility-based provider of interLATA and intraLATA toll service in Minnesota.[244] Qwest proposes to require AT&T to bill AT&T's local customers for intraLATA toll calls when Qwest is the LPIC. AT&T proposes that all of the billing arrangements for Qwest's LPIC calling should be subject to a separate agreement.

B. Position of Parties

209. Qwest asks AT&T to bill these few customers for intraLATA toll rather than requiring Qwest to establish a billing mechanism for them because Qwest's cost for such a billing system or using a service bureau exceeds the costs of carrying the calls.[245] Qwest argues that because AT&T has an existing customer relationship with these end users, AT&T is in the best position to minimize the costs for billing and is probably the least-cost provider in this unusual circumstance. According to Qwest, AT&T's wholesale discount allows a margin for profit to pay for the billing functions and AT&T has the billing accounts established and receives the necessary information to do the billing.[246] Qwest claims it is unreasonably burdensome to require it to establish a billing system that addresses only a very few intraLATA toll calls.[247]

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[243] *See* Qwest Response to DOC IR 111.
[244] Ex. 4 (Freeberg) at 48.
[245] Qwest Response to DOC IR 3.
[246] Ex. 4 (Freeberg) at 47.
[247] Tr. 1:81–82.

210. AT&T does not want to be forced to act as Qwest's billing and collection agent for Qwest long distance customers who happen to be AT&T local customers. AT&T prefers that section 21.8 of the interconnection agreement require Qwest to establish its own separate billing relationship with its intraLATA toll customers who also happen to be AT&T local customers. As with Issue 33, AT&T argues that a billing and collection agreement that makes AT&T Qwest's agent for LPIC services provided by Qwest is not required by the Act and such provisions should not be the subject of an arbitration under Section 252 of the Act.[248] AT&T notes that it "has to negotiate [billing and collection] agreements and enter into them on terms and conditions that are mutually agreeable. Qwest must be required to do the same" and should not seek to "improperly gain an advantage through this arbitration that other long distance carriers do not have."[249]

211. DOC finds Qwest's arguments unpersuasive. First, it argues that with the small number of customers and the minimal amount of revenue at issue, AT&T should not be forced to permanently provide billing services that Qwest admits may no longer be required once Qwest's 272 affiliate becomes operational. Second, DOC points out that Qwest provided no comparative cost data to support its claim that AT&T is the least cost provider of billing and collection services. Third, Qwest's claim that AT&T can bill its end user customers at any rate it chooses was unsupported and counterintuitive. Fourth, DOC argues that the fact that Qwest has no mechanisms in place to bill the end user is less a justification for Qwest's proposed language and more an reason for Qwest to negotiate a separate billing and collection agreement with AT&T that would provide for billing of Qwest's intraLATA toll customers until such time as its 272 affiliate becomes operational and can take over the billing responsibilities. DOC concludes that directing AT&T and Qwest to resolve their issues relating to Issue No. 33 through a separate billing and collection agreement would not only provide the parties with a forum for resolving Issue No. 34, as well.[250]

C. Applicable Law

212. The Commission has the authority to regulate billing and collection services. In the *Minnesota IntraLATA Toll Access Compensation Order,* the Commission detariffed billing and collection services and operator functions under powers granted by Minn. Stat. § 237.081.

D. Decision

213. The parties should negotiate a separate agreement to address this issue. Requiring AT&T to do the billing without some consideration is unfair. Negotiating it along with the alternatively billed calls agreement makes sense, but the procedure should be left to the parties. Thus, AT&T's language should be adopted, along with language to the effect that it is an interim provision and that the parties shall use their

[248] Ex. 2 (Hydock) at 37.
[249] *Id.* at 38.
[250] DOC Brief at 77-79.

best efforts to develop a separate billing and collection agreement regarding such end users to supersede the AT&T language.

Issue No. 35: Pricing of Services Provided to Qwest by AT&T, Interim Rates, ICB Pricing

A. Issue

214. Qwest and AT&T have resolved most pricing issues; however, three issues remain: Pricing for services purchased by Qwest from AT&T under Section 22.1, General Principles; application of interim rates under Section 22.4, Interim Rates; and handling of ICB pricing under Section 22.5, Individual Case Based Pricing.

B. Position of Parties

1. Section 22.1 General Principles

215. The parties agree that Exhibit A sets forth the rates services provided by Qwest to AT&T. Qwest proposed that the rates in Exhibit A also apply to any services provided by AT&T to Qwest. AT&T objects to being bound to the same rates, for several reasons, and proposed alternative language that was vague and confusing. Qwest does not insist on binding AT&T to the Exhibit A rates, but desires clarity.

216. DOC examined the arguments and proposed the following language for Section 22.1 to meet the goals of both parties by being clear and specific, but at the same time accurately reflecting the duties placed upon AT&T by the Act:

> The rates in Exhibit A apply to the services provided by Qwest to CLEC pursuant to this agreement. Unless specified otherwise in this agreement, the rates CLEC charges for Interconnection services will be equivalent to Qwest's rates for comparable Interconnection services when CLEC reciprocally provides such a service or functionality. Rates, terms and conditions for all other services, not related to interconnection, are set forth in the applicable CLEC tariff, as it may be modified from time to time.[251]

217. Qwest finds DOC's proposal acceptable and recommends its adoption.[252] AT&T notes that DOC's proposed language could be read to require AT&T, a CLEC, to take on the same obligations that Qwest, an ILEC, has under the Act, but considers the proposal far superior to Qwest's if AT&T's language is found to be insufficient.[253]

2. Section 22.4 Interim Rates

[251] *Id.* at 85-86.
[252] Qwest Reply Brief at 58.
[253] AT&T Reply Brief on Disputed Issues at 30.

218. Qwest proposes language for Section 22.4, which states that, if the Commission changes interim rates, the rate changes will become effective on the date designated by the Commission in its Order.[254] Qwest's language would not require that amendments to the agreement be filed with each interim rate revision, but would allow parties to request that amendments be filed. Qwest objects to language that gives AT&T the right to open cost dockets, because Qwest believes that "one CLEC out of the hundreds who purchase services should not be granted control over Qwest management of this process." [255]

219. Under AT&T's proposed language, if interim rates are changed by the Commission, the rate changes would become effective on either the date designated by the Commission in its order or the date the Commission issues its order establishing that such rates are legally binding, whichever date is earlier.[256] AT&T's language would require that mandatory amendments be filed with each rate revision.[257] In addition, a true-up will be carried out for interim rates and the true-up will go back to the first date on which each interim rate was first changed pursuant to the agreement.[258] Finally, AT&T's proposed language would allow either party to the agreement to initiate a cost docket at the Commission. With respect to Section 22.4, "the intent of AT&T's proposed language is to provide clear and equitable language related to rates which have not been approved by the Minnesota Commission."[259]

220. DOC recommends the language proposed by Qwest on this issue of effective dates because it is more clear. It recommends that AT&T's proposal for true-ups not be included, noting that CLECs may still request that the Commission order true-ups on a case-by-case basis and that true-ups are too valuable a tool for the Commission to be implemented automatically in every case.[260]

221. DOC recommends against AT&T's language requiring use of the amendment process every time changes are made to rates and terms of service. In notes that Qwest has agreed to give CLECs electronic notice of filings relating to changes in prices, terms or conditions of service and that will give CLECs the opportunity to determine whether they wish to request that a formal amendment be filed.[261]

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[254] Ex. 29 (Brotherson) at 32. On August 11, 2003, Qwest filed a corrected version of its proposed language which it described as deleting "by amendment" in 22.4.1.1 [sic] and as noting its rejection of 22.4.1.3. However, the attached language also changed the effective date sentence of 22.4.1.2 to read, "Such Commission-approved rates shall be effective on the date that the Commission's order establishing such rates becomes legally binding." This language is different from either original proposal. It is assumed that Qwest intended to simply restate its originally proposed language for 22.4.1.2.

[255] Disputed Issues List, Qwest language explanation, Disputed Issue 34.

[256] Ex. 24 (Starr) at 9.

[257] *Id.*

[258] *Id.*

[259] *Id.* at 10.

[260] DOC Brief at 87-88.

[261] *Id.* at 88-89.

222. Finally, DOC notes that any party can petition the Commission to initiate a cost docket irrespective of whether the applicable interconnection agreement contains a provision allowing parties to initiate a cost docket and that Qwest indicated that it has no objection to language being included in the interconnection agreement that gives AT&T the right to petition the Commission to initiate a cost docket.[262]

3. Section 22.5 Individual Case Based Pricing

223. Qwest's proposes the following language for Section 22.5, ICB Pricing:

> If CLEC requests a product or service that is identified on Exhibit A as ICB, or for which Qwest would otherwise charge an ICB rate, Qwest shall develop a cost-based rate or prepare a written substantiation of the need for ICB pricing and file such cost-based rate or written substantiation for review by the Commission within sixty (60) Days of receiving the request from the CLEC. If Qwest develops a cost-based rate after receiving a request for a product or service identified in Exhibit A as ICB, CLEC may order, and Qwest shall provision, such product or service using such Qwest proposed rate until the Commission orders a rate. In this circumstance, the Qwest proposed rate shall be an Interim Rate under this Agreement. If the Commission determines that ICB pricing is appropriate for a product or service, that determination shall apply to all subsequent requests for the product or service.[263]

224. Qwest intends that the language be consistent with the *Docket 1375 Pricing Order*.[264]

225. AT&T proposes three language changes that delete the option of preparing a written substantiation of the need for ICB pricing rather than developing a cost-based rate. AT&T argues that all UNEs must be priced at cost-based rates under the Act. AT&T's proposal would allow Qwest 60 days from offering the rate to the CLEC, rather than from the date of the original request.[265]

226. AT&T also proposes that the Qwest proposed rate, as an interim rate, should be subject to true-up, since the rate determined appropriate by the Commission should have been the appropriate rate from the beginning.[266]

227. DOC recommends adoption of the language proposed by Qwest because it is consistent with the language approved in the *Docket 1375 Pricing Order*. DOC also

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[262] Qwest Response to DOC IR 133, attached as DOC Brief Ex. 20.
[263] Disputed Issues List at 76.
[264] Order Setting Prices and Establishing Procedural Schedule, Commission Review and Investigation of Qwest's Unbundled Network Elements Prices, Commission Review and Investigation of Certain Unbundled Network Element Prices of Qwest, MPUC Docket Nos. P-421/CI-01-1375, P-442, 421, 3012/M-01-1916 (Oct. 2, 2002) (*"Docket 1375 Pricing Order"*).
[265] Ex. 24 (Starr) at 13.
[266] *Id*. at 15.

recommends that AT&T's language relating to true-ups not be included in Section 22.5. for the same reasons giving for recommending against it in Section 22.4.[267]

C. Applicable Law

228. The Act does not specifically address this issue. However, the Commission has general authority under the Act to arbitrate specific unresolved issues and to order terms consistent with the terms of the Act.[268] Further, Minn. Stat. § 237.16, subd. 1 (a) authorizes the Commission to prescribe the terms and conditions of service delivery, for the purpose of bringing about fair and reasonable competition for local exchange telephone services.

229. In the 2002 *Docket 1375 Pricing Order*, the Commission held:

> Qwest shall obtain Commission approval before charging an ICB price. If a CLEC requests an element that Qwest listed on its SGAT as ICB, Qwest shall develop either a cost - based price or substantiate the need for ICB pricing, and file with the Commission for review within 60 days of offering.[269]

230. The *Docket 1375 Pricing Order* was silent, however, on the issue of true-ups as they relate to future rate changes.

D. Decision

231. DOC's recommended language for Section 22.1 should be adopted. AT&T's proposed language is convoluted and confusing. DOC's language addresses the concerns raised by the parties. It does not impose ILEC responsibilities on AT&T.

232. In Section 22.4.1.2, Qwest's proposed language on effective dates ("Such Commission-ordered rates shall be effective as of the date designated by the Commission in its order.") should be adopted because it is more clear and consistent with the need to implement Commission orders as ordered.

233. AT&T's proposal for true-ups should not be included in Section 22.4.1.2 because that is an issue the Commission should address in each order.

234. AT&T's proposed language for Section 22.4.1.2 requiring Commission ordered changes to be incorporated into the interconnection agreement "by amendment" should be adopted. As pointed out under Issue No. 2, while Qwest promises to provide notice of its "corrections," the language it proposed for Section 2.2 did not implement that promise. If it proposed such language now, particularly for

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[267] DOC Brief at 89-91.
[268] 47 U.S.C. § 252 (b).
[269] *In the Matter of the Commission Review and Investigation of Qwest's Unbundled Network Elements Prices*, Order Setting Prices and Establishing Procedural Schedule, MPUC Docket No. P-421/CI-01-1375, Attachment at A-6 (October 2, 2002).

normally uncontested changes, AT&T should consider it. Meanwhile, uncontested amendments can be handled quickly.

235. The general concept of AT&T's proposal for a Section 4.1.3 that "either Party is free at any time to initiate a cost proceeding . . .," should be adopted. While the Parties may have that right by law, they may also have the power to agree to waive that right. Since the issue has been raised, it now needs to be clarified one way or the other. The right should exist. However, the language should be better crafted so as not to create any right that does not exist. The following is recommended:

> 22.4.1.3 Nothing in this agreement shall waive any right of either Party to initiate a cost proceeding at the Commission to establish a Commission-approved rate to replace an Interim Rate.

236. It appears to be necessary to modify, or at least clarify, the holding of the *Docket 1375 Pricing Order* regarding ICB pricing. This may be a matter of semantics. It seems obvious that there are circumstances, as Qwest states, "where the requirements of a particular service offering may vary widely from application to application making it unrealistic to use a one price fits all approach."[270] No party disputes that. Thus, it is necessary that Exhibit A list the rate for certain services as "ICB." But when a CLEC requests that service, Qwest must develop a price for it and that price must be based on the cost of providing that service under the particular circumstances of that particular request, not on the basis of a typical generic cost study for that type of service. Everyone seems to agree with that as well. The result of an individualized price determination based on specific circumstance is a cost-based rate for that particular service, in other words, an ICB rate. Qwest should be required to demonstrate the cost-basis for the rate and also be allowed to show to the Commission that the price determined for the service under the particular circumstances should not apply under different circumstances and that similar ICB pricing will need be done on future request for a similar service.

237. AT&T's proposal for true-ups should not be adopted because it is not necessary. The Commission can and should address true-up when approving the rate.

238. Section 22.5 should therefore be amended to read:

> **22.5 ICB Pricing**
>
> If CLEC requests a product or service that is identified on Exhibit A as ICB, or for which Qwest would otherwise charge an ICB rate, Qwest shall develop a cost-based rate based upon the particular circumstances of the requested product or service for review by the Commission within 60 days of offering the rate to CLEC. At the same time, Qwest may also file a written substantiation of the need for ICB pricing for any subsequent requests for the product or service. CLEC may order, and Qwest shall

[270] Qwest Response to AT&T IR 24, attached as DOC Brief Ex. 22; Ex. 1 (Easton) at 19.

provision, such product or service using such Qwest proposed rate until the Commission orders a rate. The Qwest proposed rate shall be an Interim Rate under this Agreement. ICB pricing shall apply to all subsequent requests for the product or service if the Commission so determines.

Dated this 18th day of November, 2003

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KATHLEEN D. SHEEHY
STEVE M. MIHALCHICK
Administrative Law Judges

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