BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE PETITION FOR ARBITRATION OF AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST AND TCG SEATTLE WITH QWEST CORPORATION PURSUANT TO 47 U.S.C. § 252(b)	**Docket No. UT-033035**

QWEST CORPORATION'S POST-HEARING BRIEF

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DATED: November 12, 2003

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I. INTRODUCTION

Qwest Corporation ("Qwest") submits this Post-Hearing Brief on the disputed issues that remain to be arbitrated in this proceeding. Qwest and AT&T have negotiated their new interconnection agreement for months and have resolved most disputes through negotiation, subject to changes in the law.[1] Even after the hearing in this matter, Qwest has taken the ALJ's suggestion to resolve disputes through negotiation seriously, and has attempted to work with AT&T to resolve outstanding issues. Unfortunately, those efforts were not uniformly successful.[2]

Given the Commission's role in this proceeding – to decide contract language that will apply on a going-forward basis – the Commission should not reach beyond to address disputes that may or may not arise once the parties begin operation under this new agreement. While AT&T seeks far-reaching factual declarations that all of its switches meet the definition of a "Tandem Office Switch" and that virtual NXX ("VNXX") traffic or foreign exchange ("FX") service should or should not be considered "Exchange Service," the Commission, at this stage, need not address the potential disputes AT&T projects. The Commission now must only arbitrate the terms of the parties' new interconnection agreement. If, after the terms of the agreement are set and the agreement is executed, the parties develop disputes related to these terms, the Commission can and should address them based upon a fully-developed and current record. Accordingly, when asked by AT&T to make factual determinations about the parties' past or future operation in the context of arbitrating the terms of the

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[1] Qwest and AT&T have negotiated their agreement with regard to and against the backdrop of legal requirements then-existing. As the change of law language in this agreement makes abundantly clear, if there is a change in the existing law, such as the recent *Triennial Review Order*, which the parties expressly agreed to address in subsequent negotiations, that change in law will be incorporated into the interconnection agreement, and the agreement will be revised to reflect that change. Thus, this is not a case in which the parties have negotiated their agreement "without regard" to the requirements in Sections 251(b) and (c) of the Act. *See* 47 U.S.C. § 252(a); *AT&T Communs. of the Southern States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457 (4th Cir. 2000) (when parties' agreement tracks existing legal requirements or particular language is required by existing legal requirements, the language is negotiated with regard to existing legal requirements and may be modified if there is a change in the law).

[2] The parties recently agreed to resolve Issue 22 (abandonment) by using the language developed by the Colorado commission. Accordingly, Issue 22 is no longer disputed and is not addressed in this brief.

parties' new interconnection agreement, the commissions in both Minnesota and Colorado properly declined. This Commission should do likewise.

On the remaining disputed issues, Qwest respectfully submits that its proposed language aligns with existing law, policy and equity. In resolving the contractual language for these issues, the Commission should adopt Qwest's proposed language.

II. DISPUTED ISSUES

A. Issue 3: Qwest's Tandem Office Switch Definition Aligns with FCC Rules and Commission Decisions From The 271 Workshops. AT&T Offers No Compelling Reason to Change the Commission's Decisions.

1. The Commission should reject AT&T's "capable of" modification to the FCC rules.

Issue 3 concerns a definitional dispute regarding what criteria AT&T's switches must meet to be considered tandem switches for purposes of reciprocal compensation. Qwest's proposed definition tracks the text of FCC rules and the definition in Qwest's Washington SGAT. AT&T's proposed definition, as set forth below, follows neither the FCC rules nor AT&T's own advocacy in the Washington 271 workshops.

In the *Local Competition Order*, the FCC established specific criteria for evaluating when a CLEC's switch should receive tandem compensation. As the FCC made plain, a CLEC switch must serve a comparable geographic area to the incumbent LEC's tandem to be eligible for tandem reciprocal compensation treatment:

> 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. . . . 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.[3]

The FCC incorporated this criteria in Rule 51.711(a)(3), which also provides that a CLEC switch must "serve" a comparable geographic area:

> 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.[4]

Qwest's proposed tandem switch definition tracks Rule 51.711(a)(3) *exactly*. Qwest's definition also reflects the language the Commission considered and ordered in the Washington 271 proceedings.[5] In fact, AT&T advocated in the 271 workshops the very language Qwest proposes here for the parties' agreement. Specifically, in Workshop 1, addressing reciprocal compensation among other checklist items, AT&T argued that the Commission should order Qwest to revise its tandem switch definition to state that CLEC switches should be considered tandem switches to the extent the switch(es) "serve" a comparable geographic area as Qwest's tandem.[6] The Commission adopted AT&T's position, and Qwest modified its Washington SGAT accordingly.[7]

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[3] First Report and Order, *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-98, 95-185, 11 FCC Rcd 15499 ¶ 1090 (1996) ("*Local Competition Order*") (emphasis added).

[4] 47 C.F.R. § 51.711(a)(3) (emphasis added).

[5] 25th Supplemental Order; Order Granting in Part and Denying in Part Petitions for Reconsideration of Workshop One Final Order, *Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Dkt. Nos. UT-003022, UT-003040 (Feb. 8, 2002) ("*25th Supplemental Order*").

[6] *See* Ex. 36, DLT-6T, Rebuttal Testimony of David L. Talbott ("Talbott Rebuttal"), at 8:18-21 (noting that AT&T and WorldCom argued in the 271 proceedings that a CLEC "need only demonstrate that its switch serves a geographical area comparable to that of Qwest's tandem switch" to receive the tandem rate); Revised Initial Order, *Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Dkt. Nos. UT-003022, UT-003040 ¶¶ 203-205 (Aug. 31, 2000) (describing CLEC position on definition of "Tandem Office Switch").

[7] *25th Supplemental Order* ¶ 19; 39th Supplemental Order, Commission Order Approving SGAT and QPAP, and Addressing Data Verification, Performance Data, OSS, Change Management, and Public Interest, *Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Dkt. Nos. UT-003022, UT-003040 (July 1, 2002).

AT&T presents no evidence to suggest why Qwest's definition, which tracks the language AT&T itself proposed, FCC rules, and prior Commission determinations, is now unlawful. Indeed, this language has an established track-record as many CLECs are operating under this definition, through adoption of Qwest's SGAT, today. Although AT&T, under its definition, proposes that CLECs receive tandem compensation to fund the building of their networks,[8] tandem compensation is not an automatic CLEC subsidy. Paragraph 1090 of the *Local Competition Order* makes clear that when a CLEC deploys switches that serve a comparable geographic area to an ILEC tandem, *then* the CLEC should receive tandem compensation; the FCC did not, as AT&T contends, base its rule on subsidizing growth of CLEC networks. Had the FCC granted CLECs the blanket subsidy of tandem switch compensation to permit them to build out their networks, as AT&T appears to allege, then the FCC would simply have ordered *all* CLEC switches to be treated as tandems. It did not.

Instead of presenting evidence to refute the Commission-endorsed definition Qwest proposes, AT&T claims that a CLEC switch should merely be "capable of serving" a comparable geographic area to qualify for tandem treatment. This definition, however, is standardless and, accordingly, fails of its purpose. Certainly, if the maps AT&T submitted are meant to define when a switch is "capable of serving" a geographic area, the definition is overbroad: AT&T's maps show only that it has received authority to serve certain areas.[9] Not surprisingly, AT&T could describe no meaningful criteria that would establish when a switch would or would not be "capable of serving" a geographic area to qualify for tandem compensation.[10] For example, in response to discovery from Qwest asking for the circumstances under which a CLEC would *not* qualify for tandem treatment under AT&T's proposed definition, AT&T provided the circular response that a CLEC switch would not qualify for tandem treatment "where the CLEC switch is not capable of serving the same geographic area that a tandem switch serves . . . ."[11] That AT&T's definition is standardless is demonstrated by AT&T's inability to

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[8] Ex. 31, Ex. DLT-1T, Direct Testimony of David L. Talbott ("Talbott Direct") at 6:20-7:1.

[9] Ex. 73, Ex. TRF-6RT Rebuttal Testimony of Thomas R. Freeberg ("Freeberg Rebuttal") at 6:4-8:5.

[10] *Id*. at 8:6-12.

[11] Ex. 41, AT&T Response to Qwest Data Request No. 01-024.

distinguish meaningfully between switches that would and would not meet its proposed definition. The only examples AT&T could provide of when a CLEC switch might not be "capable of serving" under its proposed definition was if the CLEC switch was not "interconnected to the appropriate facilities" to exchange traffic, the carrier did not have a certificate of authority, or the carrier did not have a tariff on file.[12] In other words, under AT&T's view of "capable of serving," a CLEC need only establish interconnection and file a tariff in an area where it has been certificated to provide service to obtain tandem compensation. AT&T's interpretation of its definition contains no requirement that the CLEC provide any level or extent of service. Under AT&T's interpretation of its definition, therefore, a CLEC might allege that its switch is "capable of serving a comparable geographic area" (and supposedly entitled to tandem treatment) from the moment it exchanges one call with Qwest, regardless of the area the CLEC may in fact serve or how it serves it. In establishing criteria for when a CLEC switch would be treated as a tandem, the FCC plainly intended its rules to have some meaning. Under AT&T's definition and its interpretation of that definition, however, Rule 51.711(a)(3) is rendered meaningless and all CLECs would claim an automatic subsidy.

AT&T's language, moreover, sends the wrong economic message to CLECs and provides no marketplace incentive to construct the necessary facilities to serve customers throughout the local exchange area or complete calls across the scope of the geographic area served by the Qwest tandem. Finally, AT&T identifies no change in law or new evidence[13] to suggest that the Commission's definition under which CLECs in Washington are operating today, and that AT&T itself advocated, should now be changed again for AT&T. Therefore, the Commission should adopt Qwest's proposed language for Issue 3.

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[12] *Id.*

[13] AT&T's argument that this Commission's definition of tandem switch must be changed to comport with a decision of the FCC's Wireline Competition Bureau ("WCB") is misplaced. Memorandum Opinion and Order, *Petitions of WorldCom, Inc., Cox Virginia Telcom, Inc. and 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. and for Arbitration*, CC Dkt. Nos. 00-218, 00-249 and 00-251, 17 FCC Rcd 27039 (2002) ("*Verizon Virginia Arbitration Order*"). This Commission's definition tracks the FCC's definition precisely, and the FCC has not changed its definition either before or as a result of the WCB's decision.

2. The Commission should reject AT&T's premature attempts to have its switches "declared" tandems in the definitional language as well as before a definition has even been adopted.

a. The Commission should reject AT&T's language declaring its switches tandems.

AT&T seeks to have the Commission declare through the actual definition of "Tandem Office Switch" that AT&T's and TCG's switches meet the yet-to-be adopted definition. Specifically, AT&T seeks to have the Commission order Qwest to insert the phrase: "For purposes of this Agreement, AT&T's [TCG's] switches in the State are Tandem Office Switches." Beyond being premature, as discussed above, AT&T's demand renders its already standardless definition even more confusing and inapplicable. For example, AT&T ignores that other carriers will be able to (and will surely seek to) opt into AT&T's agreement. In tailoring the new opt-in agreement to the specific CLEC, the CLEC will surely claim that the CLEC's name must necessarily be substituted in for AT&T and TCG. As a result of AT&T's language, therefore, other CLECs will contend that their switches, too, should be "declared" tandems through this sentence, regardless of any factual showing.

Second, and related, AT&T's request that the Commission "deem" its switches tandems by way of contract language conflicts with other parts of AT&T's own proposed definition. Like Qwest, AT&T's proposed definition states that "[i]f the Parties have not already agreed that CLEC's switches meet the definition of Tandem Office Switches, a fact based consideration of geography, when approved by the Commission or mutually agreed to by the Parties, should be used to classify any Switch on a prospective basis." AT&T's position that the Commission should declare in the definition that all of its switches are tandems would render this process of establishing a "fact based consideration of geography" meaningless.

Third, AT&T's proposed language has no temporal limitations. Thus, AT&T seeks not only to have all of its currently deployed switches declared tandems, but also every other switch AT&T and TCG may deploy in the future, regardless of the geographic area those switches serve. Although Qwest seriously questions the relevance of the maps AT&T has submitted, AT&T plainly has not presented any evidence regarding the reach of switches AT&T and TCG have yet to deploy. Nevertheless, under this proposed sentence, AT&T and TCG may argue that any switch they deploy in the future must be treated as a tandem as well. Accordingly, the Commission should not prospectively declare all AT&T and TCG switches tandems through a contract definition.

b. The Commission should not make factual declarations regarding definitions that are not yet implemented in an agreement the parties have yet to execute.

AT&T demands that in addition to adopting its standardless definition, the Commission should *apply* whichever definition it ultimately adopts and declare AT&T's and TCG's switches tandems. The Commission should reject this presumptive request, as did commissions in Minnesota and Colorado.[14] The purpose of the interconnection agreement is to set forth the terms and conditions governing the parties' relationship, not to resolve hypothetical operational disputes under an agreement the parties have yet to execute. The proper role of the Commission in an interconnection agreement arbitration is to determine the disputed term, here the definition of a tandem switch. It is not to *assume* the resolution of the definitional dispute, further *assume* a dispute as to its application, apply specific facts, and decide a specific outcome under a yet-to-be-implemented interconnection agreement. Once the definition is determined and the parties are operating under it, they may or may not have a dispute concerning whether, on the facts, a particular switch meets the definition. If such a dispute arises, the Commission can address it based on the evidence then presented and then current. Without a definition and without any implementation of it, no "dispute" is ripe for consideration here.

[14] In Minnesota, AT&T did not request that the Commission declare AT&T's and TCG's switches tandems until after the arbitrators' issued their report. Arbitrators' Report, *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)*, MPUC Docket No. P442, 421/IC-03-759, OAH Docket No. 12-2500-15429-4 (Aug. 18, 2003) ("*Minnesota Arbitrators' Report*") (A copy of this report is attached for the convenience of the ALJ as Attachment A). Although the Minnesota Commission held oral argument on the ALJs' recommendations and declined to address this request for a declaration, the Commission has not yet issued a written order. *See also* Initial Commission Decision, *Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with AT&T Communications of the Mountain States, Inc. and TCG-Colorado Pursuant to 47 U.S.C. § 252(b)*, Docket No. 03B-287T, Decision No. C03-1189 ¶ 23 (Colo. PUC Oct. 14, 2003) ("*Colorado Arbitration Order*") (discussing the Hearing Commissioner's grant of Qwest's motion to strike AT&T's request for a determination that its switches meet whichever definition of "Tandem Office Switch" the Commission adopts) (A copy of the *Colorado Arbitration Order* is attached for the convenience of the ALJ as Attachment B).

The Commission is called upon to perform a straightforward task: determine which party's definition should be included in their new interconnection agreement. Once that definition is adopted, and the parties are operating under it, there may or may not be a dispute regarding its application. The Commission should afford the parties the opportunity to operate under the agreement and attempt to resolve its interpretation and application themselves before leaping ahead to resolve a "dispute" that may not develop and is not yet ripe.

B. Issue 5: Qwest's Exchange Service Definition Complies with State and Federal Law, Cost-Causation Principles, and Industry Standards. AT&T's Does Not.

Qwest's proposed definition of "Exchange Service" has a long history of support in the Commission's rules defining local and toll calls, prior Commission decisions, and federal law. Qwest's definition is reflected in Qwest's tariffs, virtually all interconnection agreements, all 14 in-region SGATs,[15] and is adopted by AT&T itself in AT&T's own Washington tariffs.[16] Qwest's definition is the industry standard by which all carriers, including AT&T, route and rate calls today.

AT&T attempts to confuse the Commission's straightforward task. Here, the simple dispute is which party's definition of "Exchange Service" best comports with the existing law. The Commission is *not* called upon to resolve complaints that have never been presented to it in a complaint setting, nor resolve disputes about specific services that AT&T may or may not offer and that may or may not fit within the definition of "Exchange Service" once the parties begin operation under this new agreement. Focusing on the specific dispute presented – which definition to adopt – it is clear that Qwest's definition aligns with existing Commission rules, Commission decisions, other interconnection agreements, and industry practice. Accordingly, the Commission should adopt Qwest's definition of "Exchange Service."

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[15] Ex. 68, Freeberg Direct, at 16:10-17:13, 21:18-23:6.

[16] *Id*. at 19:3-21:17 (excerpts of AT&T Washington tariff).

1. Qwest's definition of "Exchange Service" complies with existing law whereas AT&T's definition does not.

As set forth in Qwest's response to AT&T's petition for arbitration and its pre-filed testimony, Qwest's proposed definition of "Exchange Service" fits squarely within the relevant definitions in the Commission's rules and the Communications Act.[17]

AT&T devotes scant attention to this Commission's rules because those rules uniformly support Qwest's definition, not AT&T's definition. For example, this Commission defines an "exchange" on the basis of a "*geographic area* established by a company for telecommunications service *within that area*," not on the basis of an NPA-NXX.[18] A local calling area, under this Commission's rules, means "one or more *rate centers within which* customers" may make non-toll calls.[19] AT&T's definition, however, divorces NPA-NXXs from rate centers resulting in a "local calling area" that could span many jurisdictions. Indeed, the only Commission definition into which AT&T's definition fits is the definition of "Interexchange," which means "*telephone calls*, traffic facilities or other items *that originate in one exchange and terminate in another*."[20]

AT&T's proposed definition also violates the requirements of WAC 480-120-265, which defines the criteria for expanding local calling areas. Because AT&T would define a local call on the basis of the NPA-NXXs of the call, by definition, its proposal results in a change or expansion of the local calling area on a call-by-call basis. The geographic boundaries, and communities of interest of local calling areas, under AT&T's definition, have no relevance.[21] WAC 480-120-265 states that the

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[17] *See, e.g.*, Ex. 68, Freeberg Direct, at 16:10-23:6. *See also* 47 U.S.C. § 153(47) (The term "telephone exchange service" means (A) service *within a telephone exchange,* or within a connected system of telephone exchanges *within the same exchange area* operated to furnish to subscribers intercommunicating service of the character *ordinarily furnished by a single exchange,* or (B) *comparable service* provided through a system of switches, transmission equipment, or other facilities (or a combination thereof) by which a subscriber can originate and terminate a telecommunications service") (emphasis added); 47 U.S.C. § 153(48) ("The term "telephone toll service" means telephone service *between stations in different exchange areas* for which there is made *a separate charge* not included in contracts with subscribers for exchange services") (emphasis added).

[18] WAC 480-120-021 (definition of "Exchange") (emphasis added).

[19] *Id.* (definition of "Local Calling Area") (emphasis added).

[20] *Id.* (definition of "Interexchange") (emphasis added).

[21] Ex. 68, Freeberg Direct, at 18:14-19:2.

Commission will order expansion of local calling areas "only for compelling reasons." This rule also provides that "optional calling plans that *assess additional charges only to participating customers*," rather than expansion of local calling areas will be relied upon by the Commission.[22] AT&T's proposal, however, directly contradicts this policy determination. Rather than assessing charges on AT&T's own VNXX customers, as in the case of the long-standing foreign exchange ("FX") service Qwest provides, AT&T's proposal shifts the costs of expanded local calling onto *Qwest*.[23] It is because Qwest, not AT&T or AT&T's VNXX customers, would provide all the transport between local calling areas that AT&T can promote its alleged VNXX "provisioning option" for free. In short, AT&T's proposed definition of "Exchange Service" does not comply with any of the Commission rules defining such service. Accordingly, the Commission should not endorse it.

2. Every state commission in Qwest's region to have considered the proper definition of "Exchange Service" has adopted Qwest's definition.

Qwest's definition has stood the test of review by this Commission and others within Qwest's in-region states. As with Issue 3, the Commission has had the opportunity in the 271 process to review the definition of "Exchange Service" for Qwest's Statement of Generally Available Terms, or SGAT. During the Washington 271 proceeding, every aspect of Qwest's Washington SGAT, including all of the definitions in Section 4 of the SGAT, were subject to review and negotiation in the collaborative workshop process in which interested CLECs participated. AT&T participated in all of the workshops and was perhaps the most active Washington CLEC participating in them. Notably, AT&T did not oppose the definition of "Exchange Service" that appears in the current SGAT, did not claim that Qwest's definition "violated" industry practices or resulted in "massive" changes to the way carriers have routed and rated calls, and did not assert that Qwest's definition discriminated against any AT&T service or otherwise competitively threatened AT&T. Qwest's definition was included in the SGAT this Commission approved without the hue and cry AT&T now raises.

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[22] WAC 480-120-265 (emphasis added).

[23] Ex. 68, Freeberg Direct, at 25:11-26:8; Ex. 73, Freeberg Rebuttal, at 25:2-10.

This Commission is also not the first to arbitrate this definitional dispute between Qwest and AT&T. State commissions in Minnesota and Colorado have recently heard the same claims AT&T makes here and both commissions have rejected them and ordered Qwest's definition of "Exchange Service" into the parties' interconnection agreement. The Minnesota Commission adopted the recommendation of two ALJs overseeing the parties' arbitration in that state.[24] The ALJs recommended Qwest's proposed definition because it is consistent with existing law, while AT&T's is not, and because adoption of AT&T's language would impact other parties and raise regulatory issues that are more appropriately addressed outside the context of a definitional dispute in a two-party arbitration.[25]

The Colorado commission also rejected AT&T's position both on the definition of "Exchange Service" and on its requests for declarations on the treatment of FX and AT&T's so-called "FX-like" service. The Colorado commission determined that Qwest's definition is consistent with federal and state laws and that AT&T's definition "would ignore the historical assumptions regarding the relationship between NPA-NXXs and the geographic rate centers to which they are assigned."[26] AT&T's definition also "would negate the requirement of a 'community of interest,' in establishing local calling areas," a requirement found both in Washington and Colorado rules.[27] The Colorado commission further held that AT&T's definition would "allow calls that would normally be toll or interexchange to be rated and routed as local calls to the detriment of the incumbent provider and its end user customers."

As AT&T's witness on this issue in Colorado testified, and Mr. Schell in Minnesota and Washington agreed,[28] under AT&T's definition, a call between a customer in New York and a

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[24] As noted above, the Minnesota commission has not yet issued a written order, but the commission did adopt the ALJs' recommendation to endorse Qwest's definition of "Exchange Service" in its deliberations.

[25] *Minnesota Arbitrators' Report* ¶ 58.

[26] *Colorado Arbitration Order* ¶ 47.

[27] *See* WAC 480-120-265 (In evaluating whether to expand a local calling area, "[t]he commission will consider the overall community-of-interest of the entire exchange, and may consider other pertinent factors such as customer calling patterns, the availability and feasibility of optional calling plans, and the level of local and long distance competition").

[28] Tr. at 51:1-8. Mr. Schell attempted to back track on his Minnesota testimony admitting both that (i) it is possible to assign a Minnesota (or Washington) NPA-NXX to an end user physically located in New York and (ii)

customer in Colorado would be a "local" call so long as the NPA-NXXs of the called and calling party "matched." The Colorado commission determined that such a practice "would not only impermissibly expand local calling areas, but also would defy the Central Office Code Assignment Guidelines and the Numbering Resource Utilization/Forecast requirements.'[29] As the Colorado commission explained, the Numbering Resource Utilization/Forecast, or "NRUF," is used by the FCC and state commissions to determine utilization of telephone numbers by rate center. Carriers must meet specified utilization percentages by rate center before they can receive additional numbering resources.[30] AT&T's definition, which disassociates NPA-NXXs from the geographic rate centers, renders the NRUF unreliable.

In addition to these authorities, many state commissions outside of Qwest's region have rejected VNXX proposals such as AT&T's.[31] Against this precedent, there is no legal or evidentiary support

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that a call between a Minnesota (or Washington) customer and the New York customer would be a "local" call under AT&T's definition so long as the NPA-NXX matched. *See* Tr. at 50:20-52:17. However, AT&T's Issue 5 witness in Colorado provided the same testimony that Mr. Schell provided in Minnesota and that he now claims needs "explanation." *Colorado Arbitration Order* ¶ 48 ("AT&T admitted on cross-examination that a call carried from Colorado to New York could be considered a local call under AT&T's definition as long as the NPA-NXX 'matched.'"). Furthermore, despite his "explanation," Mr. Schell nevertheless agreed that it is technically possible to assign a Seattle NPA-NXX to a customer physically located in New York and that a call between a Seattle-based customer and a New York customer would be a "local" call if the NPA-NXXs of the call "matched." Tr. at 50:20-51:7. Thus, the fact remains that under AT&T's definition, calls that cross LATA or state boundaries would be classified as "local" calls if the NPA-NXXs matched.

[29] *Colorado Arbitration Order* ¶ 48.

[30] *Id*. ¶ 48 n.35.

[31] For a non-exclusive discussion of these decisions, *see* Ex. 68, Freeberg Direct, at 29:20-32:15 (discussing Massachusetts and South Carolina commission decisions); Ex. 73, Freeberg Rebuttal, at 11:15-12:11 (discussing Iowa Board decision); *id*. at 21:18-22:25 (discussing Rhode Island and Vermont decisions); *id*. at 25:10-26:25 (discussing California and Maine commission decisions and Iowa Board decision). *See also* Order on Disputed Issues, Petition for Arbitration of Interconnection Agreement: Global NAPS, Inc. v. Alltel Georgia, Inc., Docket No. 14529-U, 2002 Ga. PUC LEXIS 96 (Ga. PUC Nov. 5, 2002) (physical location of the parties governs whether call is local); Interim Order of Arbitration Award, *Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Dkt. No. 99-00948, 2001 Tenn. PUC LEXIS 383 (Tenn. PUC June 25, 2001) (Deliberations and Conclusions on Issues 26 and 30) (adopted in Final Order of Arbitration Award dated September 7, 2001) (The Tennessee Regulatory Utility Commission, acting as arbitrators in an interconnection arbitration between BellSouth and Intermedia Communications, found that calls to an NPA/NXX in a local calling area outside the local calling area where the NPA/NXX is homed should be treated as intrastate, interexchange toll traffic. Therefore, calls to and from such calling areas are non-local, and subject to access charges); Arbitration Order, *Application of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc., and TCG Kansas, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Tel. Co. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455, 2001 Mo. PUC LEXIS 368 at *60 (Mo. PUC June 7, 2001) (In

for AT&T's claim that Qwest's proposed definition is novel and would lead to "massive changes" in the way calls between carriers are rated.[32] Instead, Qwest's definition reflects existing law and industry standards on number use and assignment.[33] AT&T's definition would require significant changes to both the law and these standards.

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an arbitration with Southwestern Bell ("SWBT"), AT&T claimed that because it employed a "different" network architecture than SWBT, SWBT should be required to deliver all traffic destined to the same NPA-NXX to the same AT&T switch, where AT&T would deliver the call and charge SWBT reciprocal compensation. The Missouri commission rejected AT&T's position and adopted language for the parties' interconnection agreement that recognized that calls between customers physically located in different local calling areas are not local).

[32] AT&T will likely cite the WCB's decision in the Verizon Virginia Arbitration in support of its definition. The WCB's decision is not well-reasoned and does not carefully consider the issues associated with AT&T's proposed definition or VNXX traffic. Furthermore, the WCB did not believe Verizon could identify VNXX traffic or that it would be harmed by it. Qwest, in contrast, has developed a means to identify such traffic (Ex. 71) and has described the harms of VNXX traffic at length. For these and other reasons, many state commissions have declined to follow the WCB decision. *See, e.g.*, *Colorado Arbitration Order* ¶ 51 ("We find the Wireline Competition Bureau's reasoning flawed when it states, '[a]dditionally, we note that state commissions, through their numbering authority, can correct abuses of NPA-NXX allocations.' In Colorado, we have always dealt with our numbering resource issues proactively and as a result have delayed the need for new area codes for years. We see no reason to be reactive to a situation and allow for abuses to occur rather than prevent them from occurring in the first instance") (footnote omitted); Opinion, *Petition of Global NAPs, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration To Establish An Interconnection Agreement with Verizon New England, Inc. d/b/a Verizon Massachusetts f/k/a New England Tel. & Tel. Co. d/b/a Bell Atlantic Massachusetts*, D.T.E. 02-45, 2002 Mass. PUC LEXIS 65 (Mass. DTE Dec. 12, 2002) (declining to follow WCB decision where Verizon had, like Qwest here, developed a means for identifying VNXX traffic); Arbitration Award, *Petition of Global Naps, Inc. for Arbitration for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon North, Inc.*, Case No. 02-876-TP-ARB, 01-3096-TP-ARB, 2002 Ohio PUC LEXIS 776 (Ohio PUC Sept. 5, 2002) (declining to follow *Verizon Virginia Arbitration Order* finding that the order "is neither a final decision nor a legally binding precedent in this case"); Order No. 2002-619, *Petition of US LEC of South Carolina for Arbitration of an Interconnection Agreement with Verizon South, Inc.*, Dkt. No. 2002-181-C, 2002 S.C. PUC LEXIS 10 at *38 (S.C. PUC Aug. 30, 2002) (finding that the WCB "never addressed the basic question whether Virtual FX traffic is subject to reciprocal compensation under federal law. Instead, the Bureau simply suggested that, in the absence of a concrete proposal [from Verizon] for distinguishing Virtual FX traffic from local traffic for billing purposes, the parties would not be compelled to give effect to that distinction, irrespective of the requirements of federal law." The South Carolina commission held that the WCB's "failure to respect the limitations of Verizon's reciprocal compensation obligations was both inconsistent with federal law and unsupported on the record . . . .").

[33] A recent FCC complaint decision addressed the treatment of VNXX traffic under an interconnection agreement between Starpower Communications and Verizon South. Memorandum Opinion and Order, *Starpower Communications, LLC, v. Verizon South, Inc.*, File No. EB-00-MD-19, FCC 03-278 (Nov. 7, 2003). Because the FCC simply interpreted the terms of those parties' pre-existing agreement, the decision has no relevance to this arbitration in which AT&T and Qwest are establishing the terms for their agreement going forward. Indeed, the FCC took pains to state that neither the WCB decision in the *Verizon Virginia Arbitration Order* nor this decision addressed how VNXX traffic should be treated between carriers. *Id.* ¶¶ 63, 68.

3. Qwest's definition of "Exchange Service" complies with industry numbering guidelines. AT&T's definition abuses them.

Contrary to AT&T's claims, Qwest's definition is entirely consistent with industry standards for rating and routing calls. While AT&T asserts that carriers have "always" rated and routed calls on the basis of the NPA-NXX assigned to the calling and called parties, it glosses over a critical material fact. As Mr. Freeberg explained (and Mr. Schell agreed),[34] carriers have been able to use NPA-NXXs as a reliable indicator of where a call originates and terminates because under the Central Office Code Assignment Guidelines, NPA-NXXs have been assigned to customers based upon their physical location.[35] Other industry guidelines track Qwest's position that NPA-NXXs are assigned to specific rate centers.[36] AT&T, however, proposes disassociating NPA-NXXs from the rate centers to which they correspond, thereby dramatically changing the assumptions underlying the use of NPA-NXXs to rate calls. As part of its undefined "provisioning option," an AT&T customer may select any NPA-NXX it wants, regardless of where the customer is located. Although AT&T claims that it would not abuse NPA-NXX assignments, it commits to no limitations in either its testimony or contract language for the assignment of numbers to its customers. To the contrary, AT&T acknowledged that under its definition, a call between an AT&T customer physically located in New York and a Qwest customer physically located in Seattle would be a "local" call so long as the NPA-NXXs of the calls matched.[37]

Although AT&T suggests that Qwest's FX service would also violate industry numbering standards, it plainly does not. The Central Office Code Assignment Guidelines recognize tariffed FX service as an exception.

Because AT&T will commit to no limitations on the assignment of numbers to its customers, and its proposed definition of "Exchange Service" contains no limitations, this Commission can have no assurance that AT&T will not assign numbers to its customers regardless of whether the customer is

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[34] Tr. at 61:24-63:15 (Schell Cross).

[35] Ex. 73, Freeberg Rebuttal, 11:4-15; Ex. 75, attached to Ex. 73 as TRF-8.

[36] Ex. 76, attached to Ex. 73 as TRF-9 (Thousand Block Number Pooling Administrative Guidelines); Ex. 73, Freeberg Rebuttal, at 15:8-19 (discussing number portability guidelines).

[37] Tr. at 51:1-7 (Schell cross).

located in Washington or anywhere else. Moreover, while the Commission is called upon here to arbitrate this two-party party dispute, the language it adopts will be available to any other Washington CLEC under 47 U.S.C. § 252(i), and those carriers have made no commitments or representations regarding their number assignment practices. Accordingly, were the Commission to adopt AT&T's proposal, the affect on rating and routing of calls and the assignment of numbers will have a far reaching impact on all local exchange carriers. Carriers, not this Commission or industry standards, would determine the assignment of numbers and the boundaries of a "local calling area" according to their own individual competitive interests. The result is the predictable collapse of local calling areas and the inability to rely upon industry numbering guidelines.

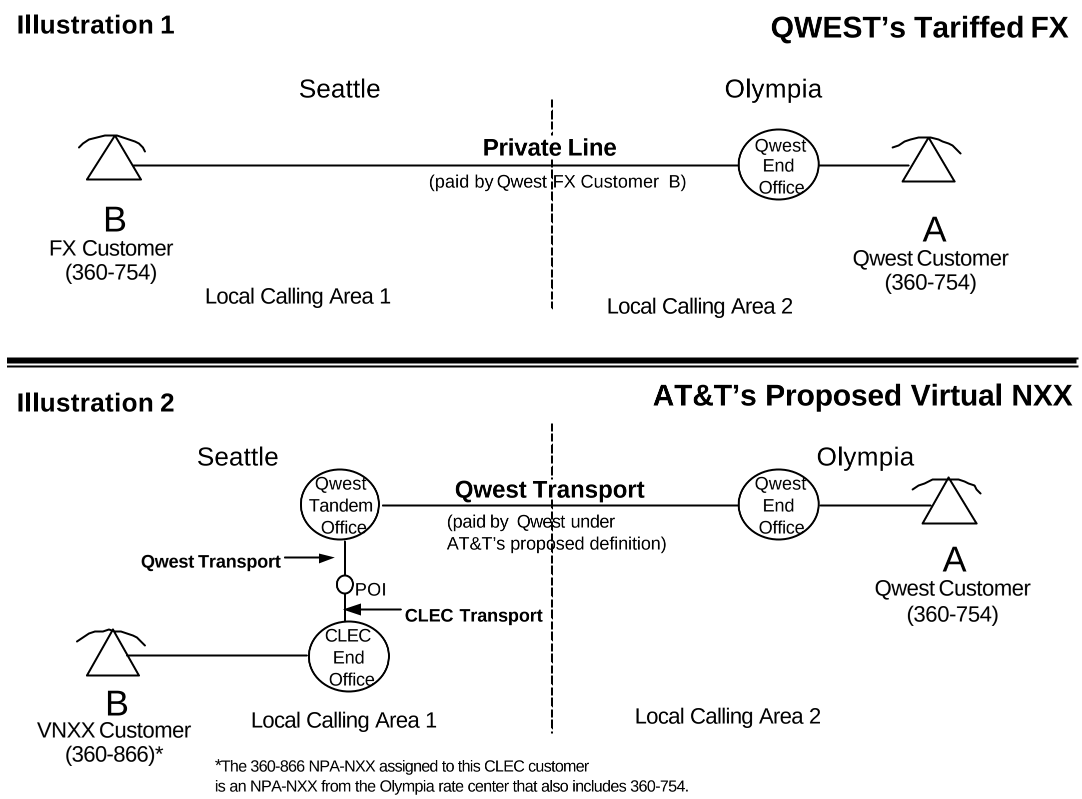
4. The Commission is only called upon to develop a definition of "Exchange Service." Application of that definition to specific products should await the parties' operation under the new agreement.

As with Issue 3, the Commission must determine a definition for the parties' agreement. Once the parties execute that agreement and begin operating under it, disputes may arise about whether certain products or services are encompassed under the definition of "Exchange Service" ordered by this Commission. However, those disputes should be addressed when they are ripe, based on then-current information, and when there is an evidentiary basis for the Commission to evaluate them. At this stage, the Commission should decline to make premature evidentiary findings regarding any particular Qwest or AT&T offering. Indeed, at this stage, there is no specific evidence before the Commission upon which any specific findings could reasonably be based. For example, the Commission has no details whatsoever regarding the nature of AT&T's VNXX "provisioning option," the extent to which AT&T's customers in Washington have availed themselves of this option, the pricing of this option, or how Qwest has treated intercarrier billing for calls involving these customers. Likewise, while AT&T claims that Qwest has treated its FX service differently from what it claims is an AT&T competitive "provisioning option," it has presented no billing dispute or factual evidence to support this claim.

Nevertheless, in its attempt to fast-forward to potential disputes about unspecified products, AT&T makes a host of conclusory arguments and allegations about Qwest's FX service, service to ISPs, and AT&T's VNXX "provisioning option." Although Qwest believes the dispute should be focused on a definition for the parties' agreement going forward, the Commission should not be left with the impression that Qwest's definition "favors" its FX service. Qwest's tariffed FX service has been in existence for years and nothing precludes AT&T from offering FX service if it wishes. FX service is, however, materially different from the "provisioning option" AT&T seeks to promote.

a. AT&T's VNXX "provisioning option" is nothing like Qwest's foreign exchange service.

While AT&T variously describes its VNXX proposal as a "provisioning option," "FX-like" and even as "FX service," its proposal is nothing like Qwest's foreign exchange service. As Mr. Freeberg explained, there are material differences in how FX service and VNXX schemes are paid for and provisioned.[38] These undisputed differences are depicted in Ex. 78, attached to Ex. 73, Freeberg Rebuttal, and simplified here:



38 Ex. 68, Freeberg Direct, at 27:16-28:12; Ex. 73, Freeberg Rebuttal, at 28:2-29:10; Tr. at 94:16-95:15 (Freeberg; ALJ questions).

Qwest's FX service is provisioned with private line transport, which Qwest sells to its FX customer at an interexchange rate as a *substitute* for the toll charges that would otherwise be due on calls that leave the local calling area. Thus, as depicted in Illustration 1 above, when Customer A, located in Olympia, picks up the phone to dial the Qwest FX Customer B, located in Seattle, that call flows to the Qwest end office in Olympia where Qwest takes it off the public switched network and places it on a private line transport for delivery across the local calling area to FX Customer B. This FX service does not involve any use of *CLEC* transport to carry the call between the local calling area and, as Mr. Freeberg explains, Qwest charges the FX customer for this additional transport in accordance with the policies expressed in WAC 480-12-265.[39] Qwest does not offer FX service as part of its basic local exchange service offering of local calling in unlimited volume at a flat rate.

By contrast, AT&T's VNXX "provisioning option" is an attempt to classify interexchange service as local and requires Qwest, not AT&T, to transport the call between the originating and terminating local calling areas and, consistent with the fact that AT&T envisions Qwest, not AT&T, supplying this transport, AT&T proposes to offer its VNXX "option" at no additional charge to AT&T's local service customers. This difference in how AT&T's VNXX "provisioning option" is provisioned from FX service is depicted in Illustration 2 above, which shows the flow of a call from Customer A to VNXX Customer B. Because the call crosses local calling areas, but under AT&T's "provisioning option" customers would pay nothing additional for this interexchange service, VNXX is toll *bypass*.[40]

In addition to these differences between FX service and VNXX options, in the case of FX service, the FX call is always brought back to the exchange where the call originated before the call is forwarded on private line transport to its destination.[41] On a VNXX call, however, the call is never routed back to the originating local calling area.[42] Further, the FX call is fully consistent with cost-

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[39] *See* Ex. 73, Freeberg Rebuttal, at 29:4-10 & nn. 30-31 (describing distance-sensitive and interexchange charges that apply to FX service in Washington).

[40] *Colorado Arbitration Order* ¶ 49.

[41] Tr. at 95:1-8.

[42] *Id.*

causation principles – the customer who desires interexchange transport pays for it – whereas the VNXX call envisioned by AT&T is not. As Mr. Freeberg explains, with FX service the FX subscriber causes the costs to be incurred by purchasing the service of transporting the call to a distant local calling area. Under AT&T's proposed VNXX "option," the VNXX subscriber likewise causes the calls to be transported to a distant local calling area, but would pay nothing as the cost causer. To the contrary, it is because AT&T's proposed "option" shifts the cost of the call away from the cost-causer and onto Qwest that AT&T states it offers the option at no additional charge its customers.[43]

AT&T also argues that several other Qwest products appear to provide something akin to VNXX service. As stated above, the Commission need not address at this stage whether any AT&T or Qwest service is "Exchange Service." It need only establish a definition. Regardless, as the record establishes, none of these services is like VNXX. For example, Mr. Freeberg refuted AT&T's suggestion that Qwest's Market Expansion Line ("MEL") product is somehow the equivalent of a VNXX scheme by demonstrating that Qwest applies toll charges if it forwards the call outside the business customer's local calling area.[44] In addition, asked at the hearing about selected pages from Qwest websites, Mr. Freeberg testified that none of the products AT&T identified sanctioned or was provisioned through a virtual NXX type arrangement. Indeed, these exhibits are entirely irrelevant to this dispute. For example, Qwest's Broadband Access Aggregation Service, Ex. 100, has no relevancy to this dispute because it is a DSL offering that does not transit the public switched network.[45] Similarly, Mr. Freeberg explained that AT&T's other proffered web page selections (Exs. 101, 103, and 104) relating to various products offered to ISPs are completely different from AT&T's VNXX "provisioning option."[46] Importantly, the ISP customer accesses the ISP provider's network within the local calling area by dialing a number within the same local calling area in which the customer is making the call. If the customer fails to use the appropriate local calling number for each specific local calling

[43] *See* Ex. 73, Freeberg Rebuttal at 19:3-13.

[44] Ex. 73, Freeberg Rebuttal, at 29:4-9.

[45] Tr. at 99:11-100:14 (Freeberg redirect).

[46] *Id*. at 100:15-102:8.

area but instead calls other ISP access numbers outside of the local calling area, then appropriate toll charges apply. In other words, as reflected on Ex. 104, the ISP customer may access the ISP service from different locations around the region, but must use the local number for the calling area in which the customer is located in order to avoid toll charges. Unlike VNXX, these products are purchased and provisioned by Qwest subsidiaries under Qwest Corporation's existing tariffs. Qwest the ILEC interacts with these subsidiaries as it would interact with a retail customer; these subsidiaries are not CLECs. The subsidiary covers the cost of collecting originating Internet-bound traffic from many dispersed points. Not surprisingly, against this backdrop AT&T stops short of asserting that Qwest provisions ISP services in the same manner as AT&T proposes for its "provisioning option."

In sum, contrary to the impression AT&T seeks to create with its discussion of FX service and selected excerpts from web pages, Qwest Corporation does not haul this traffic over local interconnection trunks between local calling areas, as AT&T seeks to legitimize as "Exchange Service" here.

b. AT&T offers no "innovative technology." AT&T simply shifts the costs of providing service from itself and its "VFX" customers onto Qwest.

AT&T's virtual NXX proposal does not rely on any "innovation" or new technology. AT&T presented no evidence of a "new" technology or innovation that enables its "VFX" "provisioning option." Rather, as AT&T admits, AT&T simply loads numbers into its switches.[47] The ability to load NXXs from many different exchanges into a switch, expecting all other carriers with more extensive networks to carry originated calls to a single point in the state or LATA, is not application of an "innovative" technology.[48] Instead, AT&T is able to offer its customers a VNXX at no cost to AT&T[49] because

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[47] Ex. 11, Ex. DNH-1T, Direct Testimony of Douglas N. Hyatt ("Hyatt Direct") at 21:13-17 ("This FX-like provisioning option is not, however, an FX service in the traditional sense because the NPA-NXX codes assigned to AT&T, including the "foreign" exchange NPA-NXX code and the "native" NPA-NXX code associated with the customer's physical location, all reside in the same AT&T switch (wire center)").

[48] Ex. 73, Freeberg Rebuttal, at 27:7-20. Order, *Petition of Global NAPs, Inc. for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England Inc., d/b/a Verizon Vermont*, Dckt. No. 6742, 2002 WL 32059712 at *11 (Vt. Pub. Serv. Bd. Dec. 26, 2002) ("VNXX does not in anyway represent an innovation of the sort that competition is intended to encourage. Rather,

under AT&T's proposed definition, *Qwest* would be required to provide, for free, *all of the transport* between the callers in distant exchanges in the LATA and AT&T's switch. In a local exchange call between Qwest and AT&T customers in Olympia, Qwest may haul a call from the Qwest customer in Olympia to another local calling area (Seattle) to reach AT&T's single point of interface in the LATA, but *AT&T* hauls the call *back* to its customer in Olympia for termination. It is a local call because both the originating caller and the called party are in the Olympia local calling area. For their respective (and *reciprocal*) roles in handling a local call, the parties pay reciprocal compensation. In a VNXX situation, however, where AT&T assigns an Olympia NPA-NXX to its Seattle-based customer, Qwest hauls the call to AT&T's switch in Seattle, but AT&T never transports the call *back* to Olympia. Instead, AT&T terminates the call in Olympia, and, because the NPA-NXX of the calls "match," AT&T would (under its proposed definition) *charge* Qwest reciprocal compensation.[50] An Olympia-Seattle call is and always has been an interexchange call. Had this Olympia-Seattle call been between two Qwest customers, or a Qwest customer and any other CLEC customer assigning NPA-NXXs in accordance with industry standards, the call would be "interexchange" or toll, for which Qwest would receive toll charges for the transport provided, and no reciprocal compensation would be owed.[51]

Under AT&T's VNXX proposal, *Qwest*, not AT&T's VNXX customer, bears the costs of transport between local calling areas and, under AT&T's proposal, Qwest must pay AT&T reciprocal compensation to boot.[52] The California commission recognized that with this cost-shifting, VNXX violates principles of cost-causation because it permits carriers to avoid paying for transport over another carrier's network and immunizes subscribers of VNXX service from paying the cost of their own service.

VNXX is an artificial service that takes advantage of the manner in which NXX codes are assigned as a means to avoid toll charges and is essentially a form of price arbitrage.").

[49] Ex. 11, Hyatt Direct, 23:10-11.

[50] *E.g.*, Ex. 68, Freeberg Direct, at 25:11-26:8.

[51] *Id*. at 25:3-10.

[52] *Id*. at 25:11-26:8.

> The [California commission's] prior arbitration decisions reflect a consistent Commission application of the principle of cost causation. The principle would be violated if the Commission allowed competitors to avoid paying for transport over another carrier's network in order to long haul interexchange traffic terminated in disparate rate centers. To allow such long-haul transport without transport compensation would be unfair for the ILEC, which bears the cost of its transport network. Further, such a policy in regards to VNXX, once widely adopted, by the CLEC industry would potentially result in a shift in the cost of such transport to local exchange subscribers rather than to the subscribers of VNXX service which is [sic] the beneficiary of the foreign exchange like service.[53]

The California commission further reasoned that VNXX without transport compensation akin to the interexchange access compensation does not reflect "innovation" and does not serve the policies underlying the Act:

> The policies of this Commission and the Telecom Act precisely intends for carriers to invest in facilities based on the innovation incentives inherent in an openly competitive market. We refrain from creating an incentive that distorts marketplace investments by requiring incumbents to either subsidize [their] competitors' [sic] or shift costs to local exchange customers for inter-exchange traffic that is destined beyond the origination rate center. Such policy would encourage CLECs to become providers of termination facilities, to collect reciprocal compensation and thereby avoid investment in multiple points of interconnection, switching and transport, and result in less network redundancy than facilities based competition economics would otherwise dictate.[54]

The Iowa Utilities Board also agreed that VNXX permits the VNXX carrier to "ride" the incumbent's network "from one exchange to another for free.'[55]

AT&T's claim that it requires its definition to *compete* with Qwest's FX service or that Qwest is attempting to "thwart" AT&T's "provisioning option" is a complete red-herring.[56] Qwest's definition of

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[53] Decision 03-05-075, *Verizon California, Inc. (U-10021-C) Petition for Arbitration with Pac-West Telecomm., Inc. (U5266-C) Pursuant to Section 252(b) of the Telecommunications Act of 1996*, App. No. 02-06-024, 2002 Cal. PUC LEXIS 945 *10-11 (Cal. PUC May 22, 2003) ("*Pac-West California*") (footnotes omitted).

[54] *Id.* at *12-13.

[55] Final Decision and Order, *In re Sprint Communications Company, L.P, and Level 3 Communications, LLC*, Dkt. Nos. SPU-02-11 & SPU-02-13, 2003 Iowa PUC LEXIS 229 at *13 (IUB June 6, 2003).

"Exchange Service" is consistent with longstanding Commission rules and the parties' own tariffs. First, whether any particular Qwest or AT&T call falls within or outside that definition should be resolved once the parties are actually operating under the definition, not before. Second, FX is not the competitive threat AT&T makes it out to be: in the 271 proceeding, no CLEC raised concerns regarding competition from or with Qwest's FX service, a service that has been tariffed in Washington for years and has relatively few customers.[57] Lastly, Qwest's definition does not "prohibit" VNXX. Rather, Qwest requires compensation for the long haul transport it provides to VNXX customers. AT&T, however, is unwilling to pay these costs.

c. The Commission should make no premature declarations about how the parties should operate under yet-to-be-implemented contract terms.

AT&T submits that if the Commission agrees with Qwest's definition of "Exchange Service," the Commission nonetheless has no authority to address the appropriate compensation for ISP-bound VNXX calls.[58] According to AT&T, the Commission "should confirm" that ISP-bound "FX-like" traffic is subject to the FCC's jurisdiction and the intercarrier compensation mechanism set forth in the *ISP Remand Order*.[59] AT&T is putting the cart before the horse. The Commission is called upon here to determine which definition of "Exchange Service" proposed by the parties better comports with the existing law.[60] Qwest's definition meets that standard, whereas AT&T's definition does not. Further,

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[56] In consideration of the ALJ's request to attempt to resolve this issue through negotiation, Qwest proposed to AT&T that AT&T compensate Qwest for the long-haul transport Qwest provides in a VNXX situation. AT&T, however, was not interested in exploring a resolution along these lines.

[57] As Mr. Freeberg explained, FX service is truly the exception, not the rule. Tr. at 95:20-96:9 (Freeberg; ALJ questions). There is no record upon which the Commission could find that Qwest's FX service competitively threatens AT&T, nor does AT&T challenge Qwest's response to AT&T's Information Request 030 stating that there are no more than 4,405 FX lines *in the entire state*.

[58] Ex. 11, Direct Testimony of Douglas N. Hyatt ("Hyatt Direct") at 30:7-11.

[59] *Id*. at 32:11-13.

[60] This arbitration involves different facts and a different definitional dispute than the Commission addressed between CenturyTel and Level 3. Seventh Supplemental Order, *Petition for Arbitration of an Interconnection Agreement between Level 3 Communications, LLC and CenturyTel of Washington, Inc.*, Docket No. UT-023043, 2003 Wash. UTC LEXIS 76 (Feb. 28, 2003). Level 3 and CenturyTel presented different definitions from either AT&T or Qwest that focused the dispute exclusively on intercarrier compensation for Internet-bound traffic.

Qwest's definition would not include *any* "FX-like" or VNXX traffic and, therefore, AT&T's claims of preemption would not be implicated and need not be addressed.[61] Finally, AT&T's claims of preemption here are inconsistent with its claim, discussed *infra* in connection with Issue 17, that this Commission should order Internet-bound traffic to be included in relative use calculations for the payment of interconnection trunks and facilities.

The Commission also should reject AT&T's request for determinations in its favor on two subissues: (i) whether the "status quo" should be maintained "whereby Qwest does not assess access charges on AT&T's FX service," and (ii) whether Qwest should "be permitted to assess access charges on AT&T's FX service and not be required to impute access charges to Qwest's competing FX service." AT&T's requests and positions suffer from a complete absence of evidentiary support and run afoul of fundamental cost causation principles. At the outset, Qwest *directly* assesses interexchange

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Furthermore, the significant concerns with numbering assignment and routing and rating of all calls that Qwest raises here and that other state commissions have recognized were not addressed in that decision.

The difference between the dispute between Level 3 and CenturyTel and this dispute between Qwest and AT&T is further highlighted by the fact that in the arbitration between *Qwest* and Level 3 in Washington, and in the parties' resulting interconnection agreement, the definition of "Exchange Service" was *not* arbitrated. Level 3 *agreed to Qwest's proposed definition*, which is the same in all material respects to the definition proposed here. *See* Fourth Supplemental Order; Final Commission Order, *Petition for Arbitration of an Interconnection Agreement between Level 3 Communications, Inc. and Qwest Corporation Pursuant to 47 U.S.C. section 252*, Docket No. UT-023042 ¶ 16 (Feb. 5, 2003) (noting parties' largely successful negotiations and arbitration of single relative use issue); Agreement for Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunication Services Provided by Qwest Corporation in the State of Washington with Level 3 Communications, LLC, § 4.24 ("Exchange Service" or "Extended Area Service (EAS)/Local Traffic" means traffic that is originated and terminated within the local calling area determined by the Commission") (dated Mar. 4, 2003). Thus, whereas the Commission may have rejected CenturyTel's position in that specific arbitration, Qwest's definition has withstood rigorous scrutiny in the 271 context, in which all interested Washington CLECs participated, and has been incorporated in numerous Washington interconnection agreements, including the recent agreement between Qwest and Level 3.

[61] AT&T's preemption claims are, in any event, overstated. The *ISP Remand Order* expressly did not displace the preexisting access regimes (for example, when an originating party dials a 1-800 number or dials a number that would be a toll number to reach an ISP). Rather, the *ISP Remand Order* reaffirms that existing interstate and intrastate access charge regimes apply to all traffic, including ISP-bound traffic, as they did before the *ISP Remand Order* was adopted. *See* Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. Nos. 96-98 & 99-68, 16 FCC Rcd 9151 ¶ 39 (2001) ("*ISP Remand Order*"), *remanded, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). The FCC has thus made clear that Congress "did not intend to disrupt . . . preexisting [access] relationships" among carriers, *id*. ¶ 37, whether based on state or federal rule.

charges on its FX customers, satisfying any imputation requirement.[62] Thus, the premise of AT&T's subissue (that Qwest may treat AT&T "differently" from its own FX customers) is flatly wrong. Further, the Commission has no basis for accepting AT&T's allusions to the "status quo" or making any determinations with regards to AT&T's alleged "FX service." AT&T identified no *AT&T* tariff provision that permits its "FX service" or any VNXX "provisioning option," and the only description of any product that AT&T has provided to this Commission is a *TCG* tariff regarding "PrimeConnect" service. However, AT&T has not described even the most rudimentary details of PrimeConnect, which by its own description hedges as to whether additional end user charges might be imposed due to TCG's obligations to pay intercarrier compensation on the calls.[63] AT&T could not identify any other VNXX-like "product.'[64] Furthermore, AT&T presented no documentation regarding the parties' alleged "status quo," no information about the number of VNXX customers it has in Washington, no evidence of Qwest's FX market in Washington, and certainly no evidence of any disputes with Qwest relating to Qwest's very few FX lines in Washington. Against this background, it is unclear what AT&T "FX service" is at issue, how it is provisioned and paid for, and against what evidentiary record AT&T seeks declaratory rulings concerning access charges on its "FX service" and Qwest's tariffed FX service. Because AT&T has no tariffed "FX service" and no coherently-described VNXX "product" or "provisioning option" the Commission can make no reasonable findings regarding it. The Colorado commission reached a similar conclusion, finding that any policy decision regarding access imputation methods should be addressed in a separate proceeding.[65] Similarly, the Minnesota commission rejected AT&T's requests for determinations on these alleged sub-issues, ruling only that Qwest's definition was the proper definition of "Exchange Service."

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[62] *See* Ex. 12, Ex. DNH-2, page 1, Qwest Tariff WN-U-40, section 5.1.4 B, sheet 16 and 5.1.4 D.2 and 5.1.4 D.3, sheet 26. Retail subscribers face per mile interexchange channel charges and interexchange channel terminal charges.

[63] Ex. 28, AT&T Response to Qwest Data Request 01-029 (Original Price Sheet 72.1a).

[64] *Id.*

[65] *Colorado Arbitration Order* ¶ 52.

For all of these reasons, the Commission should adopt Qwest's definition of "Exchange Service" and decline to make any further declarations relating to Issue 5.

C. Issue 17: Qwest's Language Complies With Commission Precedent, Cost-Causation Principles, and FCC Rules on Internet-Bound Traffic.

Issue 17 involves three subissues: (1) whether a relative use factor should apply to interconnection facilities that are used to carry non-local, non-telecommunications traffic bound for the Internet in the same way the factor applies to local 251(b)(5) traffic mutually exchanged between the parties; (2) whether a relative use factor should apply to "comparable facilities," meaning tariffed private line facilities used by interexchange carriers to carry AT&T traffic between the parties; and (3) the appropriate period for a "true up" of the parties' relative use. Qwest addresses each subissue in turn.

1. ISP-bound traffic should not be included in the parties' relative use calculations.

Although Qwest acknowledges that the Commission recently required the application of such a relative use factor in Qwest's arbitration with Level 3, the Commission also previously endorsed Qwest's language in the Washington 271 proceedings and in Docket UT-003013, the Commission's generic cost docket. Qwest continues to oppose this requirement as inconsistent with governing law and sound public policy. As Mr. Freeberg explains, moreover, AT&T's proposals in this proceeding raise issues that were not present in the Level 3 arbitration and which support a different determination here.

Under AT&T's proposal, Qwest would assume all of the interconnection facility costs associated with delivering Internet traffic to AT&T ISP customers. Requiring Qwest to pay for transmission facilities used to send Internet traffic to AT&T ISP customers violates the core FCC determinations that ISPs and their customers, not other carriers, should assume the costs they cause.[66] In this regard, there is no basis to distinguish the dedicated transport used to send Internet-bound traffic from the switching of the same traffic. To the extent both are used to provide service to ISPs, the costs of both should be recovered from the ISPs, not from other carriers.

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[66] *E.g.*, *ISP Remand Order* ¶¶ 4-5, 7, 69-71.

Qwest's proposed language appears in Qwest's Washington SGAT, the SGATs of Qwest's other 13 in-region states, and was found compliant with Qwest's checklist obligations by the FCC.[67] Qwest's language and position has been subject to federal court review by Level 3 in both Oregon and Colorado, and *both* courts upheld Qwest's language.[68] Given that two courts and the FCC have approved Qwest's language, Qwest respectfully contends that the Commission should follow its decisions from the cost docket and 271 proceeding and endorse Qwest's language.

Qwest's position is well-grounded in law and policy. Qwest's interconnection rights and obligations are defined in Sections 251(a)(1) and 251(c)(2) of the Act. Section 251(a)(1) imposes on Qwest and other ILECs the duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers," and Section 251(c)(2) explains that this obligation includes providing interconnection "for the transmission and routing of telephone exchange service and exchange access." There is a critical relationship between this obligation and Section 252(d)(2), the Act's cost recovery provision. Indeed, in defining the ILECs' cost recovery rights, Section 252(d)(2) expressly refers to the obligation of state commissions to establish "just and reasonable" rates "for the interconnection of facilities and equipment *for purposes of subsection (c)(2) of section 251*."[69]

Accordingly, Section 252(d)(1) of the Act *requires* the Commission to set rates for interconnection and network element charges that are "just and reasonable" and based on "the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element." In *Iowa Utils. Bd. v. FCC*, the United States Court of Appeals for the Eighth Circuit succinctly described the effect of these provisions: "Under the Act, an incumbent LEC *will* recoup the costs involved in providing interconnection and unbundled access from the

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[67] *Qwest 9-State Order* ¶ 325.

[68] *Level 3 Communications, LLC v. Public Utils. Comm'n of Oregon*, CV 01-1818, Opinion and Order (D. Or. Nov. 25, 2002) (slip op.). Judge Nottingham of the United States District Court for the District of Colorado recently granted from the bench Qwest's and the state defendants' motions for summary judgment on this issue. Judge Nottingham's written order, however, has not yet issued.

[69] 47 U.S.C. § 252(d)(2) (emphasis added).

competing carriers making these requests.'[70] By including Internet traffic in the calculation of relative use, AT&T's proposal would deny Qwest any recovery of its costs in violation of this critical requirement of the Act.

The policies that led the FCC to phase out the payment of intercarrier compensation for Internet traffic requires the exclusion of Internet traffic from the relative-use calculation.[71] In the *ISP Remand Order*, the FCC found that the payment of reciprocal compensation for Internet traffic under the Act causes uneconomic subsidies and encourages carriers to seek compensation from other carriers instead of from the cost-causing customer.[72] The FCC further found that the market distortions caused by reciprocal compensation payments "are most apparent in the case of ISP-bound traffic due primarily to the one-way nature of this traffic, and to the tremendous growth in dial-up Internet access since passage of the 1996 Act.'[73] By targeting ISP customers with large volumes of exclusively incoming traffic, the FCC found, CLECs are able to reap "a reciprocal compensation windfall.'[74]

In its *ISP Remand Order*, the FCC determined that Internet-bound traffic is not subject to reciprocal compensation under Section 251(b)(5).[75] Contrary to AT&T's curious claim that Internet-bound traffic is subject to Section 251(b)(5),[76] *scores* of FCC orders confirm that Internet-bound traffic is *not*.[77] Thus, none of the rules AT&T cites for application of a relative use factor to Internet-

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[70] *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 810 (8th Cir. 1997), *aff'd in part, rev'd in part, remanded, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (emphasis added) ("*Iowa Utils. Bd. I*").

[71] *ISP Remand Order* ¶¶ 77-82.

[72] *Id.* ¶¶ 67-76.

[73] *Id.* ¶ 69.

[74] *Id.* ¶ 70.

[75] The remand of the *ISP Remand Order* by the United States Court of Appeals for the D.C. Circuit in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), does not affect the FCC's determination. Rather, the remand turns on the court's determination that Section 251(g) of the Act could not provide the basis for the FCC's conclusion that reciprocal compensation is not owed for ISP-bound traffic. *See WorldCom, Inc.*, 288 F.3d at 434. Importantly, the court neither reversed nor vacated the *ISP Remand Order*. Thus, the *ISP Remand Order* remains in full force and effect.

[76] Ex. 36, Talbott Rebuttal, at 19:10-14.

[77] *See, e.g.*, Memorandum Opinion and Order, *Application by Verizon Maryland Inc., Verizon Washington, D.C. Inc., Verizon West Virginia Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select*

bound traffic applies. All of those rules apply *only* to traffic that is subject to Section 251(b)(5). Regardless whether AT&T intends to focus on serving ISPs, AT&T's proposal would shift onto *Qwest* all the costs of dedicated transport facilities that AT&T can recover from its ISP customers consistent with the principles the FCC established in the *ISP Remand Order*.[78] In the parties' recent arbitration in Colorado, the Colorado commission agreed with Qwest that Internet-bound traffic should not be included in relative use calculations.[79]

In addition, AT&T's position in this arbitration differs significantly from Level 3's position in the Washington Level 3 arbitrations. As mentioned above, Level 3 did not contest Qwest's proposed definition of "Exchange Service" and, accordingly, the parties' Washington interconnection agreement defines such service consistently with Qwest's proposed language in this proceeding. AT&T, in

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Services Inc., for Authorization to Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia, WC Dkt. No. 02-384, FCC 03-57 ¶ 147 (rel. Mar. 19, 2003); Memorandum Opinion and Order, *Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. for Authorization To Provide In-Region, InterLATA Services in New Jersey*, WC Dkt. No. 02-67, 17 FCC Rcd 12275 ¶ 160 (2002); Memorandum Opinion and Order, *Joint Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Dkt. No. 02-35, 17 FCC Rcd 9018 ¶ 272 (2002); Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Dkt. No. 01-138, 16 FCC Rcd 17419 ¶ 119 (2001); Memorandum Opinion and Order, *Application of Verizon New York, Inc., Verizon Long Distance for Authorization to Provide In-Region, InterLATA Services in Connecticut*, CC Dkt. No. 01-100, 16 FCC Rcd 14147 ¶ 67 (2001).

78 *ISP Remand Order* ¶ 76.

79 *See Colorado Arbitration Order* ¶¶ 83-85. The Colorado commission reached a similar determination in the previous arbitration between Qwest and Level 3, and as discussed above, that decision was recently upheld by a Colorado federal court. *See* Initial Commission Decision, *Petition of Level 3 Communications LLC, for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish and Interconnection Agreement with Qwest Corporation*, Dkt. No. 00B-601T, Decision No. C01-312, at 31-36 (Colo. P.U.C. March 30, 2001); Decision on Applications for Rehearing, Reargument, or Reconsideration, *Petition of Level 3 Communications LLC, for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish and Interconnection Agreement with Qwest Corporation*, Dkt. No. 00B-601T, Decision No C01-477, at 6-8 (Colo. P.U.C. May 7, 2001). State commissions in Nebraska and Oregon have also endorsed Qwest's position and language on this issue. *See* Order – Interconnection Agreement Approved as Modified, *Level 3 Communications, LLC of Broomfield, Colorado, Seeking Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation, of Denver, Colorado*, Application No. C-2780, at 3-8 (Neb. P.S.C. April 22, 2003); Commission Decision, *Petition of Level 3 Communications LLC, for Arbitration Pursuant to § 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, with Qwest Corporation Regarding Rates, Terms, and Conditions for Interconnection*, Dkt. No. ARB 332, at 3-5 (Or. PUC Sept. 13, 2001), *aff'd*, Opinion and Order, *Level 3 Communications, LLC v. Public Utis. Comm'n of Oregon*, CV 01-1818-PA (D. Or. Nov. 25, 2002). Qwest recognizes that this Commission in the Level 3 arbitration and commissions in Minnesota and New Mexico have disagreed with Qwest.

contrast, seeks not only the inclusion of ISP traffic in the parties' relative use calculation, but to foist onto Qwest AT&T's costs of carrying VNXX calls to distant local calling areas. These twin provisions exacerbate AT&T's cost-shifting away for AT&T's cost-causing customers and onto Qwest. For these reasons, the Commission should find that Internet traffic should not be included in the parties' relative use calculations.

2. The Commission should reject AT&T's "comparable facilities" language.

AT&T also seeks to apply a relative use factors to "other comparable facilit[ies] providing equivalent functionality" to direct trunk transport and entrance facilities. AT&T states in Mr. Talbott's testimony that by "other comparable facilities" AT&T primarily means private line transport services ("PLTS") that interexchange carriers purchase out of Qwest's tariffs. For several reasons, the Commission should reject AT&T's proposed expansion of relative use.

First, use of a Qwest PLTS circuit for transport of AT&T local interconnection traffic is an option available to AT&T, not a requirement of AT&T. AT&T purchases PLTS from Qwest's tariffs for a variety of purposes, not the least of which is to carry AT&T long distance traffic. At AT&T's request, Qwest has agreed that AT&T may use any spare capacity it has on PLTS to deliver its local traffic, thus avoiding any concomitant payment to Qwest. AT&T decides to use the PLTS when it submits its Access Service Request ("ASR"), and AT&T is under no obligation to choose this configuration for any of its trunking. Thus, Qwest's language provides AT&T an additional trunking *option* that is beneficial to AT&T.

Moreover, contrary to AT&T's reliance on 47 C.F.R. § 51.703(b), Qwest does not "assess" any charges on AT&T for exercising this option. AT&T pays no more than the tariffed rate it already paid for these multi-use facilities if AT&T chooses to place its local traffic on spare circuits. In other words, AT&T's PLTS payment is the same with or without the local trunk group on the otherwise idle channels. The Colorado commission has agreed that because Qwest assesses no additional charge when the AT&T elects the two-way PLTS option, AT&T has no cost to share.[80] If AT&T chooses to put the traffic that it delivers to Qwest on this spare capacity, AT&T actually avoids additional costs.

Although this Commission previously endorsed another form of ratcheting advocated by CLECs,[81] the FCC's recently issued *Triennial Review Order* supports Qwest's position. In the *Triennial Review Order*, the FCC addresses whether incumbent LECs must permit CLECs to "commingle" certain UNEs with services provided under tariffs, such as special access services. The FCC concluded that while incumbent LECs must permit commingling of certain services, CLECs are *not* entitled to "ratcheting" (or adjustment) of the rates of the special access circuits to account for the local usage.[82] Thus, the FCC has determined that CLECs could commingle UNEs and special access services, but that a prohibition on "ratcheting" would ensure that CLECs did not obtain reduced or discounted prices on tariffed special access services.[83] AT&T's proposed application of its language necessarily results in a reduced DS-3 rate.

Although AT&T's proposed contract language does not state how it would apply its relative use/ratcheting proposal, as Mr. Talbott explained AT&T's proposal, if AT&T (not Qwest) chooses that the carriers will exchange two-way traffic on a Qwest-provided DS-3 PLTS circuit, and Qwest's relative use is equal to a DS-1 level of capacity, Qwest would not bill AT&T for 1/28th of the cost of the DS-3 facility, and AT&T would pay Qwest for the pro rata billing for the remaining 27 DS-1

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[80] *Colorado Arbitration Order* ¶ 67.

[81] The Commission in the 271 proceeding held that Qwest must ratchet intrastate PLTS circuits to TELRIC rates to the extent those spare circuits are used to carry interconnection traffic. Qwest anticipates that the parties will negotiate changes to conform this agreement to the *Triennial Review Order*. Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dkt. Nos. 01-338, 96-98, 98-147, FCC 03-36 (rel. Aug. 21, 2003) ("*Triennial Review Order*"). Regardless, as discussed herein, however, the Commission recognized that it could not apply its ruling to federally-tariffed PLTS. *See* 34th Supplemental Order; Order Regarding Qwest's Demonstration of Compliance with Commission Orders, *Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Dkt. Nos. UT-003022, UT-003040, ¶ 22 (May 2002) ("*34th Supplemental Order*").

[82] *Id.* at ¶ 580.

[83] *Id.* at ¶ 583 & n. 1800.

channels.[84] This is precisely the sort of "blended rate" application the FCC rejected and, accordingly, AT&T's proposed language directly conflicts with the *Triennial Review Order*, which expressly prohibits the ratcheting and apportionment AT&T's proposal would require.[85]

Moreover, even if the Commission were inclined to adopt AT&T's position on relative use, it could not apply its determination to PLTS that is purchased out of a federal tariff, Tariff F.C.C. No. 1,[86] because this alters the FCC-tariffed rates, terms, and conditions. As this Commission previously recognized in the 271 setting when CLECs requested ratcheting of tariffed PLTS, federal interstate tariffs are subject to the sole and exclusive jurisdiction of the Federal Communications Commission: "We agree that this Commission may not assert jurisdiction over the pricing of interstate facilities, and *cannot order Qwest to apply proportional pricing to those facilities*."[87] Many courts similarly recognize that state commissions have no authority to interpret, enforce, or regulate federally-tariffed services.[88] For example, in *AT&T Communications of the Mountain States, Inc. v. Public Serv. Comm'n of Wyoming*,[89] the court, citing the Supreme Court's decision in *Smith v. Illinois Bell Tel. Co.*,[90] stated:

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[84] Ex. 36, Talbott Rebuttal, at 24:1-10.

[85] *Triennial Review Order*, ¶¶ 580; 582 & n. 1793; 583 & n. 1800. Here AT&T proposes that a unique, new DS1 rate be created by dividing the DS3 rate by 28. In general, the DS1 rate is not 1/28th of the DS3 rate. AT&T proposes blending of rates to create a new DS3 rate.

[86] Under FCC rules, if ten percent or more of traffic over a PLTS is interstate, the PLTS is deemed an interstate facility purchased from the FCC tariff. *See* 47 C.F.R. § 36.154(a), Subcategory 1.2.

[87] *34th Supplemental Order* ¶ 22 (emphasis added).

[88] *See Illinois Bell Tel. Co. v. Globalcom, Inc.*, No. 03 C 0127, 2003 U.S. Dist. LEXIS 7620 at *9-10 (N.D. Ill. May 5, 2003) ("FCC tariffs pertain to interstate, not local, telecommunications services and exist exclusively under federal authority. There is no overlapping state/federal jurisdiction over them. We cannot stop the FCC from approving them initially, we cannot fault a carrier for enforcing them later in a manner intended by the FCC, and we cannot change the FCC's interpretation of them. . . . With regard to FCC tariffs, there is no state power to require remedial action that would contravene FCC rulings regarding those tariffs"); *Qwest Corp. v. Scott*, Civil No. 02-3563 ADM/AJB, 2003 U.S. Dist. LEXIS 818 (D. Minn. Jan. 8, 2003) (overturning state commission attempt to impose performance requirements on federally-tariffed services on grounds that FCC authority over FCC tariffs is exclusive).

[89] 625 F. Supp. 1204 (D. Wyo. 1985).

[90] 282 U.S. 133 (1930).

> The *Smith* Court went on to say that the interstate tolls were not a matter for determination by state commissions, but rather were exclusively federal matters.[91]

Thus, neither Qwest, its customers, nor state regulators can modify the terms and conditions of a federal tariff without following specific procedures set forth in the Communications Act.[92] This is so because "a tariff, required by law to be filed, is not a mere contract. It is the law.'[93]

Here, the federal tariff does not permit AT&T's proposed language, and this Commission has previously stated that it can take no action to modify it. Section 2.7 of Qwest Tariff F.C.C. No. 1 covers shared use of an interstate special access circuit. This tariff provides for proportional charges for shared services, but *only for shared use of federally-tariffed services*. However, when PLTS is shared with *local exchange service*, this tariff provides *no apportionment* based the use of the facility. The tariff prohibits any cost adjustment based upon the local use of the PLTS. Consequently, the tariff precludes apportioning the costs of the PLTS based upon relative use:

> 2.7.1. PLTS with Local Exchange Service
>
> PLTS and Local Exchange Service may be provided on a Shared Use facility. *However, individual recurring and nonrecurring charges shall apply for each PLTS and Local Exchange Line. The Shared Use facility is not apportioned*.[94]

Thus, Qwest's Tariff F.C.C. No. 1 does not permit apportioning costs between PLTS and local exchange uses. Because it precludes apportioning, it precludes application of a relative use factor to reduce the tariffed rate.

Moreover, any adjustment to the tariffed rate would violate the filed-tariff doctrine. *American Tel. & Tel. Co. v. Cent. Office Tel.*,[95] involved an action brought by a long-distance reseller against

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[91] 625 F. Supp. at 1208

[92] *See Carter v. AT&T*, 365 F. 2d 486, 496 (5th Cir 1966) (upholding referral of question of tariff validity to FCC under doctrine of primary jurisdiction), *cert denied*, 385 U.S. 1008 (1967).

[93] *Id.*; *Marcus v. AT&T*, 138 F. 3d 46, 56 (2d Cir. 1997) (upholding removal "[b]ecause the tariff is filed with the FCC pursuant to the FCA, . . . the breach of warranty claim arises under federal law.").

[94] (Emphasis added).

[95] 524 U.S. 214 (1998).

AT&T, alleging breach of contract and tortious interference with contract arising from alleged defects in AT&T's provisioning and billing of services. The District Court entered a judgment based on a jury verdict for the reseller. The Court of Appeals for the Ninth Circuit affirmed in part, but the Supreme Court reversed, holding that the reseller's claims were barred by the filed-tariff doctrine. AT&T had been required to file tariffs with the FCC. Citing a long line of cases, the Supreme Court held that these tariffs preempted plaintiff's claims. As the Court explained, the rate filed is "the only lawful charge" and "[d]eviation from it is not permitted upon any pretext.'[96] Under the "filed-tariff doctrine" (which is not limited to rates),

> the Supreme Court has ruled that where the FERC [Federal Energy Regulatory Commission] has lawfully determined a rate, allocation, or other matter, a state commission cannot take action that contradicts the federal determination. And even without explicit federal approval of a rate, the Court has treated a rate reflected in a FERC tariff as setting a rate level binding on a state commission in regulating the costs of the purchasing utility.[97]

AT&T acknowledges that under its proposal, it would be charged only a "pro rata" portion of the tariffed rate.[98] If AT&T obtains a "rebate" on PLTS provided under a federal tariff based upon Qwest's relative use, then AT&T would be receiving a different, lower rate than other carriers that purchase services out of that tariff, in contravention of the filed-tariff doctrine. Accordingly, the Commission cannot apply a relative use factor to federally-tariffed PLTS. If AT&T wants to modify Qwest's federal tariffs to accommodate its relative use proposal, it must go to the FCC, which has sole jurisdiction to hear such a claim.

For all these reasons the Commission should decline to apply a relative use factor to ISP-bound traffic and should reject AT&T's "comparable facilities" language.

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[96] *Id.* at 422 (quoting *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915)).

[97] *Public Serv. Co. of New Hampshire v. Patch*, 167 F.3d 29, 35 (1st Cir. 1998) (citing *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373-74 (1988)); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-66 (1986); *cf. Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951).

[98] Ex. 36, Talbott Rebuttal at 24:3-10.

3. The Commission should adopt Qwest's position on true up of traffic levels.

Qwest generally opposes true ups. Although commission-imposed true ups of rates are impermissible, as Qwest's proposed language provides, an adjustment relating to traffic volumes exchanged during the first quarter may be appropriate given the actual balance of traffic exchanged between the parties. To the extent that the initial default relative use factor of 50% does not reflect the parties' actual traffic flows, the agreement should provide incentives to the adjust the factor promptly to reflect actual volumes. Applying a true up to the first quarter only appropriately encourages the parties to address any adjustment to the relative use factor early. By contrast, allowing for retroactive true ups beyond the first quarter simply provides an incentive to put off such an adjustment indefinitely. The Colorado commission recently agreed with Qwest's position on this subissue,[99] and this Commission should as well.

D. Issue 18: The Commission Should Adopt Qwest's Proposal For Symmetrical Treatment of Tandem Transmission Charges.

Issue 18 involves whether AT&T can "assume" that it provides Qwest 9 miles of common transport in those circumstances in which AT&T is entitled to compensation at the tandem switching rate. Qwest does not dispute that 47 C.F.R. § 51.711 requires symmetrical reciprocal compensation rates, and it does not dispute that if AT&T provides tandem transmission, the rates in Exhibit A to the SGAT would apply. However, AT&T's proposal is not symmetrical. The only time Qwest applies an assumed nine-mile charge for tandem transmission is for *transiting* calls. A transited call is neither originated nor terminated by Qwest and, accordingly, is not subject to reciprocal compensation under Section 251(b)(5). AT&T seeks to apply the assumed nine-mile rating to *non*-transited calls. When Qwest terminates non-transit local calls, Qwest applies an actual airline mileage.

AT&T appears to suggest that because it does not deploy tandems and end office switches, it should be paid for an assumed 9-miles of tandem transport even if it provides no tandem transport

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[99] *Colorado Arbitration Order* ¶ 82.

whatsoever.[100] However, as Mr. Freeberg explained, where Qwest's tandem and Qwest's end office are in the same building, and Qwest provides zero miles of tandem transmission, Qwest rates tandem transmission at zero-mileage.[101] Mr. Freeberg further explained that where Qwest's switch is both a tandem and an end office, Qwest charges zero tandem transmission:

> A. Here's what I think is true. I believe that AT&T holds that its switches are simultaneously both a tandem and an end office. And when this is the case for Qwest and Qwest is terminating a call from a CLEC to a switch like this, in calculating the terminating charge which Qwest applies, Qwest measures the distance between the Qwest tandem and the Qwest end office as zero miles.
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> So when a Qwest switch is both a tandem and end office, and that does happen, in that case, when Qwest measures that actual distance, it measures it as zero, and so here I think Qwest is holding that AT&T should do the same.[102]

Accordingly, AT&T claims that under identical circumstances, it should be permitted to charge 9-miles of assumed transport where Qwest charges none. This is not symmetrical. The Colorado commission rejected AT&T's position on Issue 18,[103] and this Commission should as well.

E. Issues 21 & 30: Qwest Cannot Be Required To Pay AT&T For Traffic That Qwest Neither Originates Nor Terminates.

1. Qwest cannot be charged for traffic that it neither originates nor terminates.

Issues 21 and 30 relate to handling of charges when Qwest acts as a transit provider, and the originating carrier (not Qwest) fails to send the proper information, such as calling party number ("CPN"), the focus of Issue 21, and operating company number ("OCN") or carrier identification codes ("CIC), the focus of Issue 30. Underlying both issues is AT&T's erroneous presumption that it can charge Qwest for traffic originated by other carriers that transits Qwest's network on its way to AT&T. It cannot. As the Colorado Commission recently found, there is no obligation anywhere in the Act for

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[100] Ex. 36, Talbott Rebuttal at 30:8-12. Mr. Talbott's testimony appears to have a typographical error (the omission of the word "not") on line 10.

[101] Ex. 73, Freeberg Rebuttal, at 41:14-19.

[102] Tr. at 152:11-23 (Freeberg cross).

[103] *Colorado Arbitration Order* ¶ 92.

Qwest to pay for traffic that Qwest neither originates nor terminates.[104] Furthermore, there is no basis in the law or evidence for requiring Qwest to incur the cost of identifying or paying for traffic when the originating carrier (*not Qwest*) fails to send the appropriate call identification information to AT&T.

To dispel any possible confusion, there is no dispute that Qwest follows industry guidelines and standards and passes on to the next carrier whatever information Qwest receives in the signaling stream.[105] Thus, Qwest does *not* "refuse" to provide this information to AT&T. Instead, this dispute centers on information *not* provided in the signaling stream. AT&T's position is that Qwest should pay for traffic if Qwest does not (for free) obtain certain information for AT&T. For a host of reasons, AT&T's position is unfair and should be rejected.

First, AT&T seeks to punish Qwest (by requiring Qwest to pay for "no CPN" traffic unless such traffic is associated with a call record that includes OCN or CIC) when the originating carrier, not Qwest, is responsible for the absence of CPN. Qwest should not be inserted into this dispute. AT&T can connect with other carriers directly and address with those carriers how to rate no-CPN calls that those carriers originate. Indeed, all local exchange carriers, including AT&T, have an obligation under Section 251(b)(5) of the Act to establish compensation arrangements with the carriers with whom they exchange traffic. AT&T acknowledges that it has made a business decision to use Qwest as a transit provider rather than interconnect with other Washington carriers.[106] When Qwest is handed a no-CPN call, Qwest forwards the call, as it is received, without the information. (This includes AT&T-originated calls that lack CPN, OCN, or CIC and are bound for other carriers). It would only create disputes to require Qwest to populate originating OCN on the record of a call that is missing CPN. This is because Qwest does not necessarily receive the call from the carrier who originated it. The most accurate identification is provided by the carriers originating the traffic. If AT&T chooses to exchange traffic with

[104] *Id.* ¶ 124.

[105] Ex. 73, Freeberg Rebuttal, at 49:5-16. Qwest routinely supplies CIC on jointly-provided switched access records per industry billing standards.

[106] Ex. 36, Talbott Rebuttal, at 33:15-17 ("When AT&T exchanges a relatively small volume of traffic with such carriers it is simply not practical to interconnect separately to each of them").

other carriers through Qwest rather than via direct trunking to other carriers, AT&T, not Qwest, should also assume the business risk of no-CPN traffic and missing OCN/CIC information.

In addition, although AT&T seeks to charge Qwest for this traffic, it will not agree to pay Qwest for its efforts to identify the originating carrier of this traffic on a call record.[107] Mr. Freeberg testified that because Qwest does not always receive a transit call from the originating carrier, identification of the originating carrier is not as simple as AT&T makes out.[108] Because a transit call may transit more than one network, Qwest is not always directly interconnected with the originating carrier. Consequently, it would require significant systems development to devise a means to identify the originating carrier of the traffic that lacks CPN.[109] Thus, whereas AT&T suggests that it "only" intends to charge Qwest if Qwest does not provide the missing information, this offer is hollow since Qwest sends what CPN it receives, and AT&T refuses to pay Qwest to develop a means for collecting and supplying additional information (originating OCN). In other words, AT&T wants to have its cake and eat it, too.

Furthermore, coupled with AT&T's request to increase the threshold for no-CPN traffic, its request that Qwest pay for unidentified traffic is even more unfair. For example, when it is *sending* a call, AT&T proposes that the threshold of no-CPN traffic should be increased to 10 percent. When it is *receiving* traffic, AT&T proposes it should collect exchange access charges associated with no-CPN traffic and hold Qwest, as the transit provider, liable for the no-CPN traffic of other CLECs. When other CLECs in Washington "opt-in" to AT&T's agreement, this approach results in those CLECs sending up to 10 percent of their traffic to Qwest without CPN with impunity, and, when that traffic transits Qwest's network for termination to AT&T, AT&T would look to Qwest for compensation for this same traffic.[110]

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[107] Tr. at 171:11-172:2 (Freeberg redirect).

[108] *Id*. at 167:15-169:15 (Freeberg; ALJ questions).

[109] Ex. 73, Freeberg Rebuttal, at 48:8-49:4; Tr. at 169:16-170:6 (Freeberg; ALJ questions).

[110] Ex. 73, Freeberg Rebuttal, at 46:9-21.

Finally, AT&T's claim that its language applies reciprocally is cold comfort. AT&T acknowledges that it declines to interconnect with many of the independent carriers, wireless and paging carriers, and CLECs in Washington.[111] Thus, as a practical matter, Qwest does and will transit far more traffic than AT&T.[112]

The problems created when an originating carrier fails to provide CPN are not problems Qwest creates. Furthermore, the solution to this problem is one that requires industry cooperation.[113] Qwest should not be saddled with the costs of this traffic between two other carriers. As the Colorado commission found in adopting Qwest's position on Issue 30:

> AT&T's proposal to bill the transiting carrier when CICs or OCNs are not provided is little more than passing of its bill collection problems onto Qwest. AT&T is the terminating carrier and not the transiting carrier more often than Qwest, so AT&T's proposal would benefit AT&T economically. This is an industry-wide issue that should be addressed at the industry level. Qwest should not be held financially responsible for an issue that is industry-wide and for which Qwest has no legal obligation. Farther [sic], AT&T is free to enter into an agreement with Qwest to pay a fee for the services requested from Qwest by AT&T.[114]

2. With regards to CPN (Issue 20), the Commission should adopt the low five percent threshold Qwest proposes and apply the switched access rate to all traffic lacking CPN.

Qwest's proposed language for Issue 20 is the identical language in Qwest's approved Washington SGAT, and Qwest's SGAT contains a five percent cap on no-CPN traffic.[115] Both the Colorado and Minnesota commissions agreed that the five percent cap was preferable given the admittedly low average volume of no-CPN traffic currently exchanged and the desire of all parties to minimize no-CPN traffic.

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[111] Ex. 36, Talbott Rebuttal, at 33:14-21.

[112] Ex. 73, Freeberg Rebuttal, at 47:20-48:7 & n. 46 (noting that Qwest delivers at least twice the transit traffic to Washington CLECs as the CLECs deliver to Qwest); Tr. at 157:18-158:13 (Freeberg cross).

[113] Ex. 73, Freeberg Rebuttal, at 47:1-8; Tr. at 169:3-15 (Freeberg; ALJ questions).

[114] *Colorado Arbitration Order* ¶ 181.

[115] Ex. 68, Freeberg Direct, at 42:1-22.

As Mr. Freeberg testified, Qwest and Washington CLECs currently exchange no-CPN traffic at 1-2%, well below the 5% threshold of no-CPN traffic that Qwest proposes.[116] AT&T, while acknowledging that no-CPN traffic is undesirable, proposes nevertheless to double the threshold for it. AT&T claims that this Commission should sanction a higher level of no-CPN traffic because other BOCs have agreed to a 10% cap in their interconnection agreements. In Washington, however, a 10% cap is not necessary or desirable, given the low average that currently exists.

AT&T further claims that the Commission should increase the cap because AT&T serves primarily business customers and some business customers use customer premises equipment ("CPE") that cannot relay CPN. AT&T, however, has not presented any evidence regarding how many (or even if any) of its business customers use this type of CPN. Furthermore, as the Colorado commission noted, the type of CPE AT&T mentions has been in the market for a long time and, therefore, is already captured in the 1-2% average no-CPN traffic exchange today.[117] If this older CPE[118] presented such a significant problem, it would have skewed the Washington average already.

Lastly with regards to Issue 20, Qwest proposes that the parties pay the switched access rate for no-CPN traffic exchanged between them. AT&T's proposal to apply a percent of local use or PLU factor to no-CPN traffic is overly complex. Under AT&T's approach, the carriers would be required to employ systems and resources to dissect what is already a very small fraction of all traffic exchanged.[119] Charging all no-CPN at a single, higher switched access rate is administratively easier. Applying a single switched access charge is also a better motivator of accurate call identification. For example, in the event that one company shows a dramatic increase in no-CPN traffic, the switched access charge will provide reasonable incentive to that company to identify the problem and to solve the problem expeditiously.[120] Because applying the exchange access rate to unidentified traffic serves as an

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[116] Ex. 68, Freeberg Direct, at 45:20-21.

[117] *Colorado Arbitration Order* ¶ 122.

[118] 47 C.F.R. § 64.1601.

[119] Ex. 68, Freeberg Direct, at 46:4-12.

[120] Ex. 73, Freeberg Rebuttal, at 45:8-15.

incentive for both companies to fully identify as much traffic as possible, the Commission should adopt Qwest's position on this Issue 20 subissue.

F. Issue 33: The Commission Should Adopt Qwest's Position for Section 21.2.4.

"Alternatively-billed calls" are billed as collect calls, billed to a third number, or billed to a credit card.[121] Qwest's disagreement with AT&T regarding alternatively-billed calls is limited to those calls that are billed to AT&T's UNE and resale customers.

Alternatively-billed calls for AT&T's UNE and resale customers should be addressed in the interconnection agreement, which spells out the terms and conditions for UNE and resale services, because these calls must be handled differently than other alternatively-billed calls.[122] Contrary to AT&T's suggestion that there is nothing inherently different about these calls,[123] they must be handled differently because existing industry billing arrangements route billing information to the owner of the NPA-NXX.[124] Thus, Qwest receives billing information for alternatively-billed calls for AT&T's UNE and resale customers, even though the end users are CLEC customers, not Qwest customers.[125]

AT&T concedes that Qwest's proposal for handling alternatively-billed calls reflects the way AT&T and Qwest have handled these calls for more than five years.[126] Qwest's proposal is also consistent with the way in which these calls are typically handled in the industry and with agreements AT&T and Qwest have reached in the undisputed portions of the agreement. Nonetheless, AT&T now claims that Qwest's proposal is incomplete, would shift to AT&T the costs and risks of billing and collection, and does not adequately compensate AT&T. As discussed below, these contentions must fail.

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[121] The parties' dispute relates only to collect calls and calls billed to third parties. Since Qwest does not resell its credit cards, these calls are not subject to the Interconnection agreement.

[122] Ex. 62, WRE-1T, Direct Testimony of William R. Easton ("Easton Direct"), at 5:11-15; Ex. 63, WRE-2RT, Rebuttal Testimony of William R. Easton ("Easton Rebuttal"), at 2:2-15.

[123] Ex. 8, Ex. MH-3T, Rebuttal Testimony of Michael Hydock ("Hydock Rebuttal", at 6:18-21.

[124] Ex. 62, Easton Direct, at 5:10-6:21.

[125] Ex. 63, Easton Rebuttal, at 2:13-15.

[126] *See* Ex. 6, Ex. MH-1T, Direct Testimony of Michael Hydock ("Hydock Direct"), at 19:23-20:4.

1. Qwest's proposal is complete.

AT&T's focus only on the language in Section 21.2.4 is too narrow. Section 21.2.4 is only one of many related provisions of the interconnection agreement that have a bearing on this issue.[127] Taken together, these sections set forth all of the provisions necessary for a complete agreement regarding billing for alternatively-billed calls for AT&T's UNE and resale customers.

To support its claim, AT&T points to a 16-page agreement between AT&T and SBC (SBC Agreement). A review of the SBC Agreement reveals that most of its terms are addressed in the interconnection agreement at issue in this docket. In fact, most of the 16-page SBC Agreement addresses standard contract terms such as those that are covered at length in the interconnection agreement presented in this docket. Accordingly, Qwest's proposal is as complete as the SBC Agreement.

2. Qwest's proposal does not shift any risk.

Qwest's proposal does not shift any collection risk because it preserves the parties' handling of these calls under AT&T's existing interconnection agreement. Qwest's proposal also reflects the method by which alternatively-billed calls are typically handled by the industry, under which the local carrier (in this case, AT&T) handles the billing and collection for their customers. This method is appropriate because alternatively-billed calls provide a service to AT&T's UNE and resale customers by allowing them to receive collect calls or to charge calls to their home phone when they are away. Thus, contrary to AT&T's assertion, Qwest's proposal does not shift any responsibilities, but maintains the status quo.

In its pre-filed testimony, AT&T includes a discussion of "billing relationships that will be required when a third party is involved."[128] However, the issues Mr. Hydock describes are not unique

[127] For example, Section 6.1.1 of the agreement addresses resale services, including Qwest toll billing. Section 12.2.5.2.1 specifies that Qwest provide usage records for resale and UNE customers to the CLEC to allow for the billing of these services. Section 12.2.5.2.3 specifies how usage information related to alternatively-billed calls is to be passed to AT&T. Finally, Section 21.5.1 states that "the CLEC shall be responsible for providing all Billing information to its Customers who purchase Unbundled Network Element, combination, or resold service from CLEC."

[128] Ex. 6, Hydock Direct, at 16:4-19.

issues resulting from Qwest's proposal. Instead, these issues simply reflect the status quo with regard to billing and collection responsibilities, consistent with how billing for this type of call is typically handled in the industry and how Qwest and AT&T have handled billing for alternatively-billed calls for the past five years.[129] Thus, the issues cited by AT&T are no different than the issues faced by other local service providers, including Qwest, in dealing with alternatively-billed calls.

Moreover, Qwest makes available -- at no charge -- a call blocking service that CLECs can order for unbundled and resold lines that blocks collect and third party billed calls and, therefore, can be used to limit the risk from problem customers.[130] Thus, if AT&T believes that the risk of an uncollectible bill for alternatively-billed calls outweighs its desire to provide those services to its customers, then AT&T can block those services for a particular customer and bear no risk of a bad debt. Qwest on the other hand, is not in a position to make this business decision because the end user is not a Qwest customer.

3. Qwest's proposal adequately compensates AT&T.

Qwest's proposal provides that AT&T will be compensated for its billing and collections efforts through the application of the wholesale discount or a sharing of the industry standard CMDS fee.[131]

AT&T's proposed language states that, if the parties are willing to enter into an arrangement regarding billing and collection for alternatively-billed calls, the terms of that agreement should be the subject of a separate agreement. AT&T points to the SBC Agreement as an example of such a separate agreement. However, the SBC Agreement not only represents a significant departure from the way these calls are typically handled in the industry, but also appears to greatly disadvantage SBC -- and would certainly greatly disadvantage Qwest.[132]

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[129] Ex. 63, Easton Rebuttal, at 5:13-21.

[130] *Id.* at 4:4-11.

[131] Ex. 62, Easton Direct, at 4:17-8:2.

[132] Ex. 63, Easton Rebuttal, at 6:1-7:6.

The SBC Agreement provides that AT&T will receive a 40% discount on all accounts receivable and a $ .05 per message fee.[133] The 40% discount applies for all calls, whether originated by an AT&T toll customer or another toll carrier's customer. Consider, for example, a $10 alternatively-billed call originated by Verizon and billed to an AT&T UNE customer served by a Qwest switch. Through the CMDS process, Qwest would reimburse Verizon $10, less a $.05 handling fee. Under the terms of the SBC Agreement, Qwest would then apply the 40% discount and bill AT&T for only $6.00. In addition, Qwest would pass on to AT&T the $.05 handling charge it is permitted to hold back from Verizon. Thus, for its efforts in handling this call, Qwest would incur a loss of $4.00, even though neither the customer who initiated the call nor the customer to whom the call is billed is a Qwest customer. AT&T, on the other hand, could receive as much as $ 4.05 (the 40% discount plus the handling fee). Such a fee would be excessive, particular in light of the fact that other local carriers routinely take on the same responsibilities and risks for the industry standard $.05 CMDS handling fee.

On its face, the terms of the SBC Agreement cannot be justified from SBC's business perspective. Indeed, it is not clear from the terms of the agreement itself why SBC would enter into such a one-sided arrangement. It is possible that the SBC Agreement was just one part of a larger transaction in which SBC negotiated more favorable terms on another issue in return for the distinctly unfavorable terms in the SBC Agreement. However, AT&T produced only the SBC Agreement itself, without any additional information regarding the context in which that agreement was reached. The Commission, therefore, should give the agreement little weight.

4. Qwest's proposal maintains the status quo.

Qwest is concerned about how these alternatively-billed calls would be handled if AT&T's proposal is adopted. AT&T's proposed language states that the interconnection agreement "does not contain an arrangement by which the parties compensate one another for alternatively-billed calls," but, if the parties are willing to enter into an arrangement for billing and collection of these calls, "the terms for any arrangement, including compensation arrangements, would be the subject of a separate

[133] *See* Ex. 7, SBC Alternate Billed Services Agreement; *see also* Ex. 63, Easton Rebuttal, at 6:1-7:6.

agreement." In addition, although AT&T admits AT&T and Qwest "have already been employing [Qwest's] suggested billing arrangement in Washington," it then attempts to dismiss the existing arrangement as "language without any impact."[134] Thus, it appears that, if AT&T's proposal is accepted, AT&T may take the position that the existing arrangement is terminated unless and until the parties enter into a new, separate agreement. Without an agreement as to how these charges will be handled, Qwest and other originating carriers may be left without compensation for handling these calls.

Qwest's proposal maintains the method by which Qwest and AT&T are currently handling alternatively-billed calls. It is also consistent with the agreements AT&T and Qwest have reached in the undisputed portions of the agreement. AT&T has not offered a workable alternative arrangement to Qwest's proposal. Without an agreement as to how alternatively-billed calls will be handled for UNE and resale customers, Qwest and other originating carriers will possibly be left without compensation for handling these calls.

Accordingly, Qwest respectfully requests that its proposal for Section 21.2.4 be adopted. Alternatively, if this issue is decided in AT&T's favor, Qwest requests that the ALJ and the Commission provide that the parties continue to abide by the existing process -- as they have for the past several years -- until AT&T and Qwest reach a separate agreement addressing alternatively-billed calls for AT&T's resale and UNE customers. This approach is appropriate because it maintains the status quo and provides a workable billing method until a different agreement is reached.[135]

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[134] Ex. 6, Hydock Direct, at 17:3-10.

[135] Both the Minnesota and Colorado commissions included language in their orders preserving the status quo until a separate agreement is reached. *Minnesota Arbitrators' Report* ¶207 ("A separate billing and collection agreement for alternatively billed calls for UNEs and resale customers should be negotiated by AT&T and Qwest. . . . Qwest . . . reasonably needs to have a workable process now. Therefore, . . . until [a separate] agreement is adopted, UNEs and resale shall continue to be billed directly to the provider and not employ CMDS."); *Colorado Arbitration Order* ¶196 ("Qwest requests that if the Commission decides in favor of AT&T that the Commission order the parties to continue to abide by the existing process until a separate agreement is reached. We grant Qwest's request.").

G. Issue 34: Because AT&T Is Not Obligated Under The Agreement To Offer Qwest Corporation As An IntraLATA Toll Provider To AT&T Customers, The Commission Should Adopt Qwest's Proposed Language For Section 21.8.

Issue 34 involves how to bill the small number of AT&T customers who have chosen Qwest Corporation, the incumbent LEC, as their preferred intraLATA toll provider, but not local service provider. Where Qwest is not an end user's local service provider, it has no means of billing the end user for intraLATA toll service only. Thus, as a result of the high billing costs, Qwest cannot offer intraLATA toll only service competitively.[136]

Unlike the situation in some states, Qwest is not required to provide AT&T's end user customers' intraLATA toll service in Washington. Accordingly, when AT&T provides local service to its end user customers, Qwest does not require AT&T to offer Qwest intraLATA toll service to AT&T customers. Indeed, Qwest's proposed language makes it clear that Qwest does not even *authorize* AT&T to offer to its customers Qwest as an LPIC.[137]

Nevertheless, AT&T claims that Qwest is "forcing" AT&T to act as AT&T's billing and collection agent.[138] This is nonsense. AT&T knows from past arbitrations and negotiations that Qwest Corporation currently cannot bill AT&T's customers for intraLATA toll service when Qwest is not the local service provider. AT&T further knows that Qwest does not authorize AT&T to offer Qwest, the ILEC, as an intraLATA toll option to AT&T local customers unless AT&T is willing to assume the billing function. If, AT&T nevertheless *chooses* to offer Qwest as an intraLATA toll service option to its customers, AT&T cannot credibly argue that Qwest "forces" AT&T to perform billing services.[139] The Commission should adopt Qwest's position on Issue 34

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[136] Ex. 68, Freeberg Direct, at 53:1-54:3. The anti-slamming "CARE" process is not employed by the carriers here since the end-user PIC does not generally change.

[137] It is unclear whether and on what grounds AT&T opposes Qwest's position. Mr. Hydock stated only that AT&T was evaluating Qwest's language. Ex. 8, Hydock Rebuttal, at 8:2-9.

[138] Ex. 6, Hydock Direct, at 17:20.

[139] As Mr. Freeberg noted, at the time that Qwest's long distance affiliate offers facilities-based service in Washington, it is likely this problem will be further reduced or eliminated. Ex. 68, Freeberg Direct, at 53:9-14, 56:5-7.

While AT&T claims that Act does not require AT&T to be Qwest's billing and collection agent, it ignores that there is no requirement for AT&T to offer Qwest Corporation as an intraLATA toll option. In short, if AT&T does not want to bill its customers for the intraLATA toll Qwest provides to them, then AT&T should not offer Qwest Corporation as an intraLATA toll option to its local customers.

H. Issue 35:

Qwest and AT&T have resolved most of their disputes relating to pricing. Three disputed issues remain, however, relating to Section 22.1 (General Principle), Section 22.4 (Interim Rates), and Section 22.5 (ICB Pricing). These issues are discussed below.

1. 22.1 General Principle

This issue relates to language that addresses the general principle regarding pricing for services AT&T may provide to Qwest pursuant to the interconnection agreement. Qwest's proposal for Section 22.1 simply provides that, "[t]o the extent applicable, the rates in Exhibit A also apply to the services provided by CLEC to Qwest pursuant to this Agreement." AT&T, on the other hand, seeks to impose overly broad language that, as the ALJs found in the Minnesota proceeding, "is convoluted and confusing."[140]

AT&T's proposed language lacks any degree of specificity, falling far short of the specificity that is appropriate for contract language.[141] For example, the first sentence of the proposed AT&T language provides that, if "one Party charges the other for a service provided under this Agreement, the other Party may also charge for that service or functionality." Thus, AT&T inexplicably seeks to tie its ability to charge Qwest to the services Qwest provides, rather than services AT&T provides. On its face, this provision appears to allow AT&T to charge Qwest for any service or functionality for which Qwest charges AT&T, without regard to whether AT&T actually provides any such services or functionality. AT&T's second sentence allows AT&T to charge rates that are "equivalent to Qwest's

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140 *Minnesota Arbitrators' Report* ¶ 231.

141 Ex. 63, Easton Rebuttal, at 9:1-17.

rates for comparable interconnection services," but then includes an open-ended proviso that apparently gives AT&T the right to charge Qwest more if AT&T claims that it has higher costs for providing the service. However, AT&T's proposal sets forth no standards or procedures by which AT&T would establish that "higher rates are justified" and provides no guidance regarding who would make such a determination.

Moreover, AT&T adds language stating that Qwest and AT&T will charge each other an amount "equivalent to" the amount charged by the other party for the same service or functionality. The concept of charging "equivalent" pricing is not necessarily objectionable. However, AT&T's definition of "equivalent to" seems to allow pricing that is anything but "equivalent." AT&T's proposed language states that "[i]n order for an amount charged by one Party to be 'equivalent to' an amount charged by the other Party, it shall not be necessary that the pricing structures be identical." Thus, under AT&T's proposal, AT&T could use entirely different pricing structures for charges that would still qualify as "equivalent to" Qwest's charges. AT&T specifies no other standard or requirement of any kind relating to its "equivalent to" language. Provisions in an interconnection agreement must be stated with more clarity than AT&T's language provides here. Parties to a contract should plainly state the terms of their bargain in such a way that both parties can understand them and form reasonable expectations. AT&T's proposal is too convoluted and vague to satisfy that objective. It is more appropriate to include language in the interconnection agreement that simply provides that the Exhibit A rates apply to services Qwest provides to AT&T and, to the extent applicable, to the services AT&T provides to Qwest.[142] Further, the Minnesota ALJs specifically rejected AT&T's claim that requiring AT&T to charge rates equivalent to Qwest's rates when AT&T provides reciprocally provides comparable interconnection services somehow imposes inappropriate obligations on AT&T.[143] Therefore, Qwest

[142] *Id*. at 9:19-10:20.

[143] *Minnesota Arbitrators' Report* ¶216, 231 (adopting language providing that "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," and stating that such language "does not impose ILEC responsibilities on AT&T").

respectfully requests that its proposed language for Section 22.1 be incorporated into the interconnection agreement.

2. 22.4 Interim Rates

AT&T and Qwest have narrowed their disputes relating to Section 22.4.1 and 22.4.1.1 to two issues: whether rates that do not require Commission approval and individual case basis (ICB) rates should be treated as interim rates. As set forth below, these rates should not be treated as interim rates. In addition, AT&T proposes to include Section 22.4.1.3 regarding initiation of cost proceedings and Section 22.4.1.4 regarding true-ups. Qwest opposes the inclusion of these two sections, as discussed below.

With regard to Sections 22.4.1. and 22.4.1.1, the parties' disputes are limited to Qwest's inclusion of language treating only those rates that require Commission approval as interim rates and AT&T's inclusion of a reference to ICB rates as interim rates. Some of the rates set forth in Exhibit A to the interconnection agreement do not require Commission approval and, as such, should not be subject to treatment as interim rates. Qwest's language for Sections 22.4.1 and 22.4.1.1 preserves the necessary distinction between those rates that require Commission approval and those that do not. Nonetheless, AT&T argues that even rates that do not require Commission approval should be treated as interim rates in the event that the Commission decides in a future cost proceeding that a true-up is warranted. Clearly, rates that do not require Commission approval are not subject to true-up.[144] Further, AT&T's proposal to define ICB rates as interim rates is inconsistent with the fact that this Commission has not previously ordered ICB rates to be subject to true-up.[145] Further, in support of its attempt to insert the reference to ICB language in this section, AT&T's points only to its desire for ICB rates to receive particular treatment under the interconnection agreement. The inclusion of ICB rates in Section 22.4.1.1 is unnecessary, however, because Section 22.5 of the interconnection agreement is

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[144] Ex. 63, Easton Rebuttal, at 12:14-23.

[145] *Id*. at 13:4-15.

dedicated to the appropriate treatment of ICB rates. Therefore, Qwest's proposal for Sections 22.4.1 and 22.4.1.1 should be adopted.

AT&T's proposed Sections 22.4.1.3 and 22.4.1.4 should be rejected because, at best, these sections are merely confusing references that unnecessarily highlight only certain of the parties' existing rights and, at worst, these sections inappropriately abridge the parties' and the Commission's rights and abilities.

Qwest objects to AT&T's proposed Section 22.4.1.3 because it contains language that purports to confer upon AT&T the right to open cost dockets regarding Qwest products. Qwest does not dispute that any party -- Qwest, AT&T, or any other party -- is free to request that the Commission include cost-related issues in a cost docket or initiate a full-blown cost docket. However, Qwest disagrees with AT&T's language suggesting that AT&T has a unilateral right to initiate a cost proceeding. The ultimate discretion to initiate a cost docket rests with the Commission and cannot be delegated to any other party by the stipulation of Qwest and AT&T in an interconnection agreement. Therefore, AT&T's proposed Section 22.4.1.3 is inappropriate and should not be inserted in the interconnection agreement.[146]

Qwest also objects to AT&T's proposed Section 24.4.1.4, which provides that, when the Commission reviews an interim rate, "the Parties shall be free to seek and the Commission may determine, that the Interim Rates are subject to true-up."[147] AT&T and Qwest cannot alter the scope of the Commission's authority by stipulation in an interconnection agreement. Moreover, AT&T has provided no reason why it is appropriate to include language in the interconnection agreement that addresses the parties' ability to make any particular argument regarding rates. Further, AT&T is not without recourse if it believes that an interim rate is inflated. Under the interconnection agreement AT&T is entitled to initiate dispute resolution to address such issues. In any event, AT&T's proposed language for Section 22.4.1.4 does not appear to add anything to the parties' rights to bring the issue to

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[146] *Id*. at 11:1-21.

[147] Ex. 10, AMS-1T, Direct Testimony of Arleen M. Starr, at 6:19-22.

the Commission's attention. Given its questionable value, incorporating Section 22.4.1.4 in the interconnection agreement could only lead to confusion. For example, the Commission's adoption of this language could be construed as constituting the Commission's prior endorsement of a subsequent request for true-up. Section 22.4.1.4 is neither necessary nor appropriate and, therefore, it should not be included in the interconnection agreement. For the reasons discussed above, Qwest respectfully requests that the ALJ and Commission adopt Qwest's proposed language for Section 22.4.

3. 22.5 ICB Pricing

ICB pricing is necessary and appropriate in certain instances where the requirements of a particular service offering may vary widely from application to application. In those instances, use of a one-price-fits-all approach is unrealistic. Therefore, Qwest should be allowed to offer ICB pricing under the terms set forth in Qwest's proposed language.[148]

In support of its proposed language, AT&T notes that Qwest agreed to include the language AT&T now proposes in the parties' Colorado interconnection agreement. This offers no support to AT&T's proposal because it ignores the important principle that interconnection agreement language in any given state should take into account that state commission's prior rulings and other actions relating to particular issues. Accordingly, language that is appropriate in a Colorado agreement may not be appropriate in the parties' Washington interconnection agreement. Indeed, after the direct testimony was filed in this proceeding, Qwest further refined its proposal for Section 22.5 to make it more consistent with the way ICB rates have been handled in Washington.[149] Qwest, therefore, requests that the ALJ and Commission adopt its proposed Section 22.5.

I. Issue 36

As Qwest indicated in its pre-filed rebuttal testimony, all of the issues identified by AT&T in its pre-filed direct testimony have been resolved. Moreover, while AT&T's pre-filed direct testimony

[148] Ex. 62, Easton Direct, at 16:18-24.

[149] Ex. 63, Easton Rebuttal, at 13:17-14:22.

listed a number of issues, neither AT&T nor Qwest has submitted any evidence regarding these issues. Accordingly, there is no factual or legal dispute to be decided relating to Issue 36.

III. CONCLUSION

For the foregoing reasons, the Commission should adopt Qwest's proposed language for the interconnection agreement between Qwest and AT&T.

Respectfully submitted,

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