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January 20, 2004

**VIA ELECTRONIC**
**AND OVERNIGHT DELIVERY**

Carole J. Washburn
Office of the Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, WA 98504-7250

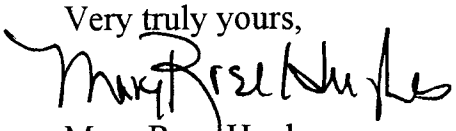
**Re: Docket No. UT-033035**

Dear Ms. Washburn:

Enclosed for filing are an original and 10 copies of Qwest Corporation's Response To AT&T's Petition For Review, in the above-referenced docket. We are also transmitting the documents electronically to the Commission today.

Thank you for your assistance.

Very truly yours,



Mary Rose Hughes

Enclosures
cc: Service List

[13141-0575/DA040190.015]

**BEFORE THE**
**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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| 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** |

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of **Qwest Corporation's Response To AT&T's Petition For Review** has been furnished electronically and by overnight delivery to following parties, this 20th day of January, 2004.

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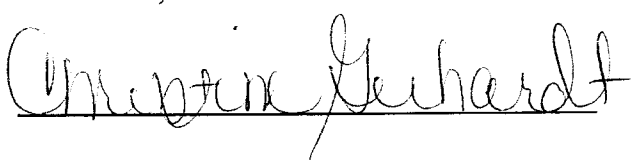

**BEFORE THE**
**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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|---|---|
| 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**<br><br>**QWEST CORPORATION'S RESPONSE TO AT&T'S PETITION FOR REVIEW** |

## I. INTRODUCTION

Pursuant to Wash. Admin. Code § 480-09-780, Qwest Corporation ("Qwest") responds to the Petition for Review of the *Arbitrator's Report*[1] submitted by AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle (collectively "AT&T") in this matter.

In this arbitration, AT&T and Qwest had the opportunity to propose language for the disputed provisions of their new interconnection agreement, submit two rounds of pre-filed testimony promoting their proposed language, conduct discovery, and present their case live and in post-hearing briefs. The ALJ carefully considered volumes of testimony and extensive post-hearing briefs regarding the disputed language the parties placed before him. Although Qwest does not agree with all aspects of the *Arbitrator's Report*, with regards to Disputed Issues 3, 5, and 17, the ALJ considered the record and correctly adopted Qwest's proposed language for the issues upon which AT&T seeks review.

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[1] Arbitrator's Report, *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)*, Order No. 04, Dkt. No. UT-033035 (Dec. 1, 2003) ("*Arbitrator's Report*").

The issues upon which AT&T seeks review have recently been addressed by state commissions in Minnesota and Colorado in arbitrations between the parties. These other state commissions have agreed with the ALJ that this arbitration is limited to addressing interconnection agreement language the parties will apply on a going-forward basis and is not the proper forum to make premature factual "findings" or "declarations" regarding *application* of language that has yet to be incorporated in a final agreement. Thus, like state commissions in Minnesota and Colorado, the ALJ properly determined that whether AT&T's switches meet the definition of a "Tandem Office Switch" should await adoption of the definition and, in accordance with other undisputed language in the parties' agreement, the performance of a fact-based analysis of geography. Similarly, the ALJ, like the state commissions in Minnesota and Colorado, rejected AT&T's proposed definition for "Exchange Service" as well as AT&T's request to make factual determinations on the application of that definition to certain alleged "provisioning options" because the parties are not yet operating under their new agreement, and AT&T failed to demonstrate that "factual determinations" are required or supported at this time.

The Washington Commission should reach the same result. The Commission's task here is straightforward: which party's proposed language for their new interconnection agreement better comports with the law, facts, and policy? Once that language is adopted, the parties *may* or *may not* have disputes regarding its application to specific facts or products. The Commission should allow the parties the opportunity to operate under the agreement and, if a dispute develops, bring a specific fact-based dispute to the Commission for resolution. With regards to Issue 5, the ALJ found that the language AT&T originally proposed, promoted in two rounds of testimony, addressed at the hearing, and promoted again in its post-hearing brief was not adequately supported in the record.[2] There is even *less* support for the language AT&T proposes for the first

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[2] *Arbitrator's Report* ¶ 34 ("Simply redefining Exchange Service or EAS/Local Traffic as AT&T advocates raises too many imponderables not fully developed on the record in this arbitration); *id.* ¶ 36 (noting that AT&T's proposed definition is "too sweeping in its potential effect and has potentially unacceptable consequences in terms of intercarrier compensation"); *id.* ¶ 37 ("The record in this proceeding is inadequate to determine exactly

time in its Petition for Review. The Commission should not reach out to endorse one-sided novel language that was not subject to testimony by either party, was not subject to examination in the hearing and where no record concerning its potential sweep and ramifications exists. As the ALJ correctly found, if a dispute arises regarding specific services either party offers once the agreement is operational, those issues can and should be addressed by the Commission in a separate, future proceeding.[3]

In short, the Commission should reject AT&T's requests under Issues 3 and 5 to issue advisory opinions or impose vague, overbroad language to address speculative future disputes that are not ripe and may never become ripe. With regards to Issue 17, the Commission should reject AT&T's arguments for the simple reason that they present nothing in addition to, or different from, the arguments the ALJ fully considered and rejected. For these reasons and those set forth below, the Commission should reject AT&T's Petition for Review.

## II. RESPONSE TO PETITION FOR REVIEW

### A. Issue 3: Like Every Other State Commission To Date, The ALJ Properly Declined AT&T's Request To Make "Declaratory Findings" In This Arbitration.

Issue 3 concerns a definitional dispute regarding what criteria AT&T's switches must meet to be considered "Tandem Office Switches" for purposes of reciprocal compensation. The ALJ properly adopted Qwest's proposed definition of "Tandem Office Switch," which tracks *precisely* the text of FCC rules[4] and reflects the language adopted by the Commission in its review of Qwest's Washington Statement of Generally Available Terms ("SGAT").[5]

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what limitations should be imposed"); *id.* ¶ 38 ("AT&T's alternative simply goes too far -- is too sweeping in its implications -- to be adopted on the record in this proceeding").

[3] *Id.* ¶ 37 ("It may become necessary for the Commission to resolve the matter in another proceeding that may come forward on a complaint depending on how the parties conduct themselves prospectively").

[4] Qwest's proposed definition reflects the actual text of 47 C.F.R. § 51.711(a)(3), which states that "[w]here 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

AT&T does not challenge the language the ALJ recommended. Instead, it asks that the Commission *apply* that definition to the alleged facts and "declare" AT&T and TCG's Washington switches "Tandem Office Switches."[6] As the ALJ noted, AT&T did not make this request in its original Petition for Arbitration but, instead, sought to insert this request into the arbitration by way of unilaterally adding it on the parties' Disputed Issues List. Thus, as the ALJ found, AT&T did not properly "queue[] up" this issue in its Petition.[7] For this reason alone, the Commission should decline to address AT&T's request.

In addition to being procedurally defective, the ALJ found that AT&T's request that the Commission "declare" its switches tandems either through express language or as part of the interconnection arbitration was inappropriate because it conflicted with other *non-disputed* language in the parties' agreement. As the ALJ discussed, both Qwest and AT&T agreed to the following language in the definition of "Tandem Office Switch":

> If 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.[8]

AT&T's request for a factual determination now short-circuits this process and, as a result, renders the parties' agreed-upon language a nullity. Thus, were the Commission to declare AT&T's switches tandems now, without permitting the parties to conduct the "fact based

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the incumbent LEC's tandem interconnection rate." (emphasis added). AT&T sought to add vague language providing that a CLEC's switch need only be "capable of" serving a comparable geographic area to receive tandem compensation.

[5] 25th Supplemental Order; Order Granting in Part and Denying in Part Petitions for Reconsideration of Workshop One Final Order, *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Dkt. Nos. UT-003022, UT-003040 ¶¶ 15-19 (Feb. 8, 2002) ("*25th Supplemental Order*").

[6] AT&T's Petition for Review at 3 and 6.

[7] *Arbitrator's Report* ¶ 23.

[8] *Id.*

consideration of geography" they agreed to conduct, it too will be undermining the process both parties agreed to engage in if they had not already determined that a particular switch meets the definition of a "Tandem Office Switch."

AT&T's Petition appears to be based on a continued misunderstanding of Qwest's position on this issue. AT&T fears that Qwest will require that AT&T demonstrate it serves the same "customer base" as Qwest or will demand that AT&T use the tandem test described in Exhibit 69, a comparable geography test proposed by Qwest and attached to the Direct Testimony of Thomas R. Freeberg. Neither fear has merit. As the ALJ repeatedly (and correctly) noted, Qwest's proposed test does *not* involve an evaluation of AT&T's customer base; rather, it examines whether AT&T has the infrastructure in place to "serve" a comparable geographic area as the Qwest tandem to which AT&T compares its switch.[9] Moreover, neither Qwest, the ALJ, nor the recommended definition of "Tandem Office Switch" mandates the application of the test proposed in Exhibit 69. Qwest provided this exhibit for illustrative purposes to show how it could reasonably and objectively apply its proposed definition. If AT&T has another proposed objective test, then in accordance with language it agreed to, AT&T should propose that test to Qwest as part of the "fact based consideration of geography" the parties will engage in once their agreement is executed.[10]

Both the Minnesota and Colorado commissions agreed that 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, determine and apply specific facts, and decide a

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[9] *Id.* ¶ 19.

[10] AT&T claims in its Petition that Qwest "concedes" in the Triennial Review proceedings that AT&T's switches "can serve the area comparable to the tandems." AT&T's Petition for Review at 3-4. In the cited testimony, however, Qwest merely recited assertions AT&T made in its testimony in this arbitration. See *Petition of Qwest Corporation to Initiate a Mass-Market Switching and Dedicated Transport Case Pursuant to the Triennial Review Order*, Docket No. UT-033044, Direct Testimony of Joseph A. Weber at 22.

specific outcome under a yet-to-be-implemented interconnection agreement.[11] 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, however, no "dispute" is ripe for consideration here.

Although ripeness is primarily a jurisdictional matter for courts, the doctrine is based in part on prudential considerations that find application in all adjudicatory settings, including the Commission's arbitration proceedings. The Ninth Circuit noted that "the 'basic rationale' of the ripeness doctrine is 'to prevent courts, through avoidance or premature adjudication, from entangling themselves in abstract disagreements.'"[12] To determine whether a claim is ripe for adjudication, the Ninth Circuit instructed that "[a]s a prudential matter, we will not consider a

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[11] Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement, *In the Matter of the Petition of AT&T Communications of the Midwest, Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. §252(b)*, MPUC Docket No. P-442, 421/IC-03-759 at 11 (Nov. 18, 2003) ("*Minnesota Arbitration Order*") ("The Commission will decline to make a factual finding about the nature of AT&T's switches at this time. This docket exists for the purpose of resolving arbitrated terms for an ICA within a federally-mandated timeframe; the Commission is disinclined to expand the docket's scope. If the parties cannot reach agreement about how the Commission-approved definition applies in any given context, they may pursue the conflict-resolution mechanisms available in the ICA"); Interim Order Granting in Part Motion to Strike and Granting Joint Motion for Submission of Certain Issues on the Prefiled Testimony, *In the Matter of 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. R03-1099-I ¶ 13 (Colo. PUC Sept. 25, 2003) ("However, I do agree with Qwest that this request [for determination on whether AT&T's switches are tandems] is premature in that the Commission has not yet made a determination on the definition of tandem office switch. In general, the purpose of an interconnection agreement arbitration is to determine appropriate *principles* governing the parties' relationship, not to apply specific *facts* to those principles. The definition of a tandem switch is such a principle; but whether a particular switch meets the definition is not appropriate for this arbitration. If a factual dispute arises later, the Commission can address that on the future application regarding terms of the interconnection agreement.") (emphasis in original).

[12] *Scott v. Pasadena Unified School District*, 306 F.3d 646, 662 (9th Cir. 2002) (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967)).

claim to be ripe for judicial resolution if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."[13]

These judicial principles are equally applicable to Commission proceedings and are reflected in the Commission's statutory authority to issue declaratory orders. For example, Section 34.05.240 of the Revised Code of Washington states that, to request a declaratory order, a petitioner must demonstrate, among other things, that there is an "uncertainty necessitating resolution" and "that there is *actual controversy* arising from the uncertainty such that a declaratory order *will not be merely an advisory opinion.*"[14] In the absence of these considerations, a declaratory judgment is not proper.

AT&T's request "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." The Commission should afford the parties an opportunity to operate under their yet-to-be executed agreement before anticipating disputes that may or may not arise.

## B. Issue 5: The ALJ Correctly Adopted Qwest's Proposed Definition of "Exchange Service." AT&T's Newly Proposed Language Is Untested, Confusing, Presents No Compromise, And Therefore Should Be Rejected.

### 1. The ALJ Properly Adopted Qwest's Definition Of "Exchange Service."

Issue 5 as set forth in AT&T's petition for arbitration involves a dispute regarding the proper definition of "Exchange Service." Qwest proposed a definition based upon a call originating and terminating within the same local calling area. AT&T, in contrast, proposed a definition that disregarded the boundaries of a local calling area and industry number assignment principles and defined a call as "local" if the NPA-NXX[15] of the calling and called parties

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[13] *Id.* (internal quotations and citations omitted).

[14] Wash. Rev. Code § 34.05.240 (emphasis added).

[15] "NPA stands for Numbering Plan Area (often referred to as area code) and is a defined geographic area identified by a unique three-digit used in the North American Numbering Plan. NXX represents a central office code of three digits that designates a particular central office." Ex. 68, Direct Testimony of Thomas R. Freeberg, at 4 n.3.

matched, regardless of their physical locations. Qwest opposed AT&T's language and its attempts to have the Commission issue declaratory rulings on vague and unripe claims. The ALJ adopted Qwest's definition, finding that AT&T's language "raised too many imponderables not fully developed in the record of this proceeding" and was "too sweeping in its potential effect and has potentially unacceptable consequences in terms of intercarrier compensation."[16] The ALJ also made no declarations, but noted that if disputes develop once the agreement is operational, those disputes could then be brought to the Commission.[17]

Unremarkably, the parties need a definition of a local call for the interconnection agreement. The ALJ correctly determined that Qwest's definition is more appropriate. Qwest's proposed definition of "Exchange Service" has a long history of support in the Commission's rules defining local and toll calls,[18] prior Commission decisions approving Qwest's SGAT,[19] and federal law.[20] Qwest's definition is reflected in Qwest's tariffs, virtually all interconnection agreements, all

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[16] *Arbitrator's Report* ¶¶ 34, 36.

[17] *Id.* ¶ 38.

[18] 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. Wash. Admin. Code § 480-120-021 (definition of "Exchange") (emphasis added). A local calling area, under this Commission's rules, means "one or more *rate centers within which* a customer" may make non-toll calls. *Id.* (definition of "Local Calling Area") (emphasis added). AT&T's proposed 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 proposed definition would fit is the definition of "Interexchange," which means "*telephone calls*, traffic facilities or other items *that originate in one exchange and terminate in another*." *Id.* (definition of "Interexchange") (emphasis added).

[19] 39th Supplemental Order; Commission Order Approving SGAT and QPAP, and Addressing Data Verification, Performance Data, OSS Testing, Change Management, and Public Interest, *In the Matter of the Investigation Into US West Communications Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; In the Matter of US 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).

[20] *See, e.g.*, 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*

14 in-region SGATs,[21] and is adopted by AT&T itself in AT&T's own Washington tariffs.[22] Qwest's definition is the industry standard by which all carriers, including AT&T, route and rate calls today. Thus, Qwest's definition also was adopted by the state commissions in Minnesota and Colorado in the parties' recent arbitrations in those states.[23]

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*different exchange areas* for which there is made *a separate charge* not included in contracts with subscribers for exchange services") (emphasis added).

[21] Ex. 68, Direct Testimony of Thomas R. Freeberg, at 16:10 – 23:6.

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

[23] *Minnesota Arbitration Order* at 13-14; Initial Commission Decision, *In the Matter of 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)*, Dkt. No. 03B-287T, Decision No. C03-1189 ¶ 54 (Colo. PUC Oct. 14, 2003) ("*Colorado Arbitration Order*"), *upheld upon reconsideration*, Decision Granting, In Part, Application for Rehearing, Reargument, or Reconsideration, *In the Matter of 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)*, Dkt. No. 03B-287T, Decision No. C03-1352 ¶¶ 12-17 (Colo. PUC Dec. 4, 2003) ("*Colorado Arbitration RRR Decision*"). In addition to the Colorado and Minnesota commissions, many state commissions outside of Qwest's region have rejected VNXX proposals such as AT&T's. For a non-exclusive discussion of these decisions, *see* Ex. 68, Direct Testimony of Thomas R. Freeberg, at 29:12 – 32:2 (discussing Massachusetts and South Carolina commission decisions); Ex. 73, Rebuttal Testimony of Thomas R. Freeberg, at 11:15 – 12:11 (discussing Iowa Board decision); *id.* at 21:20 – 22:25 (discussing Rhode Island and Vermont decisions); *id.* at 25:7 – 26:2 (discussing California Commission and Iowa Board decision). *See also* Order on Disputed Issues, *In re: Petition for Arbitration of Interconnection Agreement: Global NAPs, Inc. v. ALLTEL Georgia, Inc.*, Docket No. 14529-U, 2002 Ga. PUC LEXIS 96 at *28 (Ga. PUC Nov. 5, 2002) (physical location of the parties governs whether call is local); Interim Order of Arbitration Award, *In re: 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, *In the Matter of the 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 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).

The Commission has had the opportunity in the 271 process to review Qwest's definition of "Exchange Service" in the context of reviewing Qwest's 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 assert that Qwest's definition "discriminated against" any AT&T "provisioning options," and did not allege that it competitively threatened AT&T. Likewise, no CLEC raised concerns regarding Qwest's tariffed foreign exchange service, a service that has been tariffed in Washington for decades and for which Qwest has fewer than 4500 Washington customers. In short, the definition of "Exchange Service" raised not a single eyebrow in the numerous workshops on Qwest's SGAT. Against this precedent, the ALJ correctly adopted Qwest's definition, finding that on the record presented, AT&T failed to make the case for its untested definition.[24]

**2. The Commission Should Reject AT&T's Radical New Language.**

In its Petition for Review, AT&T does not defend the language it originally proposed, that the parties addressed during the arbitration, and upon which the ALJ based his recommendation. Instead, AT&T proposes sweeping new language, in Exhibit C to its Petition, that it did not propose in its Petition for Arbitration or present in its testimony, that the parties did not address at the hearing and that the ALJ never had the opportunity to consider. As a result, there is no record regarding this new language. For this very important reason, the Commission should reject it.

AT&T states that the ALJ "encouraged the parties to continue negotiation on this issue in an effort to resolve it consistent with the reasoning offered in the Report" and that it offers

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[24] *Arbitrator's Report* ¶¶ 37-38.

Exhibit C to respond to the Arbitrator.[25] However, the ALJ was clear that if the parties were unable to negotiate a consensus resolution, *Qwest's* definition should be adopted for the interconnection agreement.

> The parties are encouraged to offer for Commission alternative, *agreed* language for this definition, or to include additional language in their interconnection agreement that is consistent with the discussion here. *If the parties cannot agree to such language, they must adopt Qwest's definition in their interconnection agreement.* If Qwest implements this definition in a way that discriminates in favor of services Qwest offers that are functionally identical to services AT&T wishes to offer, AT&T may bring the matter to the Commission for resolution.[26]

The ALJ did not suggest that the parties should attempt to re-litigate this definitional dispute around wholly new language, as AT&T seeks to do now.

AT&T suggests that it sent this proposal to Qwest in an attempt to engage in further negotiations. The Commission should not be left with the misimpression, however, that AT&T has actively sought a Qwest compromise or that its language presents any sort of compromise position. The hearing in this matter, at which the ALJ expressed a desire for the parties to consider further negotiations, was held on October 29, 2003. The *Arbitrator's Report* was issued December 1, 2003. AT&T, however, sent this new language to Qwest on January 7, less than 48 hours before Petitions for Review were due to be filed. From the date of the hearing, the parties had numerous negotiation contacts by telephone and email when AT&T could have, but did not, propose this language. During this time, AT&T had no interest in Qwest's efforts to resolve this issue. Given this background, AT&T's claim that Qwest's rejection of AT&T's last minute language reflects a lack of incentive on Qwest's part to negotiate[27] is disingenuous, at best.

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[25] AT&T's Petition for Review at 7-8.

[26] *Arbitrator's Report* ¶ 38 (emphasis added); *see also id.* ¶ 36 ("The parties might fashion other, *mutually acceptable* limitations) (emphasis added); *id.* ¶ 37 ("AT&T and Qwest may yet *negotiate and agree to* language that will achieve satisfactory results . . . .") (emphasis added).

[27] AT&T's Petition for Review at 7 n. 22.

More important, however, AT&T's proposed language presents no attempt to compromise whatsoever. For example, AT&T's language does not address the ALJ's well-founded concern that AT&T's language is "too sweeping in its potential effects and has potentially unacceptable consequences in terms of intercarrier compensation."[28] Furthermore, AT&T's Petition for Review nowhere mentions any concession on AT&T's part in an attempt to address Qwest's objections to AT&T's position because AT&T's new language makes no concessions.[29] Instead of seeking compromise and a negotiated resolution, AT&T's newest language simply enshrines AT&T's virtual NXX (also referred to as VNXX) advocacy into several entirely new provisions of the interconnection agreement.

**a. New text added to definition of "Exchange Service."**

AT&T's newly proposed language is unsupported and inappropriate. AT&T has taken a dispute over a single definition of "Exchange Service" and created three entirely new provisions. First, AT&T adds text to the definition of "Exchange Service," claiming that it ensures that "there exists no opportunity for Qwest to discriminate in favor of its service over that of its competitors." However, the definition of "Exchange Service" Qwest proposed and the ALJ adopted is completely silent as to which services of either parties the definition applies or does not apply. Qwest's definition, in other words, does not endorse or prohibit *any* product or service. It falls equally on both parties:

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

AT&T's sole rationale for its additional language is that Qwest "might" discriminate in favor of its own services and against those of AT&T. As discussed below, AT&T has no basis

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[28] *Arbitrator's Report* ¶ 36.

[29] For example, neither AT&T's Petition for Review nor Exhibit C even purports to address Qwest's concern that AT&T's position requires Qwest to provide AT&T long haul transport across any number of local calling areas without compensation.

for this fear, and presented no evidence to support its speculation about future application of this definition.[30] Accordingly, there is simply no basis for this language.[31]

**b. New definition of new term "FX or FX-like Service."**

In addition to modifying the definition of "Exchange Service," AT&T proposes a new definition for "FX and FX-like Service," terms that do not even appear in the parties' agreement. AT&T states that it "believes" this language is consistent with the ALJ's views, but because this language was never addressed in testimony, subjected to cross-examination, or reviewed by the ALJ, there is no evidentiary support for that characterization. Regardless, this vague definitional term[32] suffers from the same infirmities as AT&T's original language rejected by the ALJ. AT&T proposes to define an "FX and FX-like Service" as one in which a customer is assigned a telephone number, referred to as an "NPA-NXX" in the hearing, associated with a rate center in which the customer is not physically located. AT&T proposes no limitations on its ability to assign customers numbers from the rate center of their choosing.

As Qwest's witness explained (and AT&T's witness agreed),[33] however, 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 ("COCAG"), NPA-NXXs have been

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[30] *See* footnote 39.

[31] Qwest agrees with the ALJ's adoption of Qwest's definition of "Exchange Service," but does not agree with some of the ALJ's statements in the report, particularly those pertaining to services purportedly offered to ISPs. As Qwest demonstrated, none of these services are relevant to the parties' current dispute and none involves VNXX-like arrangements. Tr. at 99:11-100:14, 100:15-102:8. (Freeberg redirect). Regardless, any disagreement here is ultimately irrelevant as Qwest's definition applies equally to both parties.

[32] AT&T has coined the term "FX-like" traffic perhaps in an attempt to align its undefined "provisioning option" with Qwest's tariffed foreign exchange service and distance it from virtual NXX/VNXX traffic that so many other state commissions have rejected. "FX-like" is not a defined term and AT&T points to no tariff in which it might be defined. As discussed in footnote 39, there is no record in this proceeding regarding what, if any, "FX-like" service AT&T or TCG offers and no record regarding treatment of "FX-like" traffic.

[33] Arbitration Transcript ("Tr.") at 61:24–63:15 (Schell cross).

assigned to customers *based upon their physical location.*[34] Other industry guidelines relating to number pooling and number portability reinforce that NPA-NXXs are assigned to *specific rate centers* for both technical reasons and for intercarrier compensation purposes.[35] AT&T, however, proposes freely *disassociating* NPA-NXXs from the rate centers to which they correspond by making an "FX-like" call, regardless of what boundaries it spans, a "local" call.

AT&T's attempted conversion of a limited *exception* in the COCAG into a *general rule* for all local calls would dramatically change the assumptions underlying the use of NPA-NXXs to rate calls. As part of its undefined "FX-like" "provisioning option," an AT&T customer would select any NPA-NXX it wants, regardless of where the customer is located. Although AT&T has claimed that it would not abuse NPA-NXX assignments, it committed to no limitations in its testimony and, likewise, commits to no limitations in its newly-proposed contract language. To the contrary, AT&T acknowledged that under its previous 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 (*i.e.*, "exchange service") so long as the NPA-NXXs of the calls matched.[36] As discussed below, AT&T's new language is subject to the same expansive application.

Because AT&T still commits to no limitations on the assignment of numbers to its customers, and its proposed definition of "FX and FX-like 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 located in Washington or anywhere else. Moreover, while

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[34] Ex. 73, Rebuttal Testimony of Thomas R. Freeberg, 11:4-15; Ex. 75 (attached to Ex. 73, Rebuttal Testimony of Thomas R. Freeberg, as TRF-8).

[35] Ex. 76 (attached to Ex. 73, Rebuttal Testimony of Thomas R. Freeberg, as TRF-9) (Thousands-Block Number Pooling Administrative Guidelines that prohibit use of numbers assigned to different rate centers); Ex. 73, Rebuttal Testimony of Thomas R. Freeberg, at 15:8-19 (discussing number portability guidelines that require porting of numbers within rate centers).

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

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 or their alleged "FX-like" services. Accordingly, were the Commission to adopt AT&T's latest proposal, it will endorse language with far reaching and unpredictable impacts on all local exchange carriers, including impacts on number assignment, intercarrier compensation and number portability.

**c. New section 7.3.4.3.1.**

AT&T proposes more new language for a new Section 7.3.4.3.1. This third part of AT&T's newly-proposed language addresses AT&T's views about how "FX" and "FX-like" traffic should be compensated. Here, AT&T makes no bones that its proposal *rejects* what the ALJ discussed in his Report.[37] AT&T's language would charge Qwest reciprocal compensation on top of the costs Qwest incurs to transport AT&T's traffic over numerous local calling areas while denying Qwest access charges that would normally apply to such calls. For its part, AT&T proposes that it transport the same call only a very short distance. AT&T further ignores the ALJ's concern that AT&T's position "has potentially unacceptable consequences in terms of intercarrier compensation." AT&T simply asserts, without evidentiary foundation or legal argument, that its language is "appropriate and more efficient." Because this language was never presented in testimony, subject to cross-examination, or considered by the ALJ, there is no evidentiary basis upon which the Commission can make this determination. In fact, the ALJ could not make this determination regarding the language AT&T *did* present at the hearing: "[t]he record in this proceeding is inadequate to determine exactly what limitations should be imposed"

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[37] AT&T's Petition for Review at 9. Neither party addressed bill and keep compensation in prefiled testimony, at the hearing, or in post hearing briefing. Qwest does not agree with the ALJ's comments concerning bill and keep because Qwest would not be compensated for the transport it provides or for lost toll revenues. In any event, this issue is not encompassed in the language the ALJ ordered.

and there is "no basis in the present record upon which to fashion a fully workable solution." AT&T's text for its new Section 7.3.4.3.1 has no foundation and should be rejected.

Finally, the Commission should reject AT&T's Section 7.3.4.3.1 because it is confusing and cannot be implemented. Although there is no testimony explaining this language in this proceeding, a number of problems are evident. For example, although AT&T purports to define "FX and FX-like Service" in a proposed new definition, it also proposes that "FX and FX-like Services" are those that "are functionally equivalent from an End User Customer's perspective to Qwest's FX retail service offering(s) as of January 1, 2004 . . . ." AT&T does not explain how the parties are supposed to determine if an undefined "FX or FX-like Service" is "functionally equivalent from an End User Customer's perspective" to "Qwest's FX retail service offering(s) as of January 1, 2004." It is unclear whose "End User Customers" are referenced in the provision and how the parties would implement this provision if, for example, "End User Customers" had conflicting "perspectives" on whether services are or are not "functionally equivalent."

To complicate matters further, AT&T's newly-proposed Section 7.3.4.3.1 states that "functional equivalency" is not dependent on the manner in which services are "provisioned" to customers. This additional caveat is vague as it is unclear whether the term "provisioned" refers to the technical means of furnishing "FX and FX-like Service" or whether "provisioned" also includes how a service is *tariffed* and *rated*.[38] AT&T does not define "provisioned" nor explain what it means by "provisioned" in its new language.

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[38] In the parties' recent Arizona arbitration, AT&T's own witness professed confusion with the use of the term "provision."

> Q. (*by counsel for Qwest*) If an AT&T customer in Prescott wants a Flagstaff NPA/NXX, will AT&T provide it to them?
>
> A. (*by AT&T witness John Schell*) Yes.
>
> Q. And how will AT&T *provision* that service?
>
> A. I believe I provided an example of that in my testimony. And I am not sure what you mean by *provision*, but if you could explain what you mean by *provision*, I will try and answer it or I can discuss the example in my testimony.

In addition, AT&T provides no citation for the proposition that rating of calls for *wholesale intercarrier compensation* purposes should be determined based upon their "functional equivalency" from an "End User Customer's perspective." Rather, intercarrier compensation is governed by rules of the industry, the FCC, and this Commission, not "End User Customer" perceptions. For example, services of an incumbent LEC that a CLEC resells to its end user customers under Section 251(c)(4) of the Act might be considered by "End User Customers" as "functionally equivalent" to services provided over the unbundled network element platform, or UNE-P, under Section 251(c)(3). However, for regulatory and wholesale rate purposes, those "functionally equivalent" services are treated differently. AT&T's notion that whether a call is "local" should now be based upon the perceptions of unidentified "End User Customers" ignores regulatory reality and all rules of intercarrier compensation.

AT&T claims that its Exhibit C language implements the *Arbitrator's Report*. It does not. Had the ALJ felt that the record in this proceeding allowed him to craft the language that AT&T proposes, he would have done so. However, the ALJ unambiguously found that the record was inadequate.[39] As a result, he properly determined that Qwest's definition should be adopted in the

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The Arizona arbitration was held after proceedings in Washington and, therefore, Qwest could not provide this record citation during the Washington proceedings.

[39] The ALJ correctly determined that AT&T failed to support its position. AT&T presented no evidence regarding the nature of its so-called "VFX" or "FX-like" "provisioning option." When asked for descriptive information in discovery, AT&T produced only a TCG (but no AT&T) tariff excerpt regarding "PrimeConnect" service. Ex. 28, AT&T Responses to Qwest Corporation's First Set of Data Requests and Requests for Production of Documents, Request 01-029 (Original Price Sheet 72.1a). AT&T failed to provide 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. *Id.* AT&T presented no evidence on the extent to which TCG's customers in Washington have availed themselves of the "provisioning option" of choosing their own NPA-NXX, and AT&T could not identify any other VNXX or "FX-like "product." *Id.* Moreover, although AT&T speculates that Qwest *might* discriminate in favor its own FX service, neither AT&T nor TCG has filed a complaint with the Commission regarding Qwest's FX service and neither presents any billing or other dispute between the parties relating to FX traffic. In fact, since Qwest has fewer than 4500 FX customers in the entire state, it is questionable whether a billing or other dispute between AT&T/TCG and Qwest ever *will* develop. Of the billions of minutes of traffic exchanged in Washington, AT&T presented no evidence of the number of minutes of "FX-like" traffic it or TCG sends to Qwest. Against this background, it is unclear what AT&T "FX-like service" is at issue. Because AT&T has no tariffed "FX-like service" and no coherently-described VNXX or "FX-

parties' interconnection agreement and that *if*, in the future, disputes developed regarding *specific* services, the Commission could address the disputes at that time.[40]

At its core, AT&T's newly-proposed language is fatally flawed because it does not address the concerns the ALJ identified. Under the combined provisions of AT&T's Exhibit C language, an "End User Customer" located in New York could be assigned a Seattle NPA-NXX ("a number associated with a rate center in which the customer is not physically located") and a call between that "End User Customer" and an "End User Customer" physically located in Seattle and assigned a Seattle NPA-NXX would be rated as "local" if one or both of the "End User Customers" perceived that call as "functionally equivalent" to "Qwest's FX retail service offering(s)," regardless of how those services are "provisioned." Even more so than its original proposal, AT&T's latest language is "too sweeping in its potential effect and has potentially unacceptable consequences in terms of intercarrier compensation."[41] AT&T's newest language "simply goes

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like" "product" or "provisioning option," the Commission can make no reasonable determination that this alleged "product" must be endorsed now through AT&T's Exhibit C language.

Indeed, AT&T's arguments in this docket suffer from the same infirmities the Commission found in the Washington VNXX docket, Docket No. UT-021569. In closing that docket, the Commission made clear that it would prefer to address VNXX issues in a "fact-specific" dispute. Notice of Docket Closure, *In the Matter of Developing an Interpretive or Policy Statement Relating to the Use of Virtual NPA/NXX Calling Patterns*, Dkt. No. UT-021569 (July 21, 2003). AT&T in this arbitration has not cured that deficiency. Instead, it seeks to end run the closure of that docket by having its VNXX position endorsed in its contract language with Qwest yet presents no "fact-specific" disputes that would warrant the application of its language.

[40] *Arbitrator's Report* ¶ 38. The Minnesota commission concluded that AT&T's claims of "discrimination" were unfounded and, at best, premature:

> AT&T's other criticism is that Qwest's proposed language might be construed to authorize Qwest to subject AT&T's VNXX service to access charges without subjecting its own FX service to similar charges. *Although the record is unclear about whether Qwest has imposed access charges on its FX service, AT&T acknowledges that Qwest has not heretofore imposed access charges on AT&T's VNXX service. Thus, neither AT&T nor this Commission has a current basis for alleging discrimination.* If in the future AT&T believes that Qwest is applying the terms of the ICA in an unequal fashion, AT&T may pursue the dispute resolution process contained in the agreement.

*Minnesota Arbitration Order* at 14 (emphasis added).

[41] *Id.* ¶ 36

too far – is too sweeping in its implications – to be adopted on the record in this proceeding."[42] Because this language could also be adopted by other carriers under Section 252(i), AT&T's new Exhibit C text will significantly disrupt and confuse intercarrier compensation in Washington and should not be endorsed.

## C. Issue 17: The ALJ Properly Rejected AT&T's "Comparable Facilities" Language.

Issue 17 involved several issues. The two principal issues were whether (1) Internet-bound traffic be included in the relative use calculation for direct trunk transport ("DTT") and entrance facilities ("EF") and (2) a relative use factor should apply to "other comparable facilit[ies] providing equivalent functionality" to direct trunk transport and entrance facilities. By "other comparable facilities" AT&T primarily means private line transport services ("PLTS") that interexchange carriers purchase out of Qwest's tariffs. The ALJ sided with AT&T on the first issue and adopted Qwest's position on the second. For several reasons, the Commission should reject AT&T's Petition for Review on this issue.

First, AT&T presents no new arguments the ALJ did not previously consider. The ALJ carefully considered all of the authorities presented by the parties and reached a reasonable and lawful conclusion. AT&T raises nothing new and, therefore, provides no reason for the Commission to reject the ALJ's recommendation.

Second, contrary to AT&T's claims of "unjust enrichment" and "takings"[43] use of a Qwest PLTS circuit for transport of AT&T local interconnection traffic is an *option* available to AT&T; it is 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 AT&T local

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[42] *Id.* ¶ 38.

[43] AT&T's Petition for Review at 13. AT&T's assumption that a PLTS leased from Qwest is AT&T "property" is patently wrong, per Qwest's FCC tariff. Qwest's FCC1 Access Service Tariff (formerly FCC5) Section 2.3.2.

traffic, thus allowing AT&T to avoid the costs of putting its local traffic on interconnection trunks. AT&T, not Qwest, decides that the interconnected carriers will use the PLTS for two-way trunking 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; it in no way mandates that AT&T exercise that option.

Third, 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 PLTS facilities if AT&T chooses to place its local traffic on spare circuits or chooses to let the circuits remain idle. 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 AT&T elects the two-way PLTS option, AT&T has no cost to share.[44] If AT&T chooses to put the traffic that it delivers to Qwest on this spare capacity, AT&T actually avoids additional costs. Because Qwest does not "assess" any cost on AT&T for exercising this option, 47 C.F.R. §§ 51.703(b) and 51.709 are inapplicable to this issue.

Fourth, AT&T's claim that its position does not result in "ratcheting" or a modification of Qwest's FCC tariffs is disingenuous. At the end of the day, what AT&T seeks is a lower rate for federally-tariffed PLTS, no matter how it words this request. In the *Triennial Review Order*,[45] the FCC addressed 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

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[44] *Colorado Arbitration Order* ¶ 67; *Colorado Arbitration RRR Decision* ¶ 21 (rejecting AT&T's "free ride" claim).

[45] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of 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*").

"ratcheting" (or downward adjustment) of the rates of the special access circuits to account for the local usage.[46] 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.[47] AT&T's proposed application of its language necessarily results in a *reduced* DS-3 rate.

Although AT&T characterizes its claim now as a request for reimbursement, AT&T's witness described its position differently. 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 channels.[48] 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.[49] Whether labeled a "reimbursement" or "pro rata billing," the result is the same: a reduced, blended rate. The ALJ properly decided this issue.

Finally, the ALJ properly respected this Commission's previous determination that it does not have authority to interpret, modify, or exercise jurisdiction over PLTS that is purchased out of a federal tariff, Tariff F.C.C. No. 1.[50] In the 271 docket, this Commission recognized that federal interstate tariffs are the sole and exclusive jurisdiction of the Federal Communications

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[46] *Id.* at ¶ 580.

[47] *Id.* at ¶ 583 & n. 1800.

[48] Ex. 36, Rebuttal Testimony of David L. Talbott, at 24:1-10.

[49] *Triennial Review Order*, ¶¶ 580, 582, 582 n. 1793, 583, 583 n. 1800. Here, AT&T proposed 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. Although now cast as a "reimbursement," at the end of the day, AT&T proposed blending of rates to create a new DS3 rate.

[50] 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.

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.*"[51] Many courts similarly recognize that state commissions have no authority to interpret, enforce, or regulate federally-tariffed services.[52] For example, in *AT&T Communications of the Mountain States, Inc. v. Public Serv. Comm'n of Wyoming*,[53] the court, citing the Supreme Court's decision in *Smith v. Illinois Bell Tel. Co.*,[54] stated:

> 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.[55]

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.[56] This is so because "a tariff, required by law to be filed, is not a mere contract. It is the law."[57]

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[51] 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) (emphasis added).

[52] *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).

[53] 625 F. Supp. 1204 (D. Wyo. 1985).

[54] 282 U.S. 133 (1930).

[55] 625 F. Supp. at 1208

[56] *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).

[57] *Id.*; *Marcus v. AT&T*, 138 F. 3d 46, 56 (2d Cir. 1998).

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.*[58]

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.*,[59] involved an action brought by a long-distance reseller against 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

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[58] Qwest's FCC1 Access Service Tariff (formerly FCC5) Section 2.7.1 (emphasis added).

[59] 524 U.S. 214 (1998).

explained, the rate filed is "the only lawful charge" and "[d]eviation from it is not permitted upon any pretext."[60] 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 that 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.[61]

AT&T acknowledges that under its proposal, it would be charged only a "pro rata" portion of the tariffed rate.[62] 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 ALJ properly determined that the Commission should not endorse AT&T's "comparable facilities" language. 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 these reasons, the Commission should reject AT&T's Petition for Review with regards to Issue 17.

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[60] *Id.* at 222 (quoting *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915)).

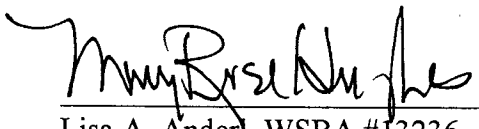
[61] *Public Serv. Co. of New Hampshire v. Patch*, 167 F.3d 29, 35 (1st Cir. 1998) (citing *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373-74 (1988)); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-66 (1986); *cf. Montana-Dakota Utils. Co. v. Northwestern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

[62] Ex. 36, Rebuttal Testimony of David L. Talbott, at 24:3-10.

## III. CONCLUSION

For the foregoing reasons, the Commission should deny AT&T's Petition for Review of the *Arbitrator's Report*.

Respectfully submitted,



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