

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of the Investigation Into	)	DOCKET NO. UT-003022
)	
U S WEST COMMUNICATIONS, INC.'s)	
	)	DOCKET NO. UT-003040
Compliance With Section 271 of the)	
Telecommunications Act of 1996)	
.....)	
	)	39 th SUPPLEMENTAL ORDER;
In the Matter of	)	COMMISSION ORDER
	)	APPROVING SGAT AND
U S WEST COMMUNICATIONS, INC.'s	)	QPAP, AND ADDRESSING
	)	DATA VERIFICATION,
Statement of Generally Available Terms	)	PERFORMANCE DATA, OSS
Pursuant to Section 252(f) of the	)	TESTING, CHANGE
Telecommunications Act of 1996	)	MANAGEMENT, AND PUBLIC
	)	INTEREST
.....)	

I. SYNOPSIS

1 *In this final order, the Commission finds that Qwest has met all of the requirements under section 271 of the Telecommunications Act of 1996 and finds that Qwest is now ready to file an application with the Federal Communications Commission to provide long-distance telecommunications service in Washington state. More specifically, in this order the Commission concludes that:*

- *Qwest has made the required changes to its standard agreement, or SGAT, governing competitors' use of the Qwest network,*
- *Qwest has developed an adequate performance assurance plan to protect local competition once the company enters the long-distance business, and*
- *An extensive test of Qwest's operating systems, as well as its actual commercial performance, demonstrates compliance with the federal law's 14-point competitive checklist.*

Finally, the Commission concludes that it is consistent with the public interest to allow Qwest to provide long-distance service in Washington state.

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II. BACKGROUND AND PROCEDURAL HISTORY

2 This is a consolidated proceeding to consider the compliance of Qwest Corporation (Qwest), formerly known as U S WEST Communications, Inc. (U S WEST),¹ with the requirements of section 271 of the Telecommunications Act of 1996 (the Act),² and the review and approval of Qwest’s Statement of Generally Available Terms (SGAT) under section 252(f)(2) of the Act. The general procedural history of this proceeding is included in the *Eleventh Supplemental Order*, entered March 30, 2001, and will not be repeated here. The proceeding is designed, among other things, to produce a recommendation to the Federal Communications Commission (FCC) regarding Qwest’s compliance with certain requirements of law.

3 The Commission has conducted its review of the section 271(c)(2)(B) checklist items, provisions of the SGAT addressing checklist issues, Qwest’s Performance Assurance Plan (QPAP), and the issue of public interest pursuant to section 271(d)(3)(C) in this proceeding primarily through a series of five workshops over which an administrative law judge presided, and about which the parties provided comments.³ The parties were given the opportunity to present oral argument to the Commission on contested issues.

4 The Commission presided over hearings that are the subject of this order: Qwest’s commercial performance data, verification of that data, Qwest’s change management process, additional public interest issues, and KPMG Consulting’s (KPMG) final report of the testing of Qwest’s Operations Support Systems (OSS). The issue of public interest was primarily addressed in the fourth workshop, but additional issues were raised in hearings before the Commission in May 2002.

¹ After this proceeding began, U S WEST merged and has become known as Qwest Corporation. For consistency and ease of reference we will use the new name Qwest in this Order.

² Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

³ QPAP issues were initially addressed in hearings in the Multi-state Proceeding. Seven states--Iowa, Utah, North Dakota, Wyoming, Montana, Idaho, and New Mexico--have held a joint proceeding, known as the Multi-state Proceeding, similar to the proceeding in Dockets No. UT-003022 and UT-003040 to evaluate Qwest’s SGAT and Qwest’s compliance with section 271 of the Act.

- 5 The Commission held its fourth workshop in this proceeding in Olympia, Washington, on July 9-13, and 16-18, 2001, addressing the issues of Checklist Item No. 4 (Unbundled Loops), Emerging Services, General Terms and Conditions, Public Interest, Track A, the requirements of section 272, and provisions of Qwest's proposed SGAT addressing these issues. The Commission held a follow-up workshop on July 31, and August 1, 2001, in Olympia, Washington, to address unresolved issues from the earlier workshop session. The administrative law judge entered the *Twentieth Supplemental Order; Initial Order (Workshop Four): Checklist Item No. 4; Emerging Services, General Terms and Conditions, Public Interest, Track A, and Section 272 (20th Supplemental Order)*, on November 15, 2001. On March 12, 2002, the Commission entered the *Twenty-Eighth Supplemental Order; Commission Order Addressing Workshop Four Issues: Checklist Item No. 4 (Loops), Emerging Services, General Terms and Conditions, Public Interest, Track A, and Section 272 (28th Supplemental Order)*.
- 6 The Commission held hearings on December 18 and 19, 2001, to hear additional testimony and argument on the issue of the QPAP, and whether Qwest's SGAT filings were compliant with Commission orders. The Commission entered its *30th Supplemental Order, Commission Order Addressing Qwest's Performance Assurance Plan (30th Supplemental Order)* on April 5, 2002. Following Qwest's petition for reconsideration and responses by the parties, the Commission entered the *33rd Supplemental Order; Order Denying in Part and Granting in Part, Qwest's Petition for Reconsideration of the 30th Supplemental Order (33rd Supplemental Order)* on May 20, 2002.
- 7 The Commission held hearings in this proceeding on April 22-26, 2002, addressing the issues of Qwest's commercial performance data, verification of the accuracy of the data, Qwest's change management process, or CMP, and compliance issues from Workshops 1 through 4. The parties filed simultaneous post-hearing briefs on the issues of data verification, commercial performance data, and CMP on May 7, 2002.
- 8 The Commission held hearings on May 13 and 14, 2002, addressing additional public interest issues and compliance issues from Workshops 1 through 4. AT&T, Public Counsel and Qwest filed simultaneous briefs on public interest issues on June 7, 2002.

- 9 On May 29, 2002, the Commission entered its 34th *Supplemental Order, Order Regarding Qwest's Demonstration of Compliance with Commission Orders (34th Supplemental Order)*. That order addressed compliance issues arising from Commission orders addressing Workshops 1 through 4, and argument on these issues during hearings held in December 2001, April 2002, and May 2002. The order required Qwest to file an SGAT in compliance with the requirements of the order by June 11, 2002.
- 10 The Commission held hearings on June 5-7, 2002, addressing the issue of KPMG's Final Report on Qwest's OSS Testing (Final OSS Test Report) and compliance issues concerning the QPAP.
- 11 On June 20, 2002, the Commission entered its 37th *Supplemental Order, Commission Order Addressing Qwest's Compliance with Commission Orders Concerning Qwest's SGAT and Performance Assurance Plan (QPAP) (37th Supplemental Order)*, requiring Qwest to file an SGAT and QPAP in compliance with the order by June 25, 2002. In response to a request for clarification of the 37th *Supplemental Order* filed by Qwest, the Commission entered the 38th *Supplemental Order; Order on Clarification of the 37th Supplemental Order*, on June 25, 2002.
- 12 The orders mentioned above address disputed issues arising from Workshops 1-4 and the QPAP hearings, and state findings and conclusions on all material facts inquired into during the course of the workshops and hearings. Where the same issues are addressed below, the Commission restates and adopts the findings and conclusions entered in the orders, with the modifications discussed below.

III. PARTIES AND REPRESENTATIVES

- 13 The following parties and their representatives participated in hearings addressing the issues of the compliance with Commission orders concerning the QPAP and the SGAT, and issues concerning the public interest, data verification, commercial performance data, Qwest's change management process, and KPMG's Final OSS Test Report: Qwest, by Lisa Anderl and Adam Sherr, attorneys, Seattle, Washington, Lynn Stang, Andrew Crain, John Munn, and Charles W. Steese, attorneys, Denver, Colorado; AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle (collectively AT&T), by Mary Tribby, Rebecca DeCook, Letty S. D. Friesen, Steven Weigler, and Gary B. Witt, attorneys, Denver, and Gregory J. Kopta, attorney,

Seattle; WorldCom, Inc. (WorldCom) by Ann E. Hopfenbeck, Michel Singer Nelson, and Thomas Dixon, attorneys, Denver; Electric Lightwave Inc. (ELI), XO Washington, Inc. (XO), and Time-Warner Telecom of Washington by Gregory J. Kopta, attorney, Seattle; Covad Communications Company (Covad) by K. Megan Doberneck, attorney, Denver; Teligent Services, Inc., Rhythms Links, Inc. and TRACER, by Arthur A. Butler, attorney, Seattle; Sprint Corporation (Sprint), by Barbara Young, attorney, Hood River, Oregon; and Public Counsel by Robert W. Cromwell, Jr., Assistant Attorney General, Seattle. Administrative Law Judge Ann E. Rendahl presided over the proceeding.

IV. DISCUSSION

A. QPAP & SGAT COMPLIANCE ISSUES

14 In the 37th *Supplemental Order*, entered on June 20, 2002, the Commission ordered Qwest to file a complete, revised SGAT, including an Exhibit K, which is Qwest's performance assurance plan, or QPAP, on June 25, 2002. In the 38th *Supplemental Order*, entered on June 25, 2002, the Commission clarified sections of the 37th *Supplemental Order* concerning payments for high-value services and inclusion of the line sharing performance measures. Qwest filed its revised SGAT and Exhibit K on June 25, 2002.⁴

1. QPAP Compliance

a. Six-Month Review

15 *Qwest*. In its June 25, 2002, QPAP Compliance Filing, Qwest explains that it has complied with paragraph 55 of the Commission's 37th *Supplemental Order*, but asks that the Commission include an additional paragraph in section 16 to address the issue of the Commission's authority to change the QPAP. *Ex. 1813 at 2-3*. In the 37th *Supplemental Order*, the Commission directed Qwest to modify section 16 of the

⁴ Qwest's QPAP compliance filing, and clean and redlined copies of the June 25, 2002, QPAP are admitted as Exhibits 1813, 1814, and 1815 respectively. Qwest's Notice of Updated Statement of Generally Available Terms and Conditions as of June 25, 2002, the eighth revised SGAT with exhibits, and the redlined version of the SGAT are admitted as Exhibits 1816 through 1819, respectively.

QPAP to conform to language set forth in paragraph 146 of the 30th *Supplemental Order*, as follows:

Qwest must modify the QPAP to allow the Commission authority to determine whether changes ought to be made to the QPAP. Qwest must amend section 16.1 of the QPAP to strike “Changes shall not be made without Qwest’s agreement,” and add the following: “After the Commission considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file to effectuate these changes.”

16 Qwest asks that the Commission include the following language as section 16.1.2 of the QPAP:

16.1.2 Nothing in this QPAP precludes the Commission from modifying the QPAP based upon its independent state law authority, subject to judicial challenge. Nothing in this QPAP constitutes a grant of authority by either party to this agreement nor does it constitute a waiver by either party to this agreement of any claim either party may have that the Commission lacks jurisdiction to make any modifications to this QPAP, including any modifications resulting from the process described in Section 16.1.

17 *Ex. 1813 at 3.* Qwest asserts that the language addresses the concern that the QPAP is a contract between Qwest and a CLEC and that the parties cannot confer upon the Commission jurisdiction it does not otherwise have. *Id. at 2.* Qwest asserts that without the proposed language, a court or future Commission might conclude that the parties had agreed to waive their right to challenge Commission action on jurisdictional grounds. *Id.*

18 **Joint CLECs.** On June 28, 2002, AT&T, WorldCom, Covad, and ELI and Time Warner filed a joint letter with the Commission asking that the Commission reject Qwest’s proposed language. The joint CLECs assert that the language negates any change control authority by the Commission and makes any changes the Commission makes subject to judicial review. The joint CLECs assert that the Commission has rejected Qwest’s proposal three times before and should reject the language as against the public interest. The joint CLECs request a briefing schedule to address the issue.

19

Discussion and Decision. The QPAP is not just a contract between Qwest and CLECs. The QPAP is Qwest’s performance assurance plan through which it assures this Commission, competing carriers, and the FCC that Qwest will continue to adhere to the requirements of section 271 after it obtains section 271 authority. Nevertheless, we understand Qwest’s concerns that the QPAP, when included as a part of a contract between Qwest and CLECs, may be interpreted as it is presently written to include a waiver of the parties’ rights to challenge Commission jurisdiction. We will accept Qwest’s proposed modification, and allow section 16.1.2 to be included in the QPAP. We also find that the remainder of section 16 complies with the Commission’s 30th, 33rd and 37th *Supplemental Orders*. We deny the joint CLECs’ request for additional briefing.

b. Compliance Table

20

Aside from the discussion above concerning the six-month review provisions in section 16 of the QPAP, Qwest has modified its QPAP, Exhibit K to the SGAT, to comply with the 37th *Supplemental Order*. The table set forth below identifies the issues discussed in Commission orders, the relevant Commission orders and ordering paragraphs, the change required by the orders, and the QPAP section or Exhibit that complies.

Description of Issue	Order and Paragraph	Change Required by the Order	QPAP/SGAT Section
Revenue Cap	30 th <i>Supp. Order</i> , ¶51; 37 th <i>Supp. Order</i> , ¶19.	Qwest must modify section 12.1 of the QPAP as reflected on page 7 of Exhibit 1689, except that Tier 2 assessments or payments made by Qwest shall be subject to the revenue cap.	Ex. 1815, section 12.1
ARMIS Data	30 th <i>Supp. Order</i> , ¶56; 37 th <i>Supp. Order</i> , ¶20.	Qwest must modify section 12.1 of the QPAP as shown in Exhibit 1687.	Ex. 1815, section 12.1

<p>Tier 2 Payment Trigger</p>	<p><i>30th Supp. Order, ¶86; 33rd Supp. Order, ¶24; 37th Supp. Order, ¶26.</i></p>	<p>Qwest must modify sections 7.2, 7.3, 9.1, 9.1.1, and 9.1.2 of the QPAP to remove changes reflected in Exhibit 1681 that do not correspond to requirements of the <i>30th</i> and <i>33rd Supplemental Orders</i>.</p>	<p>Ex. 1815, sections 7.2, 7.3 and 9.1 modified. Sections 9.1.1 and 9.1.2 deleted.</p>
<p>Collocation Payments</p>	<p><i>30th Supp. Order, ¶93; 33rd Supp. Order, ¶28; 37th Supp. Order, ¶29.</i></p>	<p>Qwest must modify QPAP section 6.3 to reflect that CP-2 and CP-4 business rules are applicable only to matters not addressed in WAC 480-120-560. QPAP section 6.3 and SGAT section 8.4.1.10 must be consistent. Qwest must modify SGAT sections 8.2.1.1 and 8.4.1.10. Qwest must modify the language as agreed during the June 5 hearing.</p>	<p>Ex. 1815, section 6.3; see also Ex. 1819, sections 8.2.1.1 and 8.4.1.10.</p>
<p>Service Quality Payments</p>	<p><i>30th Supp. Order, ¶109; 37th Supp. Order, ¶33.</i></p>	<p>Qwest must modify section 12.1 of the QPAP as required in paragraph 19 of the <i>37th Supplemental Order</i>.</p>	<p>Ex. 1815, section 12.1.</p>
<p>Adding New UNEs</p>	<p><i>30th Supp. Order, ¶124; 37th Supp. Order, ¶40.</i></p>	<p>Qwest must increase the line sharing measure in Exhibit B of the SGAT and modify section 20 of the SGAT as reflected in Exhibit 1687.</p>	<p>Ex. B to Ex. 1818; Ex. 1819, section 20.</p>
<p>Changes to Measure Weighting</p>	<p><i>30th Supp. Order, ¶135; 37th Supp. Order, ¶44.</i></p>	<p>Qwest must return the base value of QPAP payments for residential and business resale, and UBL-2 wire/ analog loops to their pre-existing payment levels.</p>	<p>Ex. 1815, Table 2.</p>

Special Fund	30 th <i>Supp. Order</i> , ¶160-62; 33 rd <i>Supp. Order</i> , ¶¶55-56; 37 th <i>Supp. Order</i> , ¶58.	Qwest must modify the QPAP to delete sections 11.3.1 through 11.3.3 and all other references to the Special Fund.	Ex. 1815, sections 11.3.1-3 deleted. References to Special Fund in sections 16.1, 16.2.
Multi-state Audits	30 th <i>Supp. Order</i> , ¶241; 33 rd <i>Supp. Order</i> , ¶55; 37 th <i>Supp. Order</i> , ¶63.	Qwest must remove the additional language in section 15.1 concerning coordination with other state and regional audits.	Ex. 1815, portion of section 15.1 deleted.
Payment Method	30 th <i>Supp. Order</i> , ¶220; 33 rd <i>Supp. Order</i> , ¶83; 37 th <i>Supp. Order</i> , ¶68.	Qwest must modify section 11.2 to include the sentence appearing in Exhibit 1687.	Ex. 1815, section 11.2.

2. SGAT Compliance

21

Qwest has modified its SGAT to comply with the 37th *Supplemental Order*. The table set forth below identifies the issues discussed in Commission orders, the relevant Commission orders and ordering paragraphs, the change required by the orders, and the SGAT section or Exhibit that complies.

Issue No.	Order and Paragraph	Change Required by the Order	SGAT Section or Other Reference
WA-I-5	<i>34th Supp. Order, ¶¶17-18; 37th Supp. Order, ¶74.</i>	Qwest must amend the first sentence of SGAT section 7.1.2.1 as follows: “Interconnection may be accomplished through the provision of a DS1 or DS3 entrance facility, Direct Trunked Transport, or both.”	Ex. 1819, section 7.1.2.1.
WA-3-4	<i>34th Supp. Order, ¶44; 37th Supp. Order, ¶84.</i>	Qwest must modify SGAT section 10.8.2.27.1 to add the omitted sentence, and must modify section 10.8.2.27.4 as set forth in paragraph 84 of the <i>37th Supplemental Order</i> .	Ex. 1819, sections 10.8.2.27.1, 10.8.2.27.4.
WA LOOP 3(a)/3(b)	<i>34th Supp. Order, ¶¶57, 66; 37th Supp. Order, ¶88.</i>	Qwest must delete the portion of section 9.2.2.8 beginning with “If the Loop make-up information for a particular facility” and continuing to the end of the paragraph.	Ex. 1819, portion of section 9.2.2.8 deleted.
WA LOOP 3(a)/3(b)	<i>34th Supp. Order, ¶74; 37th Supp. Order, ¶92.</i>	Qwest must modify SGAT section 9.2.2.1.3.1 as reflected on pages 3 and 4 of AT&T’s Response to Qwest’s June 11 compliance filing.	Ex. 1819, section 9.2.2.1.3.1.

3. Effective Date of SGAT

In paragraph 97 of the *37th Supplemental Order*, the Commission stated that it would allow Qwest’s SGAT and all accompanying exhibits to become effective on July 10,

2002, if Qwest filed an SGAT and QPAP with the Commission on June 25, 2002, that complied with the requirements of the 37th *Supplemental Order*. Given that Qwest has filed a complete revised SGAT, including an Exhibit K, or QPAP, that fully complies with the 37th *Supplemental Order*, we approve Qwest’s request to allow the SGAT to become effective on July 10, 2002.

B. COMMERCIAL PERFORMANCE DATA AND VALIDITY OF DATA

1. Statutory and FCC Requirements

23 The FCC looks to performance measurements and performance data as “valuable evidence regarding a BOC’s [Bell Operating Company’s] compliance or noncompliance with individual checklist items.”⁵ The FCC finds that:

Where these [performance] standards are developed through open proceedings with input from both the incumbent and competing carriers, these standards can represent informed and reliable attempts to objectively approximate whether competing carriers are being served by the incumbent in substantially the same time and manner, or in a way that provides them a meaningful opportunity to compete.⁶

Specifically, the FCC notes that performance data adds “necessary objectivity and predictability” to the FCC’s review of compliance with checklist requirements.⁷

24 In explaining any “facial disparities” between the BOC’s performance for itself and for competitors, a BOC must “explain why those facial disparities are anomalous, caused by forces beyond the applicant’s control (e.g., competing carrier-caused errors), or *have no meaningful adverse impact on a competing carrier’s ability to obtain and serve customers.*”⁸ Further, the BOC must “provide the underlying data, analysis, and methodologies necessary to enable the Commission and commenters

⁵ *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, Memorandum Opinion and Order, CC Docket No. 02-35, FCC 02-147, App. D, ¶7 (rel. May 15, 2002) (*Georgia/Louisiana II Order*).

⁶ *Id.*, ¶8.

⁷ *Id.*, ¶10.

⁸ *Id.*, ¶7 (emphasis added).

meaningfully to evaluate and contest the validity of the applicant’s explanations for performance disparities.”⁹

- 25 The FCC looks at particular performance data to see if any statistically significant differences exist between the service a BOC provides to itself and the service it provides to competitors.¹⁰ If there are no such differences, the FCC looks no further. If there are statistically significant differences, the FCC looks at a number of factors to determine if the nondiscrimination requirements are met.¹¹ The FCC considers the number of months of variation in performance and the recent trend in performance, and whether the differences have “competitive significance in the marketplace.”¹²
- 26 Where there are multiple performance measures associated with a particular checklist item, the FCC looks to the BOC’s performance for that checklist item as a whole.¹³ However, the FCC notes that disparity of performance in one performance measurement “may support a finding of statutory noncompliance, particularly if the disparity is substantial or has endured for a long time, or if it is accompanied by other evidence of discriminatory conduct or evidence that competing carriers have been denied a meaningful opportunity to compete.”¹⁴
- 27 Where parties have challenged the validity of performance data presented in section 271 applications, the FCC has considered a variety of factors and information in determining whether the data is accurate and reliable, including monthly review of data by state commissions, the collaborative nature of state review of the performance measures, BOC internal controls concerning the data, scrutiny and review by interested parties through audits and data reconciliations between the BOC and competing carriers, and access of competing carriers to carrier-specific data.¹⁵
- 28 The FCC has addressed this issue most recently in its *Georgia/Louisiana II Order*. Several CLECs contested the accuracy and reliability of the performance data upon which BellSouth relied in its application.¹⁶ The Department of Justice also expressed

⁹ *Id.*

¹⁰ *Id.*, ¶8.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*, ¶9.

¹⁴ *Id.*

¹⁵ *Id.*, ¶16, n.43.

¹⁶ *Id.*, ¶17.

concern with the data in certain respects, requesting that the FCC not rely solely upon performance data until audits were complete or more commercial experience was established.¹⁷ The FCC determined that BellSouth's performance data was generally "accurate, reliable and useful," based upon "the extensive third-party auditing, the internal and external data controls, the open and collaborative nature of metric workshops in Georgia and Louisiana, the availability of the raw performance data, BellSouth's readiness to engage in data reconciliations, and the oversight of the Georgia and Louisiana Commissions."¹⁸ However, where parties make credible challenges to data, the FCC will give that data lesser weight and look to other evidence in determining whether the BOC has met its obligations under section 271.¹⁹

2. The Development and Oversight of Qwest's Performance Measures

29 The performance measures Qwest uses to report its monthly commercial performance in Washington and other states in its operating territory were collaboratively developed by the Regional Oversight Committee's (ROC) Technical Advisory Group (TAG) to be used in the third-party testing of Qwest's Operations Support Systems (OSS).²⁰ These same performance measures are used in the QPAP to determine whether Qwest must make payments to CLECs or the state for failure to meet the performance standards.

30 The performance measures are a "comprehensive set of measurement definitions, called the "Qwest Service Performance Indicator Definitions (PID) ROC 271 Working PID[s]." *Ex. 1733 at 14*. The most recent set of PIDs, version 5.0, dated April 25, 2002, is included as Exhibit B to the SGAT. *See Exhibit 1818*. The ROC TAG continues to address the refinement of existing PIDs and development of new PIDs, and is currently discussing the development of a long-term PID administration process to continue oversight of the PIDs. *See Ex. 1794*.

¹⁷ *Id.*

¹⁸ *Id.*, ¶19.

¹⁹ *Id.*, ¶20.

²⁰ *See Ex. 1733, Qwest OSS Evaluation Project, Master Test Plan, Revised Release Version 5.2 (Master Test Plan)*. ROC stands for the Regional Oversight Committee, composed of representatives of the regulatory commissions in states in which Qwest provides local exchange service. The Technical Advisory Group, or ROC TAG, is composed of state commission staff, and representatives of Qwest, CLECs, and other industry participants.

- 31 The PIDs identify and define measurements for the following categories of Qwest functions and services: Electronic Gateway Availability (GA), Pre-Order/Order (PO), Ordering and Provisioning (OP), Maintenance and Repair (MR), Billing (BI), Database Updates (DB), Directory Assistance (DA), Operator Services (OS), Network Performance (NP), and Collocation (CP). *Ex. 1478 at ii-iii*. These measurements are disaggregated into 656 individual performance submeasurements for which Qwest reports its performance each month. *See Ex. 1473 at 60; see also Ex. 1474*.
- 32 Qwest’s performance is measured in three ways: (1) relative parity with retail; (2) by meeting a performance objective or “benchmark” where no retail analogue exists; and (3) “diagnostic,” or “parity by design” measures where no benchmark or retail analogue applies. *See Ex. 1357 at 2*. Benchmark measures evaluate Qwest’s performance for CLECs as a percentage, time, or number of days, where performance can be evaluated using a “stare and compare” method. *Id.* Statistical methods are used to determine performance for parity measures, where a statistically significant difference will show a failure to meet the measurement. *Id. at 2-3*. Parity-by-design measures recognize that the processes are inherently nondiscriminatory. *Id. at 2, n.3*. Measures may be categorized as diagnostic for several reasons, including that the product is too new to assign a retail analogue, or does not reflect Qwest’s performance, but provides helpful information. *Id., n.2*.

3. Data Verification

a. Background and History of Data Verification Efforts.

- 33 Pursuant to the Master Test Plan for the OSS test process, the Liberty Consulting Group (Liberty) was retained to “develop and perform an audit to insure that all aspects of Qwest’s wholesale performance measures and retail parity standards are sound and in compliance with the collaboratively developed ROC PID.” *Ex. 1733 at 20*. On September 25, 2001, Liberty issued its Final Report on the Audit of Qwest’s Performance Measures. *See Ex. 1376*.
- 34 In its report, Liberty stated that as a result of deficiencies found in Qwest’s measurement and reporting processes and in the PIDs themselves, and resulting corrections, the audit resulted in “significant improvements to both the processes used by Qwest and the specificity and clarity of the PID.” *Id. at 2*. While Liberty

concluded that “the audited performance measures accurately and reliably report actual Qwest performance,” Liberty also recommended an “on-going program for monitoring the reliability and accuracy of Qwest’s performance reporting.” *Id. at 2-3*. Liberty made this recommendation because Qwest developed the methods for reporting some performance measures during the audit and those methods may not have been subject to review or audit. *Id. at 3*.

35 Prior to the conclusion of Liberty’s performance measures audit, certain CLECs raised concerns within the ROC TAG concerning discrepancies between Qwest’s reported performance data and the CLECs’ own data. On August 23, 2001, the ROC TAG agreed to ROC TAG Change Request 20, and agreed to certain modifications to the change request on August 30, 2001. *Ex. 1378*. In that document, the ROC TAG retained Liberty to conduct a data reconciliation, i.e., to resolve disputes concerning discrepancies between PID results and CLEC data, as an extension to the performance measures audit. *Id.* Change Request 20 established a process and schedule for Liberty, the CLECs, and Qwest to engage in the data reconciliation and for Liberty to prepare a Data Reconciliation Report. *Id.*

36 The data reconciliation effort was designed to “determine whether any of the information provided by CLECs demonstrated inaccuracy in Qwest’s reported performance results,” or more generally, whether the data Qwest put into its systems to develop the performance data were accurate and reliable. *Ex. 1370 at 3*. Three CLECs, AT&T, WorldCom and Covad, participated in the data reconciliation process. The data reconciliation effort focused on data from seven states, Arizona, Colorado, Nebraska, Washington, Oregon, Utah, and Minnesota. *Ex. 1372 at 5*. During the data reconciliation effort, Liberty opened and closed one exception and 13 observations.²¹ *Id. at 8*.

37 Liberty issued individual reports following the data reconciliation effort in each state, and a final report summarizing the findings from all seven states. In its supplemental

²¹ Observations and exceptions were the means established in the ROC OSS testing process to address issues raised in the course of testing. *See Ex. 1379 at 1*. Observations are the “means of identifying a potential deficiency in a Qwest component that may result in a negative finding.” *Id.* Exceptions are “means of identifying a deficiency . . . that is expected to result in a finding of ‘Not Satisfied’ . . . if left unresolved.” *Id.* Liberty Consulting was assigned numbers in the 1000 series, Hewlett-Packard (HP) in the 2000 series, and KPMG in the 3000 series. *Id. at 5*.

report on date reconciliation efforts in Colorado, Liberty asserted that its work on data reconciliation was cumulative and that it would make final conclusions after finishing its work in all of the states. *Ex. 1329*. Liberty issued its report on the data reconciliation efforts in Washington state on March 1, 2002. *See Ex. 1330*. On April 19, 2002, Liberty completed its Report on Data Reconciliation of Qwest's Performance Measures. *See Ex. 1372*.

38 In its report, Liberty noted that the CLECs and Qwest reported data differently due to “operational and management needs.” *Id. at 5*. Liberty found that:

[G]iven the way CLECs captured data and accounted for information related to Qwest's wholesale performance measures, it is understandable why the CLECs thought Qwest was not reporting accurately. . . . In some cases, the CLECs did not have the systems required to track performance measure results at the level of detail required of Qwest.

Id. Liberty also stated that its objective was not to determine whether CLECs could replicate Qwest's results, but whether any of the information the CLECs brought forth demonstrated inaccuracies in Qwest's reported results. *Id.* The final data reconciliation report addressed data reported for the following performance measures: PO-5, OP-3, OP-4, OP-6, OP-13, OP-15, and MR-6. *Id. at 5-6*.

39 Liberty noted that half of the performance measure reporting problems involved process or system-type errors that could be solved through computer programming or revised data collection efforts. *Id. at 8*. The other set of problems was associated with human error, which Liberty asserted can be corrected through “new job aids or tools, revised methods and checks, and additional focused training.” *Id.* The final report summarizes each observation and exception and discusses the solutions or “fixes” Qwest made to correct the problem. After reviewing Qwest's fixes, Liberty concluded that “Qwest's performance reporting accurately and reliably report Qwest's actual performance.” *Id. at 9*.

40 Even after the release of Liberty's final data reconciliation report, AT&T, WorldCom, and Covad remain concerned about the accuracy and reliability of Qwest's performance data, primarily alleging that Liberty did not verify whether Qwest's efforts to fix the problems had been successful. The parties' concerns and Qwest's response to those concerns are discussed below.

b. Parties Positions

- 41 *AT&T*. AT&T witnesses Stephen Kail and John Finnegan addressed the issue of the accuracy and reliability of Qwest’s data in testimony and comments filed with the Commission. *See Exs. 1391, 1420-22*. Mr. Kail describes how he compiled AT&T data in order to match Qwest’s reported performance data for AT&T. *Ex. 1391 at 3-6*. Mr. Kail noted that he could not match the data reported by Qwest. *Id. at 22*. Mr. Kail concluded that the discrepancies in the data demonstrate that Qwest’s performance data do not accurately and reliably measure its actual performance. *Id. at 6*. In particular, Mr. Kail found many of the same errors and problems as Liberty found in its reconciliation efforts. *Id. at 17-18*.
- 42 Mr. Finnegan stated that AT&T contests one of the fundamental assumptions of Liberty’s audit of performance measures, i.e., “that the raw input data provided by Qwest was accurate.” *Ex. 1422 at 1*. Mr. Finnegan stated that the Liberty audit found that Qwest could turn data into PID-compliant results, assuming that the raw data was accurate and reliable. *Id.* AT&T asserted that the Commission should wait to determine whether Qwest’s data are accurate and reliable until after the Liberty data-reconciliation effort has concluded and until after KPMG issues its final OSS test report. *Id. at 4-6*. Mr. Finnegan notes that the OSS test includes a test to determine if KPMG can compare data compiled during the test by the pseudo-CLEC (P-CLEC) with the data Qwest compiles for the P-CLEC.²² Finally, Mr. Finnegan states the KPMG has issued Observation 3120 based on concerns over differences in data produced by the P-CLEC and Qwest. *Id. at 6*.
- 43 In exhibits filed with Mr. Finnegan’s comments, AT&T provided its comments on Liberty’s report on the data reconciliation effort for Washington state. *See Ex. 1423*. AT&T expresses concern that Liberty has closed exceptions without verifying the effectiveness of Qwest’s proposed changes. *Id. at 6-8, 11*. AT&T asserts that Liberty’s audit analysis fell short of what should have been done. *Id. at 11*.
- 44 Finally, in brief, AT&T asserts that it remains unclear whether the problems that Liberty identified have been corrected. *AT&T’s Post Hearing Brief Regarding*

²² Hewlett-Packard (HP) was hired by the ROC to perform the role of the P-CLEC during the OSS testing efforts.

Qwest's Commercial Performance and Data Reconciliation Efforts at 3 (AT&T Performance Brief). AT&T questions the professionalism of Liberty's work, and in particular, Liberty's failure to verify the effectiveness of Qwest's fixes for human error problems. *Id. at 4*. AT&T believes that Liberty prematurely closed observations and exceptions. *Id. at 10*. Finally, AT&T asserts that KPMG has found outstanding data integrity issues in Exception 3120. *Id. at 12*.

45 **Covad.** Covad expresses concerns similar to AT&T's in its comments and exhibits filed with the Commission. Like AT&T, Covad asserts that Liberty prematurely closed observations and exceptions without verifying that Qwest corrected the problem. *Ex. 1440 at 20-22*. Covad asserts that Liberty incorrectly placed the burden on CLECs to prove that there were discrepancies in the data and that Qwest had treated orders incorrectly. *Id. at 5-6*. Covad asserts the Liberty applied criteria and standards inconsistently to Qwest and the CLECs, undermining the credibility of the data reconciliation effort. *Id. at 6-7, 9-10*. Covad asserts that Liberty never quantified the level or percentage of error in Qwest's data that would be acceptable or unacceptable. *Id. at 8*.

46 In discussing the data reconciliation effort for Arizona, Covad asserts that Liberty accepted Qwest's explanations for discrepancies between Covad's and Qwest's data, even where Covad later proved Qwest's explanation was not correct. *Id. at 8-10*. Covad objects to Liberty's finding that 75 percent of the data discrepancies are inconclusive, and then finding that Qwest's data is accurate and reliable. *Id. at 11-13*. Covad expresses similar concerns for the reports Liberty has issued for the states of Colorado and Washington. *Id. at 13-17*.

47 Covad also notes that Qwest reports data for Covad in the state of Nebraska, North Dakota, and South Dakota, even though Covad has not yet entered the market in those states. *Id. at 18*. Covad identifies a problem with reporting of unbundled and conditioned loops, where unbundled loop orders were incorrectly reported as conditioned loops, to which a longer interval applies. *Id. at 18-19*.

48 **Qwest.** Qwest's witness, Michael Williams, filed testimony, supplemental testimony, and numerous exhibits with the Commission concerning performance data and Liberty's data reconciliation efforts. *See Exs. 1310-61*. In testimony filed in late March, Mr. Williams asserts that the Commission can "confidently rely" on Qwest's performance results as Liberty has determined in its performance measures audit that

Qwest's performance data accurately and reliably report Qwest's actual performance. *Ex. 1337 at 10*. Mr. Williams states that the human errors found in Liberty's data reconciliation efforts are "slight." *Id. at 12*. Finally, Mr. Williams notes Liberty testified in a Colorado hearing that Qwest's performance data is representative of Qwest's actual performance. *Id.*

49 In brief, Qwest asserts that Liberty, an independent third-party, has twice concluded that Qwest's performance data are accurate and reliable. *Qwest's Post-Hearing Brief Re: Qwest's Commercial Performance Data and Data Reconciliation at 5 (Qwest Performance Brief)*. Qwest describes the extensive efforts of Liberty in evaluating each performance measure as well as the allegations of CLECs of discrepancies in data. *Id. at 5-7*. Qwest asserts that the Commission should rely on the "substantial breadth" of Liberty's work to conclude that Qwest's data is accurate and reliable. *Id. at 6*.

50 Qwest states that Liberty identified 14 issues with Qwest's data, addressing problems with Qwest's processes and human errors by Qwest personnel in processing orders. *Id. at 7*. Qwest notes that the seven process errors were corrected through programming changes. *Id.* Qwest also notes that Liberty evaluated the code changes and resulting data to ensure that the coding change corrected the problem. *Id.*

51 Concerning the observations addressing human error, Qwest asserts that these are "slight incidences of human error," over which CLEC concerns are misguided. *Id. at 7-8*. Qwest notes that Liberty had access to data to validate corrections for human errors noted in Observations 1034 and 1037. *Id. at 8*. These observations addressed the transition to a new Firm Order Commitment (FOC) time for xDSL loops and errors occurring when Qwest transitioned to a new service center for managing coordinated cutovers throughout its region. *Id.*

52 Qwest states that the CLECs complain most about Liberty closing Observations 1028, 1031, 1032, 1033, and 1036 following a review of training materials, interviews with Qwest employees, and "using its own professional judgment that Qwest's corrective action would cure the issue." *Id. at 8*. Qwest notes that in two instances, Liberty asked Qwest to do more after receiving training materials. *Id. at 8-9*. Qwest addressed the other observations in detail, and states that Liberty found Qwest's efforts adequate to address the errors. *Id. at 8-14*. Qwest asserts that there will

always be some amount of human error and that Qwest has done what is reasonable to limit that amount of error. *Id. at 9.*

c. Discussion and Decision

53 During the hearing and in comments and briefs filed with the Commission, the CLECs have raised concern about the impartiality and credibility of Mr. Stright and of Liberty. The CLECs specifically question Liberty's professionalism and decisions to close observations without verifying that the correction Qwest made would resolve the problem. The Commission has reviewed Liberty's reports, has had the opportunity to observe Mr. Stright as a witness, and has listened to his answers to numerous cross-examination questions. While it appears that Mr. Stright and Liberty may have a comfortable working relationship with Qwest, we perceive Mr. Stright to be a credible witness, and not biased towards Qwest. Liberty engaged in an extensive review of Qwest's performance measures and reconciliation of Qwest and CLEC data. Liberty identified a number of problems which Qwest corrected, or made efforts to correct. As Mr. Stright testified during the hearing, Liberty made judgments after relying upon information provided by Qwest, AT&T, and other CLECs and determined whether Qwest's corrections were sufficient. *Tr. 6742.* In general, we do not take issue with Liberty's professional judgment.

54 We find Liberty's explanations of its verification of code fixes to correct programming errors to be credible and satisfactory. *See Ex. 1471; Tr. 6824-25.* However, after reviewing the data reconciliation reports and other exhibits relating to the data reconciliation effort, we find one area of concern – human errors by Qwest personnel identified not only by Liberty, but by KPMG as well. While additional training by Qwest may help to correct the problem, the problem appears to be more prevalent than Liberty discusses in its reports. Liberty's evaluation of problems with human error cannot be evaluated without also taking into account the actions of KPMG and HP, the P-CLEC, on the same topic.

55 Liberty opened and closed in its data reconciliation efforts seven observations addressing problems with human error. When comparing P-CLEC data to Qwest data for the P-CLEC, KPMG identified discrepancies that could have an effect on accurate reporting of PID results, and opened two observations, 3089 and 3099. *See Ex. 1759 at 1.* Both observations were closed and considered in Exception 3120. *Id.* Exception 3120 focused on concerns with excluding data, intervals, and missing data.

Ex. 1758 at 1. KPMG conducted a retest of certain items that identified continued problems. *Id. at 7.* KPMG opened Observation 3110 to address human error problems that appeared during the retest. *Id. at 8.*²³ In its Final OSS Test Report, KPMG stated that it was unable to determine the accuracy and completeness of Qwest's PID reporting for OP-4 measures due to the impact of human error. *Ex. 1697 at 201-2.*

56 KPMG and HP also opened and closed 75 observations and exceptions relating to problems with manually handled orders that were closed upon Qwest stating that additional training would be conducted, and opened Observation 3086 to address the issue. *See Ex. 1784.* At the ROC's request, KPMG conducted a Qwest Manual Order Entry Performance Indicator Description Adequacy Study to determine if existing performance measures relating to manual order handling are adequate or whether new PIDs must be developed. *Ex. 1699 at 1.* KPMG recommended changes to further disaggregate PIDs OP-3, OP-4, and OP-15, and to define new PIDs. *Id. at 6.*

57 Qwest responded to KPMG's study, and agreed to develop and present a proposal for new PIDs addressing order accuracy. *Ex. 1794 at 1.* However, Qwest is concerned with the already large number of PIDs and does not wish to further disaggregate those PIDs. *Id. at 4-11.* Qwest recognizes that there will be an ongoing process of data reconciliation and audits under its performance assurance plans. *Id. at 3.*²⁴

58 Given Liberty's and KPMG's auditing and testing of the PIDs, and Qwest's actions in correcting problems such as coding and human error issues, we believe that Qwest's performance data is sufficiently accurate and reliable to demonstrate Qwest's performance in the state of Washington. However, KPMG's and Liberty's efforts in combination provide a picture of Qwest personnel not handling orders and troubles as required by the PIDs. While Qwest has made efforts to provide additional training and auditing of personnel, and has agreed to address the issues through the PIDs,

²³ Documentation related to Observation 3110 was not placed in the record by any party. Observation 3110 is located on the ROC OSS Repository Web site at <http://www.nrri.ohio-state.edu/oss/oss.htm>. Information on the website indicates that the observation was closed/unresolved on May 28, 2002.

²⁴ At the conclusion of hearings in this proceeding in early June 2002, Qwest, the CLECs and the ROC were in the process of developing a long-term PID administration program, which has not yet been formalized. *Tr. 8460-61.* Even if such a program does not materialize, performance assurance plans for Washington and other states in Qwest's region provide for periodic audits of the PIDs.

these problems appear to affect the accuracy of the data for PID OP-4 at the very least, and possibly OP-3 and OP-6. *See Ex. 1697 at 210*. Following the FCC’s guidance on the issue of data verification, we suggest that the FCC give lesser weight to performance data for measure OP-4.

59 Given that Qwest and the CLECs are addressing the issue of human errors through revising and adding PIDs, that there will be an ongoing process under the QPAP for auditing PIDs and data results in this state or in a multi-state forum, and that CLECs will continue to have access to CLEC-specific performance data, we believe there are sufficient checks on Qwest inaccurately recording or reporting performance data. We expect Qwest to continue working to develop a solution to the problem with human errors identified by both Liberty and KPMG.

4. Commercial Performance Data

60 In order to demonstrate compliance with each checklist item, Qwest must show not only that it has a concrete legal obligation to provide the checklist item, but also that it is providing or is ready to provide the checklist item in quantities that competitors may reasonably demand and at an acceptable level of quality.²⁵ Qwest “must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis.”²⁶ Where the services or functions that Qwest provides to CLECs are analogous to those Qwest provides itself in connection with retail service offerings, Qwest must provide access to CLECs in “substantially the same time and manner” as it provides to itself, i.e., at parity.²⁷ Where there is no retail analogue, Qwest must show that the access it provides to CLECs offers the CLECs a “meaningful opportunity to compete.”²⁸ As noted above, the FCC looks to data describing the BOC’s commercial performance, along with other data, in determining checklist compliance.²⁹ The FCC usually looks to the most recent four months of data, considering trends in the data.

²⁵ *Georgia/Louisiana II Order*, App. D, ¶5.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*, ¶6.

- 61 During the workshops in this proceeding, the Commission made its determinations of checklist compliance conditional upon a review of Qwest's performance results and the findings in the Final OSS Test Report.
- 62 In September 2001, Qwest began filing monthly reports of its aggregate commercial performance data, i.e., for all CLECs, for Washington state and the region spanning a 12-month period, beginning with data for July 2000 – June 2001. The Commission has admitted numerous exhibits in this proceeding concerning Qwest's performance data, including Qwest's performance report for the 12-month periods ending January 2002, February 2002, March 2002, and April 2002. *See Exs. 1320, 1338, 1355, and 1474.*
- 63 **Qwest.** In testimony, exhibits, and briefs filed with the Commission, Qwest asserts that its performance data establish that Qwest has demonstrated compliance with each checklist item, and specifically that it provides products and services to CLECs in a nondiscriminatory manner. *Ex. 1337 at 6, 138-39; see also Qwest's Performance Brief at 1-3.* In its filings, Qwest has identified those measures for which it failed to meet performance measures in each of the last four months. Where it has failed to meet a performance measure in a particular month, Qwest has explained the nature of the "miss," the reasons for its occurrence, and what Qwest has done or plans to do to correct any problems. Qwest has also filed demonstrative exhibits, which it calls its "Blue Charts," which graphically describe Qwest's performance, showing compliance with performance measures in dark blue, with lesser performance noted in lighter blue, light green, and beige.
- 64 Qwest asserts that it has met or substantially met the performance measures for Checklist Items No. 1 (Interconnection and Collocation), 5 (Unbundled Dedicated Interoffice Transport (UDIT)), 7 (911/E-911, Directory Assistance, Operator Services), 8 (White Pages), 9 (Numbering Administration), 10 (Databases and Associated Signaling), and 13 (Reciprocal Compensation). For these measures, Qwest asserts that it has met all, or nearly all, of the measures for the checklist item in the last four months of data. *See Exs. 1337, 1473; see also Qwest's Performance Brief at 16-29.* There are no performance measures associated with Checklist Items No. 3 (Access to Poles, Ducts and Rights of Way), 6 (Unbundled Switching), and 12 (Dialing Parity).

- 65 Qwest also asserts that its performance results demonstrate that, overall, Qwest satisfies Checklist Items No. 2 (Access to UNEs), 4 (Unbundled Loops), 11 (Number Portability), and 14 (Resale), but recognizes that it has failed to meet certain individual measures of performance for these checklist items.
- 66 For Checklist Item No. 2, concerning access to UNEs, Qwest identifies misses during the last four months for the following measures: (1) PO-2B-2, measuring the electronic flow-through of orders on Qwest's IMA-EDI interface; (2) BI-3A, BI-4A, and PO-7, measuring billing completeness, accuracy and notices of billing completeness; and (3) OP-4, MR-4, MR-7, MR-8, and MR-9, measuring installation intervals and maintenance and repair service for UNE-P. *Ex. 1337 at 31-36; Qwest's Performance Brief at 18-22.* Qwest asserts that its performance is strong and that problems with trouble rates for MR-8 were so low, and misses for UNE-P POTS services were so slight that they do not have a competitive impact on CLECs. *Qwest's Performance Brief at 22.*
- 67 As to Checklist Item No. 4, concerning unbundled loops, Qwest explains that it tracks installation and repair performance data for eight different types of loops. *Id.* Qwest states that it has missed a number of performance measures concerning installation commitments met, new service installation quality and repair performance for DS-1 capable loops. *Ex. 1337 at 61-65.* Qwest asserts that DS-1 loops constitute only 4.4 percent of the loops in service in Washington and that its performance has been improving. *Id. at 58.* Qwest further states that the FCC approved Verizon's application for Pennsylvania, finding that multiple performance misses for high-capacity loops were not sufficient to deny checklist approval. *Id. at 62, n.24.* Qwest identifies other failures of Checklist Item No. 4 performance measures over the last four months explaining the misses as anomalous, minor, or aberrations. Qwest asserts that it has met 98 of the 104 performance measures associated with unbundled loops over the four month period ending February 2002, and 98 of the 105 measures for the period ending April 2002. *Ex. 1337 at 73; Ex. 1473 at 27.*
- 68 For Checklist Item No. 11, concerning local number portability, Qwest identifies that it failed in December 2001 to meet performance measures MR-11 concerning trouble reports cleared for LNP service within 24 hours, and MR-12, the average mean time to restore LNP service. *Ex. 1337 at 89.* Qwest asserts that it is meeting the requirements for local number portability. *Id.; Qwest's Performance Brief at 28.*

- 69 As to Checklist Item No. 14, concerning resale, Qwest explains that it tracks resale performance data for twelve products. *Ex. 1337 at 92*. Qwest asserts that it is providing service at parity for most of the performance measures for resale. *Id.* Qwest asserts that of 164 measures for resale products and services, Qwest met all but eight of the measures in the four months ending February 2002, and seven of 151 measures in the four months ending April 2002. *Id. at 96; Ex. 1437 at 48*. Those measures are OP-4A, OP-4C, OP-5, MR-7A, and MR-8 for residential, business, Centrex, and DS-1 products. *Ex. 1337 at 96-97*. Qwest explains the reasons for the failures to meet the measures, and asserts that it has met the requirements for the checklist item. *Id. at 96-109; Qwest's Performance Brief at 31*.
- 70 Qwest asserts that even though it has failed to meet certain performance measures over the last four to six months, missing a measurement by itself does not provide a basis for finding noncompliance with a checklist item. *Ex. 1337 at 113; Ex. 1473 at 62*. Qwest cites to the FCC's *Verizon Pennsylvania*³⁰ and *Verizon Connecticut*³¹ *Orders* to support its analysis. *Id.*
- 71 **AT&T.** In its most recent comments on Qwest's performance data, and in its brief, AT&T focuses on Qwest's failure to meet performance measures for Checklist Items No. 2 (Access to UNEs), 4 (Unbundled Loops), 11 (Local Number Portability), and 14 (Resale). AT&T agrees that Qwest has demonstrated compliance, conditional on the findings in the KPMG Final OSS Test Report, with Checklist Items No. 1, 3, 5, 6, 7, 8, 9, 10, 12, and 13. *AT&T Performance Brief at 13*. However, AT&T asserts that Qwest cannot demonstrate compliance with the remaining four checklist items. *Id. at 25*.
- 72 AT&T expresses concern over Qwest's failure to meet the performance standards for Checklist Item No. 2 for electronic flow-through of orders; billing timeliness, accuracy, and completion; the number of due-date changes per order; and

³⁰ *In the Matter of the Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, CC Docket No. 01-138, FCC 01-269, (rel. Sept. 19, 2001) (*Verizon Pennsylvania Order*).

³¹ *Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, Memorandum Opinion and Order, CC Docket No. 01-100, FCC 01-208 (rel. July 20, 2001) (*Verizon Connecticut Order*).

provisioning of UNE-P services. *Id. at 13-23*. AT&T also expresses concern over incomplete daily usage feed (DUF) files. *Id. at 17-19*.

73 AT&T asserts that the percentage of orders that flow through Qwest's Interconnect Mediated Access – Electronic Data Interchange (IMA-EDI)³² interface for resale orders, unbundled loop orders, and LNP orders is quite low. *Ex. 1422 at 6-7*. AT&T raises concern about the level of manual handling of orders when the orders do not flow through the interface. *Id.*

74 AT&T states that in the four months ending February 2002, Qwest's commercial results show that Qwest's wholesale bills are not accurate, and are not in parity with its retail bills. *Id. at 9-10*. AT&T suggests that the Commission consider KPMG's findings on the issue in the Final OSS Test Report. *Id. at 8-9*. AT&T also notes that Qwest's data show a statistically significant difference for measure PO-7, concerning the timeliness of billing completion notices. *Id. at 13-15*.

75 AT&T raises a concern about problems in the OSS testing process concerning delivery of daily usage feed, or DUF, information.³³ *Id. at 10-13*. AT&T asserts that KPMG has found significant problems with how Qwest provides usage information and is conducting a fifth retest of Qwest's process for delivering usage information. *Id. at 13*. There is no comparable PID measuring Qwest's performance in providing accurate usage information. *Id. at 12*.

³² Qwest provides several uniform interfaces to CLECs for their use in pre-ordering, ordering, and maintaining and repairing wholesale services. The Interconnect Mediated Access – Electronic Data Interchange, or IMA-EDI, is an electronic, or computer-to-computer, interface that allows CLECs to perform pre-order inquiries, place orders and obtain order status. The EDI interface extends from the CLEC's OSS application to the Qwest IMA-EDI gateway. *See Ex. 1733 at 145*. By contrast, Qwest's Interconnect Mediated Access – Graphical User Interface, or IMA-GUI, is a human-to-computer interface used by CLECs to perform pre-order inquiries, place orders, report troubles and obtain order status through a computer workstation connected to Qwest's gateway via a website. *Id.*; see also *Tr. 8395 – 97*.

³³ “Daily Usage Feed (DUF) files contain records that provide details of calls that originate from and are recorded by Qwest's switches.” *Ex. 1697 at 407*. These records are transmitted on a daily basis to CLECs through a designated interface. *Id.* CLECs use this information to bill their own customers for usage sensitive activities. *Tr. 8288*.

- 76 AT&T expresses concern over the performance results for a diagnostic measure, PO-15, which measures the number of due-date changes per order.³⁴ *Id. at 15-17*. AT&T asserts that the data for this measure demonstrate a problem in the quality of Qwest's process for issuing Firm Order Commitments, or FOCs. *Id. at 16*.
- 77 As to performance measures for UNE-P service, AT&T asserts that Qwest provides the service in a manner that discriminates against CLECs. *Id. at 17*. Specifically, AT&T asserts that Qwest does not install the service with the same care it does for its own retail customers, and that CLECs experience a higher rate of repeat troubles on UNE-P services. *Id. at 17-18*.
- 78 AT&T asserts that there is not enough activity, i.e. number of orders, in Washington state to allow the Commission to draw a conclusion about Qwest's performance with respect to unbundled loops, i.e., Checklist Item No. 4. *AT&T Performance Brief at 23*. AT&T also asserts that measure OP-4D demonstrates discrimination by Qwest in 11 of the last 12 months, ending in February 2002. *Id.* AT&T notes that while there is not a statistically significant difference, the results show that CLEC intervals are longer than those for Qwest customers. *Id. at 24*.
- 79 Concerning Checklist Item No. 11, AT&T asserts that CLECs experience repair times almost double those of Qwest's customers for restoring troubles with LNP orders. *AT&T Performance Brief at 24*. AT&T notes that the differences are statistically significant in only one month, due to the differences in volume between wholesale and retail customers. *Id. at 24-25*.
- 80 Finally, as to Checklist Item No. 14, concerning resale products and services, AT&T asserts that, as reflected in measure OP-4C, Qwest consistently treats CLECs worse than its retail counterpart. *Id. at 25*. AT&T asserts that Qwest installs CLEC orders for residential resale orders one day later than it provides the service to its own retail customers. *Id.* AT&T notes a similar pattern for business resale service. *Id.*
- 81 **Covad.** Covad raises concerns with Qwest's performance in providing line sharing, noting that Covad is Qwest's only competitor in the DSL market. *Ex. 1440 at 19*. Covad asserts that Qwest's provisioning of line sharing does not provide Covad with

³⁴ AT&T refers to measure OP-15. The correct measure, however, for due-date changes per order is PO-15.

a meaningful opportunity to compete. *Id.* In particular, Covad expresses concern with Qwest's failures to meet line sharing measures for OP-3A, OP-4A, and several maintenance and repair (MR) measures. *Id. at 19-20.*

82 ***ELI/Time Warner.*** ELI and Time Warner assert that Qwest has failed to demonstrate that Qwest is providing DS1 capable loops at an acceptable level of service quality, and ask the Commission to require Qwest to improve its service quality. *ELI and TWTC Brief on Qwest Performance Reports at 1 (ELI/TWTC Brief).* ELI and Time Warner assert that Qwest exceeds the 5-day installation interval for DS1 loops established in the Qwest-US WEST Merger Agreement and also exceeds the 9-day interval established in Exhibit C to the SGAT. *Id. at 1-2.* ELI and Time Warner also state that "Qwest's provisioning and repair of DS1 loops accounted for five of the six loop performance objectives Qwest failed to meet between November 2001 and February 2002." *Id. at 2.* ELI and Time Warner object to Qwest minimizing its poor performance on DS1 loops as only a small portion of the loops Qwest provides, stating that Qwest's performance is important for those companies that rely heavily on high-capacity loops. *Id.*

83 Referring to the requirement in the Commission's 30th *Supplemental Order* that Qwest report its monthly provision and repair intervals for special access circuits, ELI and Time Warner ask that these measures be included in the performance reports and that Qwest be required to disaggregate its data concerning special access circuits to distinguish between circuits it provides to affiliates rather than retail customers. *Id. at 3-4.* Further, ELI and Time Warner ask the Commission to require Qwest to measure and report on the same document its data concerning the provisioning and repair of UNEs, special access services provided to unaffiliated carriers, comparable service provided to Qwest affiliates, and comparable services provided to Qwest's end-user customers. *Id. at 4.*

84 ***Discussion and Decision.*** After reviewing Qwest's most recent performance results for Washington state (Exhibit 1474), and the parties' comments and briefs, we conclude that Qwest's performance data support a finding of compliance with Checklist Items No. 1, 5, 7, 8, 9, 10 and 13. As we have stated in previous orders, no performance measures have been developed for Checklist Items No. 3, 6, and 12. Now that Qwest has addressed all remaining compliance issues relating to Checklist Items No. 1 and 3, and based upon our findings in Section C below concerning the

Final OSS Test Report, we find that Qwest complies with Checklist Items No. 1, 3, 5, 6, 7, 8, 9, 10, 12, and 13.

85 The primary areas of dispute among the parties concerning performance data have focused on results for measures associated with Checklist Items No. 2 (Access to UNEs), 4 (Unbundled Loops), 11 (LNP) and 14 (Resale). For the reasons set forth below, and after applying the FCC's standards of review to Qwest's performance results, we find that Qwest's performance results also support a finding of compliance with Checklist Items No. 2, 4, 11, and 14. Now that Qwest has addressed the compliance issues discussed in this order concerning Checklist Items No. 2 and 4, and based upon our findings in Section C below concerning the Final OSS Test Report, we also find that Qwest complies with Checklist Items No. 2, 4, 11, and 14.

86 Qwest's data show that for benchmark measures PO-2B-1 and PO-2B-2, Qwest has met the benchmark for local service requests (LSRs) for resale, unbundled loops, and LNP that are eligible to flow through the IMA GUI and IMA EDI interfaces during the last four months. The only types of flow-through-eligible LSRs that did not meet the benchmark were LSRs for POTS resale received via IMA-EDI (PO-2B-2), and UNE-P POTS LSRs received via IMA-EDI (PO-2B-2). *See Ex. 1474 at 51-54.* These last two measures, however, show an improving trend over the last two months of reported data. *Id.*

87 AT&T raises concern over the overall level of flow-through of LSRs, focusing on measure PO-2A. That measure is diagnostic, and does show a high level of orders that do not flow through, and thus require manual handling. However, it is unclear from the testimony and evidence whether the reason for the high level of manual handling is due solely to Qwest's IMA GUI and IMA EDI interfaces, or whether CLEC actions also affect the flow-through of orders. As we discuss above concerning data verification,³⁵ the issue of manual handling of orders and the possibility of human errors will continue to be topics of discussion for the parties in revising and adding to the performance measures. We expect that AT&T's concerns will be considered during those discussions.

88 After reviewing data for all measures associated with billing, we find AT&T's concerns are not substantially supported by the data. With the exception of a problem

³⁵ *See supra*, paragraphs 54-57.

in the month of February for measure BI-2, Qwest has met the performance measures for billing associated with Checklist Item No. 2. *Ex. 1474 at 65, 75-78.* AT&T's concern over the completeness of daily usage feed information has been largely resolved in the ROC OSS Test, as KPMG determined following the fifth retest that Qwest satisfied certain test criteria for Test 19.6 concerning accuracy and completeness of daily usage feed information. *See Ex. 1697 at 413-19; see also Tr. 8086-87.* However, KPMG could not determine whether Qwest has satisfied two of the test criteria. This issue is discussed in more detail below in Section C.³⁶

89 Measure PO-15, concerning due-date changes per order, is a diagnostic measure. Qwest's data show a statistically significant difference between the average number of days of due-date changes for CLECs compared to Qwest's retail customers. *Ex. 1474 at 71.* As Qwest notes, the measure accumulates all orders for all services and tracks the due-date changes collectively. *Ex. 1337 at 133.* At retail, Qwest mainly receives simple, non-design POTs orders, whereas CLECs order more complex services, which may affect the number of due-date changes. *Id.* Given the diagnostic nature of the measurement, we do not find Qwest out of compliance with the requirements of Checklist Item No. 2, even though the data reported for the measure show statistically significant differences.

90 AT&T raises concerns with the installation quality for UNE-P services, as well as with the repeat trouble rate for UNE-P. Qwest's performance data demonstrate that Qwest is installing UNE-P at intervals equal to what Qwest provides to its retail customers, and at a quality that exceeds what Qwest provides its own customers. *Ex. 1474 at 81-82.* Performance results for UNE-P for MR-7, which measures the repeat trouble rate, demonstrate that when dispatched within an MSA, the repeat trouble rate is at parity. However, when dispatched outside of an MSA, or when there is no dispatch, the repeat trouble rate is not at parity, but has been improving in the last two months. *Id. at 84-88.* This level of performance, by itself, is not sufficient to find that Qwest does not comply with the requirements of Checklist Item No. 2.

91 AT&T, Covad, and ELI/Time Warner all raised concerns with Qwest's performance results for Checklist Item No. 4. Addressing AT&T's concerns first, AT&T asserts that Qwest has discriminated against CLECs because it installs unbundled loops to its customers in a shorter time interval than it takes to install loops for CLECs. *AT&T*

³⁶ *See infra*, paragraphs 120-25.

Performance Brief at 23. Qwest's performance data demonstrate that Qwest has met the benchmark of 6 average days for installation in all of the last twelve months. *Ex. 1474 at 109.* While the data show that Qwest has consistently installed loops to its customers in an average of 5 days, Qwest's average and the CLEC average have become very close in the last two or three months. *Id.* Given that Qwest has met the benchmark established by the ROC, we do not find the difference in installation intervals sufficient to find that Qwest does not comply with Checklist Item No. 4.

92 Covad asserts that Qwest's performance results for line sharing commitments met, installation intervals, and repairs demonstrate that Qwest does not provide Covad with a meaningful opportunity to compete. *Ex. 1440 at 19-20.* A review of Qwest's performance data shows little or no data in the areas of installation commitments met or installation intervals for line sharing dispatched within MSAs or outside of MSAs, but shows that Qwest has met the benchmarks set for those measures for line sharing with no dispatch. *Ex. 1474 at 165-167.* The data also show that Qwest's performance for maintenance and repair of line sharing is, at best, erratic. *Id. at 171-77.* However, there is very little data to consider. We do not find the line sharing results sufficient to find that Qwest does not comply with Qwest's compliance with Checklist Item No. 4.

93 Finally, ELI and Time Warner identify problems with Qwest's provisioning and repair of DS1 capable loops. *ELI/TWTC Brief at 1-3.* A review of the performance results for Qwest's provisioning of DS1 capable loops does show that Qwest has not met the intervals established in the Merger Agreement (5 days) or in the SGAT (9 days). *Ex. 1474 at 133.* The data show, however, that Qwest has consistently installed DS1 capable loops to CLECs at parity and in intervals shorter than it installs the loops for its own customers. *Id.* The data concerning repair of DS-1 capable loops show that Qwest is not consistently repairing DS1 capable loops at parity. *Id. at 137-39.* This is also borne out in Qwest's Blue Chart. *Ex. 1480 at 12.* However, the problems identified by ELI and Time Warner do not establish problems sufficient to justify finding Qwest out of compliance with Checklist Item No. 4.

94 ELI and Time Warner ask the Commission to order Qwest to report in one document its data concerning provisioning and repair of UNEs, special access services provided to unaffiliated carriers, comparable service provided to Qwest affiliates, and comparable services provided to Qwest's end-user customers. ELI and Time Warner recently requested similar reporting requirements in the context of Qwest's

compliance with section 272(e)(1). We have already addressed ELI and Time Warner's concerns. The Commission declined to order such reporting in the 34th *Supplemental Order*, but did require Qwest to refine how it will report data in compliance with section 272(e)(1). In addition, the Commission issued Bench Request No. 54, asking Qwest to describe with particularity how it will report on special access provisioning and repair for purposes of the QPAP.

95 Qwest's performance results demonstrate no problems with trouble reports for local number portability. *See Ex. 1474 at 210*. Qwest's performance results demonstrate that it provides local number portability in compliance with the requirements of Checklist Item No. 11.

96 AT&T raises concern over Qwest's installation intervals for residential and business retail, specifically measures OP-3C for residential resale and OP-4A for business resale. After reviewing Qwest's performance results for those measures, we find there is not a sufficient basis to find that Qwest does not comply with the requirements of Checklist Item No. 14. *See Ex. 1474 at 214, 223*.

97 After reviewing the few instances where Qwest failed to perform at parity or to meet a benchmark, looking at Qwest's overall performance in its detailed performance report, Exhibit 1474, and its Blue Chart, Exhibit 1480, and based upon our findings in Section C below concerning the Final OSS Test Report, we find that Qwest has demonstrated through its commercial performance that it is providing functions and services to CLECs in compliance with the requirements of the fourteen checklist items.

C. FINAL REPORT ON THIRD-PARTY OSS TESTING

1. Statutory and FCC Requirements

98 Operations support systems, or OSS, are the systems, databases, and personnel the incumbent local exchange carrier, or LEC, uses "to ensure that they provide telecommunications services to their customers at a certain level of quality, timeliness and accuracy."³⁷ OSS databases and systems include gateway systems, as well as

³⁷ *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in*

those required for pre-ordering, ordering, provisioning, maintenance and repair, and billing.³⁸

99 In its *Local Competition First Report and Order*, the FCC determined that OSS was a network element that must be unbundled upon CLEC request, finding that nondiscriminatory access to OSS functions is a part of the incumbent LEC's obligations under section 251(c)(3) to provide unbundled network elements under terms that are nondiscriminatory, just, and reasonable, and under section 251(c)(4) to offer resale services without imposing discriminatory or unreasonable limitations or conditions.³⁹ The FCC determined that CLECs would be "severely disadvantaged, if not precluded altogether, from fairly competing," if they were unable to perform OSS functions in the same time and manner as the incumbent LEC could perform the functions for itself.⁴⁰

100 Because OSS is an unbundled network element, the FCC considers under section 271 whether a BOC offers nondiscriminatory access to OSS under section 271(c)(2)(B)(ii), or Checklist Item No. 2. The FCC has also determined that a BOC's obligations to provide nondiscriminatory access to OSS functions are a part of its obligations under other checklist items, such as those requiring nondiscriminatory provisioning of loops, switching, and resale services.⁴¹

101 In order to demonstrate that it provides nondiscriminatory access to OSS functions, Qwest must show that it provides access that "sufficiently supports each of the three modes of competitive entry envisioned by the 1996 Act – competitor-owned facilities,

Michigan, Memorandum Opinion and Order, CC Docket No. 97-137, FCC 97-298, ¶129 (rel. Aug. 19, 1997) (*Ameritech Michigan Order*).

³⁸ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15590, CC Docket No. 96-98, FCC 96-325, ¶¶505, 523 (1996), (*Local Competition First Report and Order*).

³⁹ *Id.*, ¶¶516-17; see also *Ameritech Michigan Order*, ¶130. The FCC affirmed its finding that OSS is an unbundled network element in its order on remand. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, CC Docket No. 96-98, ¶424 (rel. Nov. 5, 1999) (*UNE Remand Order*).

⁴⁰ *Local Competition First Report and Order*, ¶518.

⁴¹ *In the Matter of Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New*

UNEs, and resale.”⁴² Where OSS functions are analogous to those Qwest provides to itself, it must demonstrate that it provides CLEC access in substantially the same time and manner as Qwest provides for itself.⁴³ For those functions for which there is no retail analogue, Qwest must offer access that is “sufficient to allow an efficient competitor a meaningful opportunity to compete.”⁴⁴ The FCC looks to performance standards adopted by the state or agreed to by the BOC in determining whether the quality of access allows a competitor a meaningful opportunity to compete.⁴⁵

102 The FCC uses a two-step method to determine whether a BOC has met the nondiscrimination standard for each OSS function. First, the FCC looks to “whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them.”⁴⁶ Second, the FCC evaluates “whether the OSS functions that the BOC has deployed are operationally ready, as a practical matter.”⁴⁷

103 In evaluating whether a BOC has met the first step, the FCC requires BOCs to demonstrate that they have developed sufficient electronic and manual interfaces to allow CLECs equivalent access to all necessary OSS functions.⁴⁸ Further, the FCC requires BOCs to disclose to CLECs all necessary business rules and formatting information, and to demonstrate that its OSS is designed to accommodate both current and future demand for CLEC access to OSS functions.⁴⁹

104 In evaluating whether a BOC’s OSS functions are commercially ready, the FCC considers data collected using a BOC’s performance measures.⁵⁰ In the absence of “sufficient and reliable data on commercial usage, the [FCC] will consider the results

York, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404, ¶84, n.202 (rel. Dec. 22, 1999) (*Bell Atlantic New York Order*).

⁴² *Georgia/Louisiana II Order*, App. D at ¶27.

⁴³ *Id.*

⁴⁴ *Id.*, ¶28.

⁴⁵ *Id.*

⁴⁶ *Id.*, ¶29.

⁴⁷ *Id.*

⁴⁸ *Id.*, ¶30.

⁴⁹ *Id.*

⁵⁰ *Id.*, ¶31.

of carrier-to-carrier testing, independent third-party testing, and internal testing in assessing the commercial readiness of a BOC's OSS."⁵¹

2. The ROC OSS Test

- 105 In September 1999, the Regional Oversight Committee (ROC) and Qwest agreed to pursue a regional approach for OSS third-party testing. *See Ex. 1695 at 2*. The ROC hired Maxim Telecom Group (MTG) as the Project Manager, and the National Regulatory Research Institute (NRRI) as the Project Administrator in October 1999. *Id. at 2-3*. The ROC established a strong governance structure for the planning, design, and oversight of the testing effort, establishing an executive committee, a steering committee, and the Technical Advisory Group, or TAG. *Tr. 7981-82, 7987-88*.
- 106 The Executive Committee, composed of seven state commissioners, met monthly to provide executive authority for the test and to resolve various issues that arose over the course of the testing effort. *Tr. 7981; see also Ex. 1695 at 4*. The Executive Committee's decision on any dispute was final, with no further appeal. *Tr. 7988*. The Steering Committee, composed of state commission staff, met on a weekly basis and guided the conduct of the test. *Tr. 7981; see also Ex. 1695 at 4*. The ROC TAG⁵² was formed to provide a collaborative forum for Qwest, CLECs, state commission staff, and industry representatives to develop and oversee the testing effort. *Ex. 1695 at 5*. Issues and disputes that could not be resolved at the TAG level were deliberated by the Steering Committee, and if necessary, resolved by the Executive Committee.
- 107 Beginning in November 1999, the ROC TAG met weekly, and sometimes more often, to develop testing principles, develop and refine performance measures, develop the Technical Requirements Document, or TRD, (which KPMG and the ROC TAG relied upon in developing the Master Test Plan), and to oversee the testing effort. *Id. at 3, 7, 8*. The ROC TAG developed a set of 20 guiding principles, addressing testing philosophy, scope of testing, and the communications environment during the testing process. *See Ex. 1733 at 15-18*. These principles guided the ROC TAG's efforts in developing the Performance Indicator Definitions, or PIDs, the TRD, and the Request

⁵¹ *Id.*

⁵² *See supra*, note 20.

for Proposals for hiring the test administrator, pseudo CLEC (P-CLEC), and performance measure auditor. *Tr.* 7984; *see also Ex.* 1695 at 6.

108 In July 2000, the ROC hired KPMG as the Test Administrator, HP to operate as the P-CLEC, and Liberty as the Performance Measure Auditor. *Id.* at 5. The first half of the testing effort focused on developing the Master Test Plan and developing and auditing the PIDs for use in the test. *Tr.* 7987-88. The performance measure audit and Liberty's efforts are discussed above in Section B of this order.

109 The Master Test Plan provides “a description of a comprehensive plan to test Qwest's OSS, interfaces and processes.” *Ex.* 1733 at 12. The Master Test Plan provides that the testing process “will evaluate the operational readiness, performance and capability of Qwest to provide pre-ordering, ordering, provisioning, maintenance and repair and billing Operation Support Systems (OSS) documentation, interfaces, and functionality to . . . CLECs.” *Id.* at 11. The Master Test Plan also states that “[t]he test results should help the ROC to determine whether Qwest's provision of access to OSS functionality enables and supports CLEC entry in the local market.” *Id.*

110 The Master Test Plan describes each test and identifies the objective for the test and criteria for determining whether Qwest satisfied the test. KPMG tested Qwest's OSS functions by focusing on four major “domains,” or business functions: (1) Pre-order, Order, and Provisioning (POP); (2) Maintenance and Repair (M&R); (3) Billing; and (4) Relationship Management and Infrastructure. *Id.* at 27. Within each domain, the Master Test Plan identified discrete tests by function.⁵³ *See Ex.* 1697 at 7.

111 The OSS test used two different types of testing techniques, transaction-based testing and operational analysis testing. *Id.* at 7-8. The transaction-based testing was intended to accomplish real-world testing of Qwest's OSS functions by creating a fictional CLEC, or pseudo-CLEC, which would engage in pre-order inquiries, place orders, and submit repair transactions to Qwest as a real CLEC would do. *Id.* at 8. KPMG describes this type of testing as black box testing, because neither KPMG or HP had access to Qwest's internal systems during this type of testing. *Tr.* 8022.

⁵³ For example, the POP domain consisted of Tests 12, 12.7, 12.8, 13,14, 14.7, 14.8, 15, 22, and 24.8. The Billing domain consisted of Tests 19, 19.6, 20, 20.7, and 24.10. The Maintenance and Repair domain consisted of Tests 16, 1,7, 18, 18.7, 18.8, and 24.9, while the Relationship Management and Infrastructure domain consisted of Tests 23, 24.3, 24.4, 24.5, 24.6, and 24.7. *See Ex.* 1733 at 7.

- 112 In order to meet the objective of real-world testing, it was important that certain OSS test activities be blind to Qwest. *Ex. 1697 at 11; see also Ex. 1733 at 16, 22.* The TRD established a requirement of “adequate blindness,” recognizing that some Qwest employees would need to know the identity of the P-CLEC. *Ex. 1732 at 16.* KPMG accomplished this by establishing a procedure of “sighting” Qwest employees who were aware of the P-CLEC’s identity i.e., keeping a list of Qwest employees who were aware of the P-CLEC’s identity, and requiring the employees to take an oath not to disclose the information. *Ex. 1697 at 11; see also Tr. 8205-6.* KPMG also took care to exclude Qwest from participating in certain meetings and conference calls.
- 113 The operational analysis testing looked at the form, structure, and content of Qwest’s business practices, and involved KPMG observing Qwest’s day-to-day operations and management practices. *Ex. 1697 at 9.* KPMG describes this type of testing as white box testing. *Tr. 8022.*
- 114 The OSS test was conducted as a “military-style” test, in which KPMG conducted tests and retests until Qwest either satisfied the test criteria or either KPMG or Qwest determined that further testing or action by Qwest to correct a problem would not be productive. *Ex. 1697 at 9; see also 1379 at 4.* If during the test KPMG or HP identified any problems, the vendor would open an observation or exception describing the failure in Qwest’s system or processes. Qwest would file a response to the observation or exception and if the proposed fix of the problem or clarification was acceptable, KPMG would conduct a retest.⁵⁴ *Id.; see also Ex. 1733 at 13.*
- 115 Actual testing began in April 2001. *Ex. 1695 at 3.* During the test, the vendors opened 242 observations and 256 exceptions. *See Ex. 1721 at 15.* KPMG and HP conducted a total of 32 tests, consisting of 711 evaluation criteria, 26 of which were diagnostic. *Id. at 22.* KPMG issued a draft final report on its OSS testing efforts on April 19, 2002. *See Ex. 1549.* KPMG issued its final report, referred to in this order as the Final OSS Test Report, on May 29, 2002. *See Ex. 1697.* A comprehensive set of documents produced during the ROC OSS test have been deposited in the ROC OSS Test Repository web site maintained by NRRI.⁵⁵

⁵⁴ The observation and exception process is described in note 21.

⁵⁵ *See supra*, note 23.

3. The Final OSS Test Report

116 The Final OSS Test Report is a comprehensive description of the results of KPMG and HP's testing efforts. KPMG asserts that the Report simply reports the facts of the test and does not state an opinion or take an advocacy position on any of the issues associated with the OSS test results. *Ex. 1697 at 13.* KPMG presents the results of the test to allow each state to review the Final OSS Test Report "in forming its own assessment of Qwest's compliance with the requirements of the Act." *Ex. 1697 at 5.*

117 KPMG used the following categories in evaluating whether Qwest met the criteria for each test: (1) Satisfied; (2) Not Satisfied; (3) Unable to Determine; and (4) Diagnostic. *Ex. 1697 at 12.* KPMG cautions that not all of the test criteria are of equal importance and that simply counting the number that were satisfied or not satisfied, or stating an average of the results, is not an appropriate way of analyzing the results. *Id.* KPMG also notes that:

One of the unique aspects of the Qwest OSS Evaluation was a collaborative decision by the TAG to define a number of the PIDs as Diagnostic. . . . In OSS tests in other jurisdictions, the related evaluation criteria would have received either a Satisfied or a Not Satisfied result based on the ILEC's performance. Because this situation is somewhat unique, KPMG Consulting encourages regulators to examine Qwest's performance for all Diagnostic PIDs, and to determine whether or not the level of service delivered to the P-CLEC during the Qwest OSS Evaluation is consistent with commercial experience, and is acceptable for the purposes of 271 approval.

Id. at 13.

118 During the June hearing addressing the Final OSS Test Report, KPMG witnesses Michael J. Weeks and Joe DellaTorre offered an exhibit that graphically describes the overall test results by test. *See Ex. 1700.* That exhibit identified through several charts those test criteria for which KPMG found that Qwest had not satisfied the test criteria, or was unable to determine whether Qwest met the criteria. The discussion during the hearing focused primarily on those test criteria that KPMG designated as "not satisfied" or "unable to determine," referring to KPMG's Exhibit 1700.

119 This order does not address any of the test criteria that KPMG designated as “satisfied.” Where KPMG has found that Qwest satisfied the test criteria, we find that Qwest provides the OSS function in a nondiscriminatory manner, either in the same time and manner as it provides to itself, or in a way that allows CLECs a meaningful opportunity to compete.

120 We focus our discussion on those test criteria that were either not satisfied, or for which KPMG could not determine whether the test criteria were satisfied. This order first addresses issues relating to OSS functions for the Billing, Maintenance and Repair, and Relationship Management and Infrastructure domains of the test. The order then focuses on the results of Tests 12, 12.8, and 14, which address POP functionalities, and Tests 23 and 24.6, which address Change Management and OSS interfaces. The order also addresses the results of the tests designated as “Diagnostic.”

4. Test Criteria for Billing, Maintenance and Repair, and Relationship Management and Infrastructure

a. Billing Domain

121 Two test criteria in the Billing domain, 19.6-1-17 and 19.6.1-19, were designated in the Final OSS Test Report as “unable to determine” because there were no events for KPMG to observe to make a determination. These test criteria measure whether Daily Usage Feed (DUF) returns, i.e., DUF that a CLEC sends back to Qwest because of errors or questions and that Qwest returns to the CLEC, were accurate, complete, and timely. KPMG verified that Qwest has a process for DUF returns, but observed no events requiring DUF returns, and could not determine if “the process is sufficiently robust or whether Qwest adheres to the process.” *Ex. 1697 at 432-33.*

122 For Test 20.7, an operational test of the processes Qwest uses to produce and distribute timely and accurate wholesale bills, KPMG was unable to determine whether Qwest satisfied four of 21 test criteria. For three of the test criteria, 20.7-1-3, 20.7-1-5, and 20.7-1-9, which address cycle balancing procedures, payments and adjustments procedures, and bill retention requirements, KPMG determined that the Qwest activities associated with the criteria were “embedded in automated systems, rather than manual systems” and could not be observed through an operational analysis test. *Ex. 1697 at 458-59, 461-62, 466-67.*

123 For criterion 20.7-1-4, KPMG could not determine whether Qwest’s processes include “reasonability checks to identify errors not susceptible to predetermined balancing procedures.” *Id. at 459-61*. KPMG observed the processes and determined that they exist, but because KPMG observed no events associated with the criteria, KPMG examined the outputs of the billing systems and identified several problems. *Id.* During final retesting of the criterion, Qwest did produce correct bills, but KPMG could not verify if the correct bills were a result of the bill creation process or the post-production quality assurance processes. *Id. at 461*.

124 **AT&T.** AT&T argues that KPMG should have found that Qwest did not satisfy the requirements for certain test criteria in Test 19.6 based on Qwest’s failure to provide accurate and complete DUF information over five retests. *Ex. 1709 at 25*. Even though Qwest finally produced accurate information during the sixth retest, AT&T questions whether Qwest’s processes are adequate. *Id. at 23-24*. AT&T expresses concern that no data were available to test the DUF return function of Qwest’s OSS, because Qwest’s DUF systems were not working properly until the very end of the test. *See Tr. 8087-88*.

125 **Qwest.** Qwest asserts that KPMG was not able to determine whether Qwest satisfied test criteria 19.6-1-17 and 19.6-1-19 because no CLEC currently subscribes to the automated process for returning DUF files. *Ex. 1721 at 80*.

126 **Discussion and Decision.** Qwest appears to have corrected the problem related to delivering accurate and complete DUF information to CLECs, even if it took six retests to correct the problem. Because KPMG has determined that Qwest has a process in place for DUF returns, and because it appears that no CLEC currently subscribes to the process for DUF returns, we find that the results for test criteria 19.6-1-17 and 19.6.1-19 provide a sufficient basis for finding that Qwest provides this OSS function in a nondiscriminatory manner and allows CLECs a meaningful opportunity to compete.

b. Maintenance and Repair

127 In the Maintenance and Repair domain of the test, KPMG designated one test criterion as “not satisfied” in Test 16, and two criteria as “not satisfied,” and one as “unable to determine” in Test 18. Test 16 evaluated the trouble administration

functional elements of Qwest's Customer Electronic Maintenance and Repair (CEMR) graphical user interface, reviewed documentation for CEMR, and compared CEMR's functionality with Qwest's retail systems for trouble management. *Ex. 1697 at 300*. KPMG determined that Qwest had not satisfied test criterion 16-3-5, which evaluates whether Qwest can process transactions to modify a trouble report within guidelines set by the ROC-TAG. *Id. at 331*. KPMG explained that in phase 3 of the test, which was a volume test, Qwest did not meet the established benchmark during stress testing. *Id. at 331-32*.

128 Test 18 evaluated "the execution of selected Maintenance and Repair tests scenarios with the objective of evaluating Qwest's performance in making repairs under the conditions posed by various wholesale maintenance scenarios." *Id. at 346*. KPMG determined that Qwest did not satisfy test criteria 18-6-1 and 18-7-1, and was unable to determine whether Qwest satisfied test criterion 18-6-3. Criterion 18-6-1 evaluates whether Qwest correctly applies close-out codes for UNE-P, resale, and Centrex 21 troubles. KPMG found that Qwest did not meet the benchmark even after modifying its audit measures. *Id. at 353-54*. Qwest asked that KPMG conduct no additional testing and that Exception 3055, related to the criteria, be closed as unresolved. *Id.*

129 Criterion 18-6-3 addresses Qwest's ability to apply close-out codes to DS1 or higher bit rate troubles. Due to the small sample size for the test, KPMG was not able to reach a definitive conclusion. *Id. at 354*. Qwest declined the opportunity to increase the sample size and conduct additional testing, so KPMG concluded that it could not determine if Qwest met the criterion. *Id.*

130 Criterion 18-7-1 evaluates whether troubles affecting wholesale UNE-P, resale, and Centrex 21 are successfully repaired. KPMG found that Qwest did not meet the 95 percent benchmark that KPMG established for this criterion. *Id. at 355*. Qwest opted not to retest the criterion as Qwest disagreed with the benchmark KPMG used, as well as whether troubles were correctly resolved. *Id.*

131 **AT&T.** AT&T asserts that the "modify trouble report" function is "a critical component of the CEMR interface." *Ex. 1709 at 19*. AT&T asserts that Qwest decided to close Exception 3055 as unresolved, and not to retest criterion 16-3-5. *Id.* During the hearing, however, AT&T's witness stated that Qwest's failure to provide timely responses to modify trouble tickets was not a significant issue. *Tr. 8311*. AT&T asserts that the problem KPMG identified with Qwest applying inaccurate

close-out codes correlates with Liberty's findings in Observations 1028 during the data reconciliation effort. *Ex. 1709 at 20-21*. AT&T argues that this problem could affect CLECs because Qwest may not correct avoidable problems before they occur, and that CLEC customers may become dissatisfied because of the problems. *Id. at 21-22*. AT&T also notes that Qwest's failure to successfully repair troubles similarly affects CLECs and their customers. *Id. at 22*.

132 **Qwest.** Concerning test criterion 16-3-5, Qwest notes that the transaction for which Qwest's CEMR failed the test accounts for only 0.3% of actual CLEC transaction volumes. *Ex. 1721 at 67-68*. Qwest only failed the volume test by three seconds, using volumes higher than those required in the Master Test Plan. *Id. at 68*. As to test criteria 18-6-1 and 18-6-3, Qwest disputes KPMG's reliance solely on the close-out codes for determining whether Qwest accurately closed out troubles. *Id. at 70-73*. Qwest also explains that it has implemented internal audit procedures to ensure that technicians use the proper close-out code. *Id.* Qwest asserts that KPMG should have used the PID measurement MR-7, a parity measure, to evaluate successful repairs instead of the benchmark of 95 percent that KPMG used during the test. *Id. at 74*. Qwest notes that its performance results show that Qwest has met the parity standard for MR-7 for most of the PID disaggregations for the last 12 months. *Id.*

133 **Discussion and Decision.** Considering KPMG's, Qwest's, and AT&T's comments concerning test criterion 16-3-5, we agree with AT&T that Qwest's failure to meet the criterion is not significant. Nor does Qwest's failure to meet the criterion represent a failure by Qwest to provide nondiscriminatory access to OSS or to provide CLECs an a meaningful opportunity to compete. Missing a benchmark on a peak volume test by a few seconds, even if statistically significant, does not cause us to question Qwest's ability to modify trouble reports. We are concerned, however, that Qwest chose not to retest its procedures for applying close-out codes.

134 Qwest's failure to meet the KPMG established benchmarks appears to be another variation of the problem with human error discussed above in Section B of this order. We find, however, that Qwest has instituted proper auditing and training procedures, and that Qwest's failures to satisfy the test criteria are not so significant to justify a finding that Qwest is out of compliance with Checklist Item No. 2 for access to OSS functions. Finally, concerning Qwest's failure to satisfy criterion 18-7-1: In light of the dispute over the benchmark established by KPMG and the fact that MR-7 does appear to measure the same activity, we find that Qwest provides access to this OSS

function in a nondiscriminatory manner and in the same time and manner as it provides the service to its retail customers.

c. Relationship Management and Infrastructure

135 As previously discussed concerning test criteria in the Billing domain, two test
criteria in the Relationship Management and Infrastructure domain, 24.3-9 and 24.10-
3-4, were designated in the Final OSS Test Report as “unable to determine” because
there were no events for KPMG to observe to make a determination.

136 Test 24.3 was “an evaluation of Qwest’s methods and procedures, processes and
practices for establishing and managing CLEC account relationships.” *Ex. 1697 at*
533. Test criterion 24.3-9 was intended to evaluate whether “customer calls are
returned per documented/stated intervals.” *Id. at 542*. During the operational
analysis testing, KPMG and HP identified several problems with Qwest’s processes
and procedures, resulting in delayed responses. *Id. at 543*. Qwest revised its
procedures and established communication response guidelines, but due to the test
schedule, KPMG was not able to observe Qwest’s adherence to the new process. *Id.*
at 543-44.

137 Neither AT&T nor Qwest addressed the issue in their comments. Given that Qwest
appears to have revised its processes and guidelines to better respond to CLEC calls,
we find that the results of test criterion 24.3-9 demonstrate that Qwest provides access
to OSS functions in a nondiscriminatory manner and that Qwest provides CLECs a
meaningful opportunity to compete.

138 Test 24.10 was designed as “an operational analysis of the processes and
documentation developed and employed by Qwest to support Resellers and [CLECs]
with usage and/or billing related claims, inquiries, problems and issues.” *Id. at 668*.
Test criterion 24.10-3-4 was intended to evaluate whether “training of representatives
is defined, documented and followed.” *Id. at 677*. KPMG observed that Qwest has
processes in place for training representatives, but because no training occurred
during the test, KPMG could not determine whether Qwest satisfied the test criterion.

139 AT&T did not address this issue in its comments. Qwest asserts that it has satisfied
11 of the 12 test criteria for Test 24.10, and that one result of “unable to determine”
should not alter the conclusion that “Qwest’s ISC/Billing and Collection Center

adequately supports CLECs with usage and billing-related claims, inquiries, problems and issues.” *Ex. 1721 at 86*. Qwest describes the training it has provided over the last year, and asserts that KPMG concluded that it was unable to determine if Qwest met the test criterion only because no testing occurred during the test. *Id. at 87*. Based on KPMG’s and Qwest’s discussion of the issue, we find that Qwest adequately supports CLECs with usage and billing-related claims, inquiries, problems and issues, and that for this OSS function, Qwest provides CLECs a meaningful opportunity to compete.

d. Other

140 Test 22 “evaluated Qwest’s Network Design Request (NDR) process, collocation and interconnection trunks procedures for establishing and maintaining a [CLEC’s] ability to access [UNEs] and/or [UNE-P] components.” *Ex. 1697 at 481*. Test criterion 22-1-10 was intended to evaluate whether Qwest adheres to its defined processes for NDR implementation. *Id. at 494*. Because Qwest did not process any commercial NDR orders during the test, KPMG was unable to determine if Qwest satisfied the criterion. AT&T did not address the issue. Qwest asserts that it only processes network design requests for new entrants. *Ex. 1721 at 65*. Qwest has received two potential NDR orders in the last year, but one was for an unqualified CLEC, and the other is for a CLEC with which Qwest is engaged in negotiations. *Id.* Based upon KPMG’s and Qwest’s description of the issue, we find that KPMG’s determination is not sufficient to justify a finding that Qwest provides nondiscriminatory access to the OSS function, and allows CLECs a meaningful opportunity to compete.

5. Test 12 – Evaluation of POP Functionality and Performance Versus Parity Standards and Benchmarks, and Test 12.8 – POP Manual Order Processing Evaluation

141 Test 12 was designed to validate the existence, functionality, and behavior of Qwest’s interfaces and processes required for pre-ordering, ordering, and provisioning (POP) transaction requests and responses. *Ex. 1697 at 63*. The test also included an analysis of Qwest’s performance in comparison with its retail systems. *Id.* During this test, HP attempted to “replicate, to the fullest extent possible, the responsibilities, behavior, and experiences of a CLEC attempting to conduct Wholesale business with Qwest.” *Id.* A number of pre-order and order scenarios were tested for a variety of Qwest wholesale products. *Id. at 65-67, Tables 12-1, 12-2, 12-3, and 12-4.*

- 142 Test 12.8 was designed as an operational analysis of Qwest’s manual order handling processes at the Interconnect Service Centers (ISCs) that serve CLECs. *Id. at 133*. KPMG describes the ISCs as “the primary Qwest work centers for providing CLEC pre-ordering and ordering service and support.” *Id.* Qwest has established 10 ISCs throughout its region to assist CLECs with Local Service Requests (LSRs) and Access Service Requests (ASRs). *Id.*; *see also Table 12.8-1*.
- 143 In its Final OSS Test Report, KPMG found that Qwest had not satisfied two of the test criteria for Test 12, and was unable to determine whether Qwest had satisfied three other test criteria for Test 12, and one for Test 12.8. *See Ex. 1697 at 91-92, 98*. Four of the test criteria for Test 12 (12-9-1, 12-9-2, 12-9-4, and 12-9-5) concerned jeopardy notifications. KPMG designated the remaining criterion for Test 12 and a criterion for Test 12.8 as “unable to determine” due to concerns expressed in Exception 3120 and Observation 3110 concerning human errors during the manual handling of orders.⁵⁶
- 144 Jeopardy notifications are notices an ILEC sends to a CLEC when the ILEC will not be able to provision a service or product in the interval or at the time the ILEC had stated it would provide the service or product. *See Tr. 8008-9*. Criteria 12-9-1 and 12-9-2 evaluated whether Qwest provides jeopardy notices in advance of the due-date for resale and UNE-P products and services. *Ex. 1697 at 91*. For both resale and UNE-P, KPMG explained that PID PO-8 established the parity standard for the test. *Id.* KPMG found, however, that Qwest issued no jeopardy notices during the test in response to test bed transactions or commercial observations and could not determine if Qwest satisfied the test criteria. *Id.*
- 145 Criteria 12-9-4 and 12-9-5 evaluated whether Qwest’s systems or representatives provide timely jeopardy notices for resale products and services and for UNE-P. *Id. at 92*. The standard for these criteria was also parity with retail and was measured using PID PO-9. *Id.* KPMG identified in the Final OSS Test Report that Qwest failed to satisfy the criteria after the dual statistical tests resulted in a “no decision,” and the Steering Committee determined that Qwest should fail the test. *Id. at 92*.

⁵⁶ Exception 3120 and Observation 3110 are discussed above in paragraph 54, and below in paragraphs 146-47.

146 For parity standards used in the test, the Master Test Plan required the use of a dual statistical test, i.e., dual null hypothesis testing, whereby one hypothesis assumed there was no statistical difference between wholesale and retail, and the other hypothesis assumed that there was a statistical difference. *Tr. 8007-8; see also Ex. 1733 at 156-57.* If one test indicated that Qwest satisfied the test criterion and the other test indicated that Qwest did not, the issue was sent to the TAG for decision and then to the Steering Committee if the TAG could not reach a decision. *Tr. 8008.*

147 Test criterion 12-11-4 evaluated whether Qwest's performance results for Pre-Order and Order measures were consistent with the results produced by KPMG for the P-CLEC. *Ex. 1697 at 98.* While conducting its comparative analysis of results, KPMG identified discrepancies in the results and opened Exception 3120 and Observation 3110 to address human error issues concerning manual processing of data when orders do not flow-through. *Id.* Specifically, KPMG found that out of 109 orders that did not flow through Qwest's systems, seven contained human input errors that could result in a miscalculation of the PID.⁵⁷ KPMG requested a retest to assess the impact of human error on the accuracy and completeness of Qwest's performance data. *Id.* Qwest chose not to conduct a retest and KPMG stated that it was not able to find that Qwest satisfied the test criterion. *Id.* KPMG closed Observation 3110 as unresolved.

148 Test criterion 12.8-2 evaluated whether Qwest's procedures for processing electronically submitted non-flow-through orders are defined, documented and followed. *Id. at 145.* During retesting of Exception 3120 concerning Tests 12 and 14, KPMG identified issues related to orders that were dropped due to manual handling. *Id. at 146.* As discussed above for Exception 3110, these issues concerned human errors occurring during the manual handling of orders. After Qwest chose not to conduct further retesting, KPMG stated that it could not determine whether Qwest had satisfied the test criteria. *Id.*

149 **AT&T.** AT&T asserts that the OSS test shows that "Qwest has a serious problem in its manual handling of CLEC orders." *Ex. 1709 at 2.* Based on a summary of Qwest's performance results for measures PO-2A-1 and PO-2A-2,⁵⁸ AT&T asserts

⁵⁷ Observation 3310 – KPMG's Second Response at 4. *See supra*, note 23.

⁵⁸ PIDs PO-2A-1 and PO-2A-2 measure the flow-through rate of orders via IMA-GUI and IMA-EDI for all orders. By contrast, PIDs PO-2B-2 measure the percentage of flow-through eligible orders that actually flow-through via IMA-GUI and IMA-EDI.

that Qwest manually processes nearly 9,000 CLEC orders each month in Washington.
Id. at 3.

150 AT&T asserts that KPMG found during testing that Qwest personnel did not know how to treat CLEC orders and that Qwest personnel made an excessive number of human errors. *Id.* AT&T notes that KPMG opened Observation 3086 after finding in the course of 75 observation and exceptions, that Qwest had committed to undertake additional training, most of which affected personnel in the Qwest’s Interconnect Service Center and Qwest’s Service Delivery Coordinator. *Id. at 4.* AT&T believes that KPMG improperly closed Observation 3086. *Id. at 5-6.*

151 AT&T asserts that the retest of orders addressed in Exception 3120 indicated high levels of human error. *Id. at 6-7.* AT&T asserts that Qwest’s failure to achieve a “satisfied” result for the processing of non-flow-through orders is significant enough to justify a finding of noncompliance with Checklist Item No. 2. *Id. at 8.*

152 Concerning Qwest’s provisioning of jeopardy notices, AT&T asserts that Qwest’s failure to satisfy test criteria 12-9-4 and 12-9-5 for providing timely jeopardy notices for resale products and services and UNE-P is evidence that Qwest has failed to meet its obligations for Checklist Item No. 2. *Id. at 13.*

153 **Qwest.** Qwest asserts that it has satisfied all non-diagnostic test criteria for pre-ordering OSS functions, 88 of 94 non-diagnostic test criteria associated with ordering functions, and 96 of 105 non-diagnostic criteria for provisioning functions. *Ex. 1721 at 25, 32, 54.* Qwest asserts that has satisfied the OSS-related requirements of section 271 through its strong performance in the OSS test and its performance results. *Id. at 24.* Qwest asserts that many of the test criteria that were designated “not satisfied,” or “unable to determine” are mitigated by Qwest’s commercial performance. *Id. at 23.*

154 Qwest explains that test criteria 12-9-1 and 12-9-4 both address jeopardy notifications for resale products and services, whereas criteria 12-9-2 and 12-9-5 concern jeopardy notifications for UNE-P. *Ex. 1721 at 34-35, 37.* Qwest does not agree with the Steering Committee’s decision that Qwest failed criteria 12-9-4 and 12-9-5. *Id. at 36, n.112, 37.* Qwest asserts that the data upon which the Steering Committee based its decision was 9-12 months old and that recent performance results for measure PO-9A demonstrate that Qwest is providing jeopardy notifications at parity. *Id.* Qwest also

asserts that KPMG closed exceptions and observations relating to manual order processing errors after Qwest resolved issues relating to jeopardy notices. *Id.*, n.112.

155 Qwest also asserts that measures PO-8A and PO-8B evaluate the timeliness of resale and UNE-P jeopardy notifications “by measuring how far in advance of the due date in average days Qwest provides such notice.” *Id.* at 36, 37. Qwest argues that the most recent performance results for those measures show that Qwest is providing jeopardy notices at parity. *Id.*

156 Qwest asserts that KPMG’s determination concerning criteria 12-11-4 and 12.8-2 should not affect a finding that Qwest satisfies the OSS requirements of section 271. *Id.* at 45. Qwest takes issue with KPMG’s analysis in Exception 3110, asserting that the number of human errors are within a reasonable tolerance level, and that the majority of CLEC orders are processed on a flow-through basis. *Id.* at 39. Qwest asserts that it satisfied other test criteria that evaluated order accuracy, and that Qwest has “made significant efforts to reduce the incidence of human error in manual order processing.” *Id.* at 40. In addition, Qwest notes that it is working to develop a new PID to address manual processing order accuracy in order to address concerns over the accuracy of manually handled orders. *Id.* at 41.

157 **Discussion and Decision.** Because of the circumstances surrounding Qwest’s failure to satisfy test criteria 12-9-4 and 12-9-5, we are not persuaded that Qwest does not comply with its process for providing jeopardy notices. As to KPMG’s inability to determine if Qwest satisfied criteria 12-9-1 and 12-9-2, KPMG asserted that there was not enough data to make a decision. The Final OSS Test Report does not establish that Qwest provides discriminatory service when providing jeopardy notices, and does not assist us in reaching a decision. We do not find Qwest’s recent performance results to be helpful in determining whether Qwest provides jeopardy notices at parity. The results for non-designed services and UNE-P POTS are erratic, but also show that there is very little data on which to base a conclusion. *See Ex. 1474 at 66-69.* Based on this inconclusive evidence, we are not persuaded that Qwest does not comply with the requirements of Checklist Item No. 2 concerning its practices in issuing jeopardy notices.

158 As we described above concerning the accuracy and reliability of Qwest’s performance data, we are concerned about the number of orders that are manually handled, and the number of human errors that appear to occur due to manual

handling. We find, however, that Qwest is taking appropriate measures to address the issue, and that a PID or PIDs measuring accuracy of manual order handling will provide Qwest greater incentive to control human errors by its personnel.

6. Test 14 – Provisioning Evaluation

- 159 Test 14, the provisioning evaluation, was conducted together with Test 12, and was designed to evaluate Qwest's ability to provision CLEC orders on time, and according to documented methods and procedures. *Ex. 1697 at 168.* The test evaluated the provisioning of a number of Qwest's products and services. *Id.* The test was conducted using orders placed by the P-CLEC to determine if the orders were provisioned as requested, according to Qwest's documentation and on the committed due-date. *Id.*
- 160 In the Final OSS Test Report, KPMG determined that Qwest did not satisfy four test criteria, and could not determine if Qwest satisfied the criteria for five test criteria. *Id. at 186-87, 196, 198-99, 201.*
- 161 KPMG determined that Qwest did not satisfy the criterion for 14-1-10 concerning provisioning of dark fiber, and 14-1-14 concerning the provisioning of EELs. In both test criteria, KPMG established a benchmark of 95 percent for accuracy in provisioning because the ROC had not established a benchmark for provisioning these products. *Id. at 186-87.* During initial testing of these products, KPMG identified problems with Qwest provisioning the products in accordance with Qwest's documented methods and procedures. Upon retesting, KPMG found that there were very low commercial volumes of these products, and decided to suspend testing. *Id.*
- 162 The other two test criteria that KPMG determined that Qwest did not satisfy were criteria 14-1-34 and 14-1-36. These criteria evaluated whether Qwest met the parity standard in measure OP-4C, the installation interval for business POTS and UNE-P services. *Id. at 96, 198.* During the test, KPMG found that Qwest failed to meet the standard for both criteria. Because of discrepancies in how Qwest calculated the intervals, KPMG opened Exception 3086. Following Exception 3086, KPMG conducted its Manual Order Adequacy Study due to concerns about whether Qwest was accurately calculating performance data. Qwest recast the data after it corrected the calculation problem concerning orders spanning a weekend. *Ex. 1758.* While reanalyzing the data, KPMG found additional problems with the data, and opened

Exception 3120, described above in the discussion of Test 12. Exception 3120 was closed, and two Observations, 3109 and 3110, were opened to address flow-through issues and human errors. *Id.*

163 KPMG was unable to determine whether Qwest satisfied the requirements of test criteria 14-1-37, 14-1-38, and 4-1-39 due to a lack of data sufficient to evaluate the criteria. These test criteria were evaluated based upon the parity measurement OP-6A for business POTS, residential POTS, and UNE-P POTS. *Ex. 1697 at 198-99.* OP-6A measures the number of days that an order is delayed. KPMG found that Qwest did not delay any orders for business POTS, residential POTS, or UNE-P POTS during the test, and due to the lack of data, was unable to evaluate the PID. *Id.*

164 Similarly, KPMG stated in the Final OSS Test Report that it was unable to determine whether Qwest satisfied the requirements of test criterion 14-1-43 due to a lack of data sufficient to evaluate the criterion. *Id. at 201.* The test criterion was evaluated based upon the measurement OP-15 for all products. *Id.* OP-15 measures the interval that an order is delayed past the due-date. KPMG found that Qwest did not delay any orders past the due-date during the test and was unable to evaluate the PID. *Id.*

165 Test criterion 14-1-44 is similar to test criteria 12-11-4, discussed above. Test criterion 14-1-44 evaluated whether Qwest's performance results for ordering and provisioning measures were consistent with the results produced by KPMG for the P-CLEC. *Id. at 201.* While conducting its comparative analysis of results, KPMG identified discrepancies in the results and opened Exception 3120 and Observation 3110 to address human error issues concerning manual processing of data when orders do not flow-through. *Id.* Specifically, KPMG found that out of 109 orders that did not flow through Qwest's systems, seven contained human input errors that could result in a miscalculation of the PIDs. *Id.* When Qwest chose not to retest the criteria, KPMG found that it could not determine whether Qwest satisfied the criterion. *Id.*

166 **AT&T.** AT&T asserts that KPMG found during the initial testing of Qwest's provisioning of dark fiber and EELs products, that Qwest did not follow the documented procedures for provisioning the products. *Ex. 1709 at 14-15, 15-17.* Although Qwest revised its documented methods and procedures to satisfy KPMG's concern, AT&T is concerned that Qwest's technicians may still be unable to follow the methods and procedures. *Id. at 15, 17.* AT&T asks that the Commission find

Qwest out of compliance with the requirements of Checklist Item No. 2. *Id. at 16, 17.*

167 AT&T argues that Qwest is providing UNE-P and business resale services in a discriminatory fashion by installing these services in a longer interval than it does for retail customers. *Id. at 18.*

168 AT&T did not address the other test criteria for Test 14 for which KPMG was not able to determine whether Qwest satisfied the criteria.

169 **Qwest.** Qwest asserts that KPMG's Final OSS Test Report "confirms that Qwest provisions CLEC orders accurately and expeditiously." *Ex. 1721 at 54.* Qwest asserts that it satisfied 96 of 105 non-diagnostic evaluation criteria during the OSS test. *Id.*

170 Qwest asserts that because there is virtually no ordering activity for unbundled dark fiber in Qwest's region, it acknowledges that Qwest cannot demonstrate through the OSS test that it provisions the product according to its documented methods and procedures. *Id. at 56.* Qwest asserts that in the absence of commercial data, the FCC has found it sufficient that a BOC can demonstrate that it is capable of meeting the section 271 requirements. *Id.* Qwest asserts that it has demonstrated that it has processes in place to allow CLECs to order and provision dark fiber. *Id. at 56-67.* Qwest applies the same analysis to the provisioning of EELs, for which there is also little to no ordering activity in Qwest's region. *Id. at 57.*

171 Qwest disputes KPMG's determination that Qwest has not satisfied test criteria 14-1-34 and 14-1-36. *Id. at 57.* Qwest asserts that it met the parity standard for OP-4C for business POTS in the western region during the test and in Washington, shown in its most recent performance results. *Id. at 58.* Qwest asserts that its performance results for OP-4C for UNE-P are improving over the last two months. *Id.* Qwest asserts that its commercial performance for these measures establishes that Qwest is providing a meaningful opportunity for CLECs to compete in Washington for these products. *Id. at 59.*

172 Although there was a lack of test data to show that Qwest met the OP-6A measure, Qwest asserts that its commercial data supports a finding that Qwest has met the parity standard. *Id. at 60.* To the extent that there is little or no data for the measure,

Qwest asserts that it means Qwest is not delaying orders, but provisioning them appropriately. *Id. at 61.*

173 Qwest contests KPMG’s finding that it has not met the standard for OP-15, which measures the interval for pending orders delayed past the due-date. Qwest asserts that the measure is a diagnostic one, and is not appropriately designated as “satisfied,” or “not satisfied.” *Id. at 61-62.*

174 As to KPMG’s inability to determine whether Qwest had met the criteria for 14-1-44, Qwest asserts that it has implemented, and continues to implement, system fixes and additional training to address the deficiencies KPMG noted in comparing Qwest’s performance results with the P-CLEC’s data. *Id. at 62.* Qwest notes that KPMG designated the test criteria as “unable to determine” because KPMG was concerned about the impact of manual processing errors, even though KPMG had agreed that all the system issues had been corrected. *Id. at 63.*

175 ***Discussion and Decision.*** The FCC has stated that it will rely on actual commercial data and the results of third-party testing to determine if a BOC is capable of providing an OSS function, in particular whether orders flow-through the BOC’s interface.⁵⁹ Based on the FCC’s analysis and KPMG’s report, we are persuaded that Qwest is capable of providing unbundled dark fiber and EELs. While there are no PIDs to measure provisioning of these products, we encourage Qwest and other parties to develop PIDs for provisioning dark fiber and EELs should CLECs begin to order the products in more significant volumes.

176 We find that Qwest’s most recent performance results do not establish the results that Qwest asserts for OP-4, or OP-6A. In addition, as we stated above in the section on data verification, the performance data for the OP-4 and possibly the OP-6 measures should not be accorded much weight given the problems identified by KPMG and Liberty. However, we find that Qwest’s failure to demonstrate provisioning at parity for this measure does not preclude a finding of overall compliance with Checklist Item No. 2. With these measures included in the QPAP, Qwest has every incentive to properly provision business resale and UNE-P services, as with all other services.

⁵⁹ *Bell Atlantic New York Order*, ¶169.

177 We agree with Qwest that the reference in the Final OSS Test Report to OP-15 as a parity measure must be an error, as the measure is designed as a diagnostic measure in the ROC PIDs. *See Ex. 1478 at 43-44.*

178 Finally, we have addressed the issues of manual order handling and human error above in our discussion of data reconciliation in Section B and concerning Test 12 results, and find our determination on the issues applicable to issues arising under Test 14.

7. Test 23 – Change Management Test

a. Statutory and FCC Requirements

179 The FCC defines the change management process as “the methods and procedures that the BOC employs to communicate with competing carriers regarding the performance of, and changes in, the BOC’s OSS.”⁶⁰ The FCC has given “substantial consideration” in applications for section 271 approval to whether a BOC has an adequate change management process and whether the BOC has adhered to the process over time.⁶¹

180 The existence of and adherence to a change management process are part of a BOC’s demonstration that it meets the requirements of Checklist Item No. 2 to provide nondiscriminatory access to OSS.⁶² To meet the requirements of the checklist item, a BOC must show that it “has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and is . . . adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them.”⁶³ Finally, by demonstrating that it is adequately assisting competing carriers with use of OSS functions, the BOC demonstrates “that it offers an efficient competitor a meaningful opportunity to compete.”⁶⁴ Problems with a BOC’s change management process may impair a competing carrier’s access to UNEs, and indicate lack of compliance with section 271(c)(2)(B)(ii).

⁶⁰ *Georgia/Louisiana II Order*, App. D at ¶41.

⁶¹ *Id.*, ¶40.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

181 The FCC applies the following standards in evaluating a BOC's change management process:

In evaluating whether a BOC's change management plan affords an efficient competitor a meaningful opportunity to compete, the Commission first assesses whether the plan is adequate. In making this determination, it assesses whether the evidence demonstrates: (1) that information relating to the change management process is clearly organized and readily accessible to competing carriers; (2) that competing carriers had substantial input in the design and continued operation of the change management process; (3) that the change management plan defines a procedure for the timely resolution of change management disputes; (4) the availability of a stable testing environment that mirrors production; and (5) the efficacy of the documentation the BOC makes available for the purpose of building an electronic gateway. After determining whether the BOC's change management plan is adequate, the Commission evaluates whether the BOC has demonstrated a pattern of compliance with this plan.⁶⁵

b. The Commission's Review of Qwest's Change Management Process

182 The Commission first addressed the issue of Qwest's change management process in the fourth workshop in July 2001. The Commission heard additional testimony and admitted additional exhibits on the issue during hearings held on April 22 –26, 2002, and again during the Commission's review of the Final OSS Test Report in June 2002.

183 **The Fourth Workshop.** During the fourth workshop, Qwest described its Co-Provider Industry Change Management Process, or CICMP, as a forum for CLECs and Qwest to discuss changes to Qwest's products, processes, technical publications and OSS interfaces through regularly scheduled meetings. *Ex. 750-T (Allen) at 2-3, 5; see also Exs. 751, 752.* Qwest initiated the process in 1999. *Id.* The CICMP process is outlined in SGAT section 12.2.6. *See Exs. 755, 1170.*

184 In response testimony filed prior to the fourth workshop, AT&T and WorldCom objected to Qwest's CICMP process as not sufficiently inclusive of CLECs and not

⁶⁵ *Id.*, ¶42.

sufficiently open to CLEC comments and suggestions. *Ex. 855-T (Balvin) at 4-6; Ex. 845-T (Finnegan) at 15-26; see also Ex. 846.* During the workshop, WorldCom and Covad filed comments on the CICMP process. *See Exs. 857, 877.* In particular, the CLECs objected to their limited role in prioritizing changes to Qwest systems. Third-party testers KPMG for the ROC and, for Arizona, Cap Gemini Ernst and Young (Cap Gemini), issued exceptions to the process. *Tr. 7405, 7408-10.* The CLECs also expressed concern that the SGAT should not reference internal Qwest documents such as technical publications. *Tr. 7411-12.* Qwest agreed to submit changes to technical publications and product documents through its change management process. *Id.*

185 In rebuttal testimony, Qwest proposed to revise the CICMP process. *Ex. 770 (Brohl) at 2-17; see also Exs. 771, 772.* Qwest stated that the revised CICMP would be evaluated in the ROC OSS testing process rather than through a workshop process, and that measurements, or PIDs, for compliance with change management would be developed in the ROC process. *Ex. 770 (Brohl) at 8, 12, 16.*

186 During the fourth workshop, the parties notified the Commission of negotiations concerning a redesign of the change management process. *Tr. 5313, 5316, 5318-19.* The parties agreed to defer further discussion of the issue of CICMP and its redesign, although the CLECs insisted that the Commission retain regulatory oversight over CICMP. *Tr. 5317, 5319-20, 5321.* Qwest agreed to file with the Commission a set of revised CICMP documents when the negotiations concluded.⁶⁶ The Commission determined that it would review the revised CICMP process after issuance of the final report on the ROC OSS third-party test results. *See Eighteenth Supplemental Order, ¶¶20-21.*

187 Beginning in July 2001, representatives from Qwest, a number of CLECs, KPMG, and, for Arizona, Cap Gemini, have participated in change management process (CMP) redesign meetings at least four days a month. *Tr. 7368.* The parties also attend CMP Forum meetings concerning system and product and process issues. *Tr. 7428-29.*

⁶⁶ On October 11, 2001, and periodically thereafter, Qwest filed with the Commission a Report on the Status of Change Management Process Redesign.

188 **The April Hearings.** The Commission reviewed the redesigned CMP in hearings held during the week of April 22, 2002. In preparation for those hearings, the parties filed testimony and exhibits concerning the redesign process, including copies of the Master Redlined Document. That document is Qwest’s evolving change management plan, and includes language the parties have agreed to during the redesign process. *Tr. 7368, 7426-27.*

189 Through the affidavits and exhibits of Judith M. Schultz, the Director of Change Management, Qwest states that it has met the FCC’s requirements for a change management process. *Ex. 1535 at 2.* Ms. Schultz also reports on the status of the CMP redesign sessions and identifies that Qwest and the CLECs have agreed conceptually on all substantive issues for the plan, and that the Master Redlined Document incorporates most of those agreements. *Id. at 4-5; see also Ex. 1536.* The Master Redlined Document is “continuously updated,” and is posted on Qwest’s CMP website. *Id. at 4, n.7.* Qwest also filed on April 15, 2002, an updated report on the status of the CMP redesign process, with attachments, including an updated Master Redlined Document. *See Ex. 1550-1558.*

190 In response to CLEC comments concerning whether Qwest has demonstrated compliance with its CMP plan, Qwest filed affidavits by Ms. Schultz, Mr. Thompson, and Mr. Hubbard. *See Ex. 1538-44, Ex. 1545, Ex. 1546-48.*

191 The Joint CLECs, AT&T, WorldCom, and Covad filed several sets of comments and exhibits, asserting that Qwest has not yet completed the redesign process, does not have an adequate stand-alone testing environment, and has not demonstrated compliance with the FCC’s requirement for change management. The first set of materials were filed in response to a filing Qwest made in October 2001 on the status of the redesign process. *See Exs. 1565-1570.* The second set of comments and exhibits was filed in January 2002 in response to Qwest’s December status report. *See Exs. 1571-1585.* The third set of comments and exhibits was filed in response to the affidavit and exhibits of Ms. Schultz. *See Exs. 1586-1601.* Covad also filed comments and exhibits in October and December in response to Qwest’s status reports. *See Exs. 1605-1611.*

192 **The June Hearing and the Final OSS Test Report.** The Commission addressed the issue of change management once more during its review of the Final OSS Test Report on June 5-7, 2002. KPMG evaluated Qwest’s change management process in

Tests 23 and 24.6 of the OSS test.⁶⁷ Test 23 evaluated the “adequacy and completeness of procedures for developing, publicizing, evaluation, and implementing changes to Qwest’s Wholesale [OSS] interfaces and business processes.” *Ex. 1697 at 508*. The test also reviewed the tracking mechanisms of proposed changes and Qwest’s adherence to established change management intervals. *Id.* KPMG noted in the Final OSS Test Report that Qwest and the CLECs participating in the redesign effort have not completed documenting all of the components of the change management process. *Id.*

193 The Final OSS Test Report separately evaluates Qwest’s change management process for Systems changes, i.e., OSS changes, and Product/Process changes. *Ex. 1697 at 509-11*. Product/Process changes are changes to Qwest wholesale products, or Qwest processes, such as changes to the manual processing of orders. In the Final OSS Test Report, KPMG states that it was unable to determine whether Qwest satisfied three of the test criteria for Systems CMP, and likewise was unable to determine whether Qwest satisfied four of the test criteria for Product/Process CMP. *Id. at 513-32*.

194 The Systems CMP test criteria for which KPMG identified a result of “unable to determine,” are 23-1-7, 23-1-8, and 23-1-9. The Product/Process CMP test criteria for which KPMG identified a result of “unable to determine” are 23-2-2, 23-2-7, 23-2-8, and 23-2-9. KPMG identified the four Product/Process CMP criteria as unable to determine primarily because Qwest had not fully implemented the Product/Process CMP at the conclusion of the test. *See Id. at 526, 530-32*.

195 Criterion 23-2-2 evaluates whether the change management process is in place and documented. *Id. at 526*. KPMG noted that at the conclusion of the test, Qwest and participating CLECs were still discussing two issues though the CMP redesign process. KPMG stated that “the draft CMP document does not include all of the components that constitute a well-formed and complete Product/Process CMP.” *Id.*

196 Criteria 23-1-7 and 23-2-7 evaluate whether Qwest has “procedures and systems in place to track information such as a descriptions of proposed changes, key notification dates, and change status.” *Id. at 519, 530*. As to criterion 23-1-7, KPMG determined that the systems were in place, but was not able to validate whether Qwest adheres to its process. *Id. at 519-20*. During the test, KPMG opened Exception 3110

⁶⁷ Test 24.6 is addressed separately below beginning at paragraph 211.

to address a concern over Qwest's failure to meet intervals for implementing a systems release, and due to concerns over Qwest's frequent changes to notification dates and content. *See Ex. 1730 at 3-4*. KPMG closed the exception as inconclusive, because it could not verify that Qwest consistently adhered to its stated intervals for software release notifications. *Id. at 4*. As to criterion 23-2-7, KPMG was not able to confirm that Qwest has procedures and systems to track all Product/Process changes, given that the Product/Process CMP had not yet been fully implemented. *Ex. 1697 at 530*.

197 Criteria 23-1-8 and 23-1-8 evaluate whether "criteria are defined for the prioritization system and for severity coding." *Ex. 1697 at 520, 531*. Concerning criterion 23-1-8, KPMG explains that during the test, CLECs disputed Qwest's process for prioritizing change requests, in particular, regulatory changes. *Id. at 521*. Following a decision entered by the Colorado Commission in March 2002, Qwest agreed to a prioritization process in which Qwest and each CLEC have a vote in prioritizing all change requests, including regulatory changes. *Id. at 522*. However, KPMG was unable to observe the prioritization of a major software release in accordance with the new process. *Id.* As to criterion 23-2-8, KPMG described the prioritization system included in the draft CMP documents, but because the system had not yet been implemented, KPMG could not verify that it was working. *Id. at 531*. In addition, KPMG opened Exception 3094 during testing, after observing that Qwest implemented certain changes over CLEC objections. *Id.* Following a retest, KPMG was still unable to verify whether Qwest had implemented the process had been implemented.

198 Criteria 23-1-9 and 23-2-9 evaluate whether "Qwest complies with notification intervals and documentation release requirements." *Id. at 523, 532*. During testing of criterion 23-1-9, KPMG identified problems with how the system event notifications were formatted, preventing CLECs from obtaining information from the notifications. KPMG also noted discrepancies concerning the date of the notification, inaccurate time stamps, and late distribution. *Id. at 524*. After further testing, KPMG identified continuing problems and issued Exception 3110, which is described above. As to criterion 23-2-9, KPMG was not able to observe whether Qwest adhered to its notification intervals because the process had not yet been fully implemented at the conclusion of the test. *Id. at 532*.

- 199 **AT&T.** AT&T states that over the course of the test, KPMG could not determine whether Qwest has complied with the obligation to adhere to its CMP plan over time, referring to the three Systems CMP and four Product/Process CMP criteria closed as unable to determine, and three exceptions (3110, 3111, and 3094) that have been closed as inconclusive or unresolved. *Ex. 1709 at 26.* AT&T asserts that Qwest cannot prove that it has met the FCC’s criteria and adhered to them over time. *Id. at 26-27.*
- 200 **WorldCom and Covad.** WorldCom and Covad, filing jointly, assert that it is premature to find that Qwest’s CMP complies with the FCC’s requirements for change management until KPMG and Liberty, through Liberty’s review of PID PO-16,⁶⁸ observe actual, present compliance with the plan. *See Ex. 1715 at 5.* Further, WorldCom and Covad assert that Qwest’s CMP redesign is not yet complete and that Qwest has failed to meet the FCC’s first criteria for change management. *Id. at 6.*
- 201 **Qwest.** Qwest asserts that “the results of the ROC OSS Test support a finding that Qwest’s CMP meets FCC standards.” *Ex. 1721 at 98.* Qwest asserts that it has met the FCC’s first criterion, even though the language for two Product/Process CMP issues is not yet finalized, and a final review of the language in the plan has not yet occurred. *Id. at 100-101.* Qwest asserts that the Product/Process portion of the CMP is not required by the FCC and that no other BOC has agreed to such processes. *Id. at 101.* During the June hearing, Qwest’s witness Ms. Filip stated that language for one of the outstanding Product/Process issues has been finalized (the exception process) and that language for the other (the postponement process) would likely be finalized by the end of June. *Tr. 8568, 8486; see also Ex. 1799 and 2-3.*
- 202 Qwest describes its efforts to develop and comply with its new change management plan, asserting that many of the core elements of the plan have been in place for over six months. *Ex. 1721 at 105-15.* Qwest asserts that it has demonstrated a “strong record of compliance with the redesigned CMP.” *Id. at 105.* Addressing the concerns raised by KPMG, Qwest asserts that it has made significant improvements to its tracking and release notification internal procedures in response to Exception 3110. *Id. at 112.* Qwest asserts that these improvements, in combination with

⁶⁸ The ROC TAG has adopted changes to measure PO-16, which measures whether release notifications were issued on a timely basis. *Ex. 1721 at 111, n. 382.* This measure, when included in the QPAP, will create additional incentive for Qwest to provide timely release notifications.

improvements in the performance results for measure PO-16, show that Qwest has demonstrated compliance with the CMP requirement for notifications. *Id. at 112-13.*

203 Qwest asserts that, contrary to KPMG’s determination concerning criterion 23-1-8, that KPMG was able to observe Qwest’s compliance with the prioritization process for IMA release 10.0, IMA release 11.0 and SATE. *Id. at 113.* Qwest asserts that the fact that Qwest and the CLECs were at impasse over the prioritization of regulatory changes did not affect KPMG’s ability to observe Qwest’s compliance with the process. *Id. at 113-14.*

204 ***Discussion and Decision.*** The parties dispute Qwest’s compliance with some, but not all, of the FCC’s criteria for change management. The CLECs do not contest whether Qwest complies with the FCC’s second, third, and fifth criteria: “(2) that competing carriers had substantial input in the design and continued operation of the change management process;” “(3) that the change management plan defines a procedure for the timely resolution of change management disputes;” and “(5) the efficacy of the documentation the BOC makes available for the purpose of building an electronic gateway.”⁶⁹ Qwest’s testimony and evidence concerning these criteria and KPMG’s evaluation of criteria in the OSS, show that Qwest’s CMP is adequate for these criteria, and that Qwest has demonstrated compliance with these three criteria.

205 The CLECs contest whether Qwest has complied with the first and fourth criteria, “(1) that information relating to the change management process is clearly organized and readily accessible to competing carriers,” and “(4) the availability of a stable testing environment that mirrors production.” The issue of Qwest’s testing environment is discussed below in the context of the results of OSS Test 24.6. Finally, the CLECs assert that Qwest has not demonstrated a pattern of compliance with its CMP, as required by the FCC.

206 Since the June hearing, the participants in the redesign process have agreed to in concept and finalized language, on all remaining issues in the Product/Process CMP. *See Exs. 1808-1813.*⁷⁰ The FCC has stated that “changes that do not impact OSS

⁶⁹ *Georgia/Louisiana Order*, App. D at ¶42.

⁷⁰ On June 24, 2002, Qwest filed a response to Bench Request No. 58, providing a status report on the CMP redesign process. Qwest’s response and Exhibits A through C are admitted as Exhibits 1808-1812.

interfaces are not necessarily required to be a part of a change management process.”⁷¹ Given Qwest’s demonstration that the Systems and Product/Process CMP are now both complete and the FCC’s description of the required aspects of a change management system, we find that Qwest has satisfied the FCC’s first criteria for an adequate change management plan.

207 Similarly, concerning the other Product/Process CMP criteria designated as “unable to determine,” we do not find it problematic that KPMG was unable to determine if Qwest satisfied the criteria. The FCC does not find that these elements are necessary to a change management plan. While the FCC may not consider Product/Process issues as necessary to a change management plan, we commend Qwest and the other parties participating in the CMP redesign effort for their work in developing the Product/Process CMP provisions. The work the parties have engaged in will create a more structured, and hopefully less contentious, business environment for Qwest and the CLECs.

208 The FCC requires that BOCs adhere to their notification schedule for system releases, noting the importance of timely, accurate and complete notice of changes to their systems and processes.⁷² The FCC has found BOCs to have demonstrated compliance with release notification processes, even when the BOC had failed to meet certain intervals.⁷³ Finally, the FCC recognizes that performance measures can assist the BOC in complying with notification intervals.⁷⁴ Given the FCC’s actions in past section 271 applications, Qwest’s efforts to improve its release notification processes, and the revisions to measure PO-16, we find that Qwest has sufficiently adhered to its release notification processes.

209 Concerning its prioritization processes, we also find that Qwest has sufficiently adhered to the processes set forth in the CMP. First, in analyzing compliance with prioritization within BellSouth’s change management system, the FCC stated that it does not require perfection for compliance with a checklist item.⁷⁵ The FCC found adequate compliance with BellSouth’s prioritization processes, and noted that:

⁷¹ *Georgia/Louisiana II Order*, ¶181, n.673.

⁷² *Id.*, ¶197, n.751.

⁷³ *Id.*, ¶196, nn.754-55.

⁷⁴ *Id.*

⁷⁵ *Id.*, ¶194.

[I]t is important that BellSouth continue to work collaboratively with competitive LECs through the Change Control Process on prioritization issues, provide competitive LECs with sufficient information to be able to make informed decisions regarding prioritization of proposed systems changes, and implement changes in a timely manner.⁷⁶

210 Qwest has modified its prioritization process to allow each CLEC a vote in prioritizing all change requests. Qwest has demonstrated its compliance, with the exception of regulatory changes. Qwest has now modified the prioritization process to include CLEC participation in prioritizing regulatory changes, even if KPMG could not verify Qwest's actual compliance. We do not believe that KPMG's inability to verify that Qwest adheres to the process undermines Qwest's showing that it has complied with the prioritization process.

211 Finally, as we discuss below, we find that Qwest provides a stable testing environment that mirrors production, and that Qwest has demonstrated compliance with that requirement.

8. Test 24.6 - OSS Interface Development Review

212 Test 24.6 evaluated Qwest's OSS interface development procedures. The test evaluated the "adequacy, consistency, and completeness of Qwest's documentation, specifications, and support provided to CLECs in developing , providing, testing, and maintaining OSS interfaces for pre-ordering, ordering, maintenance and repair and billing." *Ex. 1697 at 563*. In order for a CLEC to connect with Qwest via the Electronic Data Interchange, or EDI, interface, the CLEC must work with Qwest to implement an interface. *Id. at 564*. Part of the implementation process is progression testing, for which Qwest maintains two test environments, the Interoperability Test Environment (Interop), or the Stand-Alone Test Environment (SATE). *Id. at 564, 568*. Qwest also offers two maintenance and repair interfaces, the Mediated Access System for Electronic Bonding Trouble Administration (MEDIACC EB-TA), and the Customer Electronic Maintenance and Repair (CEMR) for performing trouble administration. *Id. at 570*.

⁷⁶ *Id.*, ¶193.

- 213 In the Final OSS Test Report, KPMG found that Qwest did not satisfied two test criteria for Test 24.6, 24.6-1-8 and 24.6-2-9. *Id. at 580, 597.* The first criterion, 24.6-1-8, evaluated whether “Qwest made available a functional test environment to customers for all supported interfaces.” *Id. at 580.* In evaluating that criterion, KPMG found problems with both of Qwest’s test environments, Interop and SATE. *Id.*
- 214 Initially, KPMG found deficiencies in the Interop environment, and opened an exception. KPMG closed the exception after Qwest announced that it would devote its test resources to developing SATE. *Id.* After Qwest introduced SATE in August 2001, KPMG evaluated the test environment and found that it is separate from the production environment. *Id.* KPMG also found, however, that SATE transaction records are manually generated and that SATE does not support flow-through transactions. *Id. at 580-81.* KPMG opened Exception 3077 to address this deficiency. The exception was ultimately closed as unresolved as Qwest chose to close the exception without making enhancements to SATE. In addition, KPMG found problems with adding new functions, as well as new and existing products, for testing via SATE. *Id. at 581.* KPMG opened Exception 3095 to address this exception, which Qwest also chose to close as unresolved. *Id.*
- 215 The second criterion, 24.6-2-9, evaluated whether “carrier-to-carrier test environments are available and segregated from Qwest production and development environments.” *Id. at 597.* KPMG found that “Qwest’s carrier-to-carrier testing environment used by CLECs to develop their MEDIACC EB-TA interface is not segregated from the MEDIACC EB-TA production environment.” *Id.* KPMG raised concerns in Exception 3109, which was ultimately closed as unresolved. *Id. at 598; see also Ex. 1768.*
- 216 **AT&T.** AT&T asserts that Qwest’s failure to satisfy two test requirements in Test 24.6 indicates that Qwest cannot demonstrate that it has met the fourth criteria established by the FCC for an adequate change management process. *Ex. 1709 at 27.*
- 217 **WorldCom and Covad.** The Joint CLECs assert that the deficiencies found in Exceptions 3077 and 3095 concerning SATE have not been resolved. *Ex. 1715 at 6-7.* The Joint CLECs assert that because of these deficiencies, Qwest cannot demonstrate that either SATE or Interop is a stable testing environment that mirrors the production environment, as required by the FCC. *Id. at 8.*

- 218 As to the problems with Qwest’s MEDIACC EB-TA interface, the Joint CLECs also assert that Qwest’s testing environment would fail the FCC’s requirement that Qwest provide CLECs with a stable testing environment mirrors the production environment. *Id. at 9*. Although the Joint CLECs’ acknowledge that the FCC has approved test environments that do not fully test end-to-end, they also assert that Qwest’s failures in the OSS test are fundamental failures of OSS interface testing. *Id. at 10*.
- 219 **Qwest.** Qwest asserts that both of its test environments, Interop and SATE, meet the FCC’s requirements for a stable test environment that mirrors production. *Ex. 1721 at 126*. Qwest describes its Interop and SATE environments, asserting that CLECs may use either Interop or SATE to test their EDI interface. *Id. at 128-35*. Qwest asserts that it has satisfied 46 of the 48 separate test criteria evaluating test environments. *Id. at 137*. Qwest asserts that it has resolved the problem with automated post-order responses within SATE by developing a tool known as the Virtual Interconnect Center Knowledge Initiator, or VICKI.⁷⁷ *Id. at 131; see also Ex. 1741*. Qwest has also addressed the flow-through issue by modifying SATE to allow flow-through for all products in SATE that are flow-through eligible. Qwest asserts that it has done so to meet KPMG’s concerns, despite the fact that the FCC does not require a test environment to test flow-through of orders. *Id. at 131*.
- 220 Qwest also asserts that it is addressing through the change management process KPMG’s concerns about adding new functions and products and existing products that are not currently supported by SATE. *Id. at 139-41*. Finally, Qwest notes that 26 CLECs have successfully developed EDI interfaces using the Interop environment, and five individual CLECs, and an additional five through a service bureau, have completed testing using SATE and have achieved production status using EDI for pre-ordering capabilities. *Id. at 135, 140*.
- 221 Concerning the problems that KPMG found with the MEDIACC EB-TA interface, Qwest asserts that the FCC has not required computer-to-computer interfaces to demonstrate that a BOC provides nondiscriminatory access to maintenance and repair functions, nor has the FCC applied the requirement for a “stable testing environment

that mirrors production” beyond pre-ordering and ordering transactions. *Id. at 141-42.* Qwest further disputes KPMG’s criticism “that test scenarios for non-designed services are processed by the LMOS production mainframe.” *Id. at 142.* Qwest argues that this feature is advantageous to CLECs as it provides a true representation of how transactions will function and respond in Qwest’s EB-TA environment. *Id.*

222 ***Discussion and Decision.*** The one test criterion addressing SATE that Qwest failed to satisfy concerned whether Qwest provided a *functional* test environment to customers for all supported interfaces. *Ex. 1697 at 580 (emphasis added).* The CLECs assert that the testing environments are not adequate or functional, focusing on KPMG’s findings. While we are concerned about the problems that KPMG has identified in the Interop and SATE environments, it appears that Qwest has made efforts to address the issues for the SATE environment. Qwest has addressed the problem of manually generated responses through its VICKI tool. Qwest has also taken steps to address the flow-through issue, by making modifications to SATE. Finally, Qwest has addressed and will continue to address the issue of products supported by SATE through the change management process, which is an appropriate place to discuss changes to an OSS system. We do not agree with the CLECs that the failures identified by KPMG require a finding that Qwest does not provide an adequate change management plan. We find that Qwest is continuing to address KPMG’s concerns, and that Qwest has sufficiently demonstrated compliance with the change management requirements of Checklist Item No. 2.

223 Based upon the FCC’s statements about the scope of the “stable testing environment” requirement, and that computer-to-computer interfaces are not required in the maintenance and repair environment, we find that Qwest’s failure to satisfy criterion 24.6-2-9 does not justify a finding that Qwest does not comply with the requirements of Checklist Item No. 2 to provide nondiscriminatory access to OSS systems.

9. Diagnostic Test Criteria

224 Many of the diagnostic PIDs address functions performed by the IMA interfaces, IMA-GUI, and IMA-EDI, and in particular, how orders flow through on those interfaces. KPMG stated in its Final OSS Test Report that the ROC OSS test

⁷⁷ Qwest describes VICKI as “ a tool that Qwest provides in the SATE environment to automatically generate valid production order and post-order responses to CLEC-generated test transactions.” *Ex. 1721 at 131, n. 459.*

included a higher number of diagnostic measures than in tests conducted in other states. *Ex. 1697 at 13.* We do not find the number of diagnostic PIDs problematic. The PIDs were developed collaboratively by state commission staff, CLECs and Qwest, and reflect a collective decision of how Qwest's actions or systems should be monitored. In addition, the ROC is working with the CLECs and Qwest to develop a long-term PID administration that will continue to address the issue of developing new PIDs and evaluating whether diagnostic PIDs should be assigned parity or benchmark standards.

10. Effect of Unfiled Agreements on OSS Test

225 WorldCom and Covad raise the issue that for some portions of the OSS test, KPMG relied substantially or solely upon data generated by certain CLECs (Eschelon, Covad and McLeod USA) who had signed agreements with Qwest that were not filed with state commissions pursuant to section 252. WorldCom and Covad are concerned that some of the unfiled agreements contain provisions giving these CLECs preferential treatment that may make Qwest's performance look better than it otherwise would. The parties state that they do not believe that Covad received any special treatment from Qwest, but are concerned that Eschelon or McLeod may have received such special treatment sufficient to affect the results of the OSS test and Qwest's performance data. *Ex. 1715 at 11; see also Ex. 1717.* WorldCom and Covad assert that KPMG indicates that it relied in part upon data from these CLECs for Tests 12, 12.7, 14, 18, and 24.6. *Id.* KPMG relied solely upon data from one of more of the three CLECS in Tests 18.7, 18.8, 23 and 24.5. *Id.*

226 As we discuss below in Section D.4.d.2, no party has filed a complaint with the Commission claiming that Qwest or any other party acted improperly in entering into an agreement that was not filed with the Commission. Although we recognize that other states are engaged in reviewing this information, there is no pending complaint before this Commission. We do not presume that any party acted illegally, and do not rely on such presumptions in making any decision. We, therefore, do not find it appropriate to address the allegations that the OSS test results or Qwest's performance data are somehow suspect and not valid.

11. Final Conclusions Concerning Final OSS Test Report

227 Although we note certain deficiencies in Qwest’s OSS functions, and Qwest’s ability to make the functions available to CLECs, we do not find the deficiencies sufficient, individually or collectively, to preclude a finding that Qwest is providing OSS functions as required under Checklist Item No. 2. Consistent with our findings above concerning other aspects of Checklist Item No. 2, we find that Qwest provides nondiscriminatory access to UNEs as required by section 271(c)(2)(B)(ii).

D. PUBLIC INTEREST

1. Statutory and FCC Requirements

228 Before the FCC will approve an application under section 271, Qwest must show that “the requested authorization is consistent with the public interest, convenience and necessity.” 47 U.S.C. §271(d)(3)(C).

229 BOCs may not gain entry into the long-distance market simply by complying with the competitive checklist. The FCC declares that compliance with the competitive checklist is a “strong indicator” that long-distance entry is in the public interest.⁷⁸ The FCC has also stated, however, that:

In making our public interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC’s local telecommunications market to competition. If we were to adopt such a conclusion, BOC entry into the in-region interLATA services market would always be consistent with the public interest requirement whenever a BOC has implemented the competitive checklist. Such an approach would effectively read the public interest requirements out of the statute, contrary to the plain language of section 271, basic principles of statutory construction, and sound public policy.⁷⁹

230 The FCC has made clear that the public interest analysis should begin by focusing on whether the local market is open to competition and whether there is adequate

⁷⁸ *Georgia/Louisiana II Order*, App. D, ¶70.

⁷⁹ *Ameritech Michigan Order*, ¶389.

assurance that the local market will remain open to competition after the section 271 application is granted.⁸⁰

231 The FCC considers a variety of factors in determining whether an application is in the public interest, including (1) whether approving the application will foster competition in all relevant markets, (2) the nature and extent of competition in the local market, (3) whether all methods of entry are available, and (4) whether a BOC has agreed to performance monitoring through a performance assurance plan to determine whether the BOC “would continue to satisfy the requirements of section 271 after entering the long-distance market.”⁸¹

232 Finally, the FCC has described the public interest inquiry as “an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected.”⁸²

2. The Commission’s Review of Public Interest Issues

233 The Commission first addressed the issue of whether an application by Qwest under section 271 would be consistent with the public interest during the fourth workshop, in July and August 2001. Qwest, AT&T, WorldCom, and Public Counsel filed testimony and exhibits concerning the issue, and their witnesses were subject to cross-examination. The parties also filed responsive briefs on the issue. In the 20th *Supplemental Order*, the administrative law judge recommended that the evidence presented during the workshop was not sufficient to make a determination as to

⁸⁰ *Id.*, ¶402; see also *Bell Atlantic New York Order*, ¶423; *In the Matter of SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238, ¶417 (rel. June 30, 2000) (*SBC Texas Order*); *In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, ¶267 (rel. Jan. 22, 2001) (*Kansas/Oklahoma Order*); *Verizon Connecticut Order*, App. D ¶72.

⁸¹ *SBC Kansas/Oklahoma Order*, ¶269; see also *Ameritech Michigan Order*, ¶¶391, 393, 402.

⁸² *Georgia/Louisiana II Order*, ¶71.

whether an application by Qwest under section 271 was in the public interest, and that such a determination would be premature. *20th Supplemental Order at ¶473*. In particular, the *20th Supplemental Order* noted that the Commission had not yet found Qwest to be in compliance with all fourteen checklist items, that the Commission had not completed its review of Qwest’s Performance Assurance Plan or approved such a plan, and that the ROC OSS Test Final Report was not yet complete. *Id. at ¶¶474-75*.

234 The *20th Supplemental Order* recommended deferring final consideration of the public interest issue until after KPMG issued its Final OSS Test Report was issued. The *20th Supplemental Order* also recommended deferring consideration of the various allegations by parties about “unusual circumstances” that might affect a determination of whether Qwest’s application to the FCC would be in the public interest. *Id. at ¶¶475-76*.

235 The parties presented argument to the Commission concerning the *20th Supplemental Order* on January 10, 2002. In the *28th Supplemental Order*, the Commission adopted the recommendations in the *20th Supplemental Order*, and deferred final consideration of the public interest issue until after KPMG issued its Final OSS Test Report. The Commission recognized that the parties had presented testimony and evidence during the workshop concerning the following issues: the state of competition in the local market, the effect of Qwest’s entry into the long-distance market, Qwest’s proposed performance assurance plan, and unusual circumstances that may affect a public interest finding. However, based on a review of the factors the FCC relies on to consider the public interest requirement, the Commission determined that it did not have all of the necessary information to make a determination of whether an application by Qwest would be in the public interest. *28th Supplemental Order at ¶131*.

236 In the *20th Supplemental Order*, the Commission noted that it did not intend to reopen the record to allow parties to file new testimony and exhibits repeating the same information. The Commission did say it would allow additional testimony and evidence to the extent the parties might have *new* information concerning the state of competition in the local market, the effect of Qwest’s application on competition in the local and long-distance markets, assurance of future compliance, and any unusual

circumstances, including the effect of the *Sprint v. FCC*⁸³ decision in Washington state. *Id. at ¶133.*

237 On February 28, 2002, the Commission issued Bench Requests No. 43, 44, and 45, requesting information from all CLECs registered in Washington state and all Washington ILECs concerning interconnection agreements with Qwest and any operations in Qwest's Washington territory, in order to gain a better understanding of the state of local competition and CLEC market share in Qwest's serving territory in Washington.

238 The Commission held hearings on May 13 and 14, 2002, addressing the public interest requirement and remaining compliance issues. During that hearing, AT&T and Public Counsel filed additional testimony and comments, to which Qwest responded. The Commission also heard testimony from AT&T and Qwest witnesses. AT&T, Public Counsel, Sprint, ASCENT, Covad, WorldCom, and Qwest filed post-hearing briefs on the public interest issue on June 7, 2002.

239 The parties remain in dispute as to whether granting an application by Qwest for in-region interLATA service in Washington would be consistent with the public interest. The parties' overall positions on the issue of public interest, as well as those concerning key issues in dispute, are discussed below.

3. Overall Positions of the Parties

240 **Qwest.** Qwest asserts that the record in this proceeding shows that competition is thriving in Washington and that Qwest's entry into the long-distance market would benefit Washington consumers. *Qwest Corporation's Supplemental Post-Hearing Brief on Public Interest Issues at 2 (Qwest's Supplemental Brief)*. Qwest asserts that once a BOC has provided assurance that its local markets are open and will remain open to competition, there is a presumption in favor of interLATA entry unless a party can rebut the presumption by demonstrating that unusual circumstances exist. *Id. at 3.* Qwest asserts that the parties have not shown or proved the existence of any unusual circumstances that would rebut the presumption. *Id. at 3-4.* Qwest requests that the Commission find that Qwest has satisfied the requirements of section 271(d)(3)(C). *Id. at 20.*

⁸³ See *Sprint Communications Co., L.P. v. FCC*, 274 F.3d 549, (D.C. Cir., Dec. 28, 2001).

241 **AT&T.** AT&T asserts that Qwest continues to wield considerable market power in the local exchange markets in Washington and that the prospects for the development of UNE-based and facilities-based competition in Washington remain poor. *Supplemental Brief of AT&T Regarding Public Interest at 1 (AT&T’s Supplemental Brief)*. AT&T asserts that Qwest has failed to provide adequate assurances that the local market will remain open if an application for section 271 authority is granted for Washington state. *Id.* AT&T asserts that few things have changed since discussion of the public interest issue during the fourth workshop, and those things that have changed demonstrate that the Commission should defer any recommendation pending further investigation. *Id. at 2.* AT&T asserts that “regulators at both the state and federal level are finally beginning to notice irregularities in the way in which Qwest conducts its business,” and that Washington state should not turn a “blind eye” to such conduct by recommending approval of Qwest’s section 271 application. *Id. at 3.* AT&T asserts that the evidence demonstrates a “clear and unabated pattern of anti-competitive behavior” by Qwest and that the Commission should recommend that Qwest’s application be denied. *Id. at 25.*

242 **Public Counsel.** Public Counsel asserts that a pattern of anti-competitive conduct by Qwest weighs against a finding that granting an application for section 271 authority would be in the public interest. *Brief of Public Counsel on the Public Interest at 6.* Public Counsel also asserts that it is still premature to reach a decision on the issue of public interest, due to the number of issues outstanding before the Commission. *Id. at 1.* Public Counsel argues that the QPAP, SGAT, and Qwest’s change management process have not yet been finalized, and that the question of cost-based UNE pricing is still unresolved. *Id. at 2.* Public Counsel also asserts that the Commission must also determine whether unusual circumstances exist that would weigh against a finding of public interest. *Id.* Finally, Public Counsel asks the Commission to require Qwest to comply with the QPAP for a 90-day period, in order to demonstrate that Qwest has fully and irrevocably opened its local markets to competition. *Id.*

4. Issues in Dispute

a. Is the Local Market Open to Competition?

243 One of the factors the FCC considers in evaluating whether granting an application would be in the public interest is whether the local market in the state is open to

competition.⁸⁴ From the very first section 271 application that the FCC approved, the FCC has held that if a BOC demonstrates compliance with the fourteen-point competitive checklist, the FCC will presume that the barriers to competitive entry in the local exchange markets have been removed and that the local exchange market in the state is open to competition.⁸⁵ While the FCC will look at the nature and extent of competition in the local market and other factors, the FCC has consistently declined to consider the level of CLEC market share, a low percentage of total access lines served by CLECs, concentration of competition on urban areas, minimal competition for residential services, the weakening economy, or financial difficulties of CLECs as a basis to deny an application.⁸⁶ The FCC bases its criteria for whether the local market is open on Congressional intent that it condition approval of section 271 authority “solely on whether the applicant has opened the door for local entry through full checklist compliance, not on whether competing LECs actually take advantage of the opportunity to enter the market.”⁸⁷

244 The parties addressed this issue primarily in testimony, exhibits, and briefs filed during the fourth workshop.

245 *Qwest.* Through the testimony of Mr. Teitzel, Qwest asserts that once the Commission completes its review of checklist items, Qwest will have demonstrated that its local markets are open to competition. *Ex. 1055 at 44-45.* Qwest identifies the numbers of interconnection agreements it has signed and provides statistics for access lines, loops, local interconnection trunks, collocation arrangements, and resale arrangements. *Id. at 43-68.* Relying on data that CLECs provided to Qwest, Qwest asserts that it meets the Track A requirements,⁸⁸ and also that it has opened its local markets to competitors. *Id. at 1-43.*

⁸⁴ *Ameritech Michigan Order*, ¶402; *see also Bell Atlantic New York Order*, ¶423; *SBC Texas Order*, ¶417; *SBC Kansas/Oklahoma Order*, ¶267.

⁸⁵ *Bell Atlantic New York Order*, ¶426; *see also Georgia/Louisiana II Order*, ¶281.

⁸⁶ *Bell Atlantic New York*, ¶427; *SBC Texas Order*, ¶419; *Georgia/Louisiana II Order*, ¶282.

⁸⁷ *Bell Atlantic New York Order*, ¶427.

⁸⁸ Track A requirements are intended to determine whether competing local exchange carriers provide an “actual commercial alternative to the BOC.” *Ameritech Michigan Order*, ¶¶76-77. Under section 271(c)(1)(A), a BOC must show that it has entered into one or more binding interconnection agreements, that the BOC provides “access and interconnection to unaffiliated competing providers of telephone exchange service,” that these providers offer exchange service to residential and business customers, and finally, that the BOC demonstrate the means by which competing carriers provide exchange service, i.e., facilities-based, resale, or UNE-based service. *Id.*, ¶70.

246 In its brief, Qwest presents information on competitive entry that shows CLEC market share based on ported numbers and LIS trunk methods, as well as estimates on the number of access lines served by competitors. *Qwest's Brief in Support of Its Showing of Compliance With the Track A Entry Requirements and Public Interest Test (Qwest's Public Interest Brief)* at 22-26. Qwest notes that the FCC does not require a significant showing of market share or market penetration to determine the public interest. *Id.* at 22-23. Nevertheless, Qwest estimates that CLECs serve at least 7.2 percent of access lines in Qwest's service territory, and possibly as great as 16.9 percent. *Id.* at 24-25. Qwest argues that these market shares exceed those in states where the FCC has granted applications for section 271 authority. *Id.* at 25. Qwest asserts that the local market is open in Washington, and "that competition is robust." *Id.* at 26.

247 In rebuttal, Qwest counters AT&T's assertion that the local market is not yet open to competition, specifically referencing this Commission's decision in Docket No. UT-000883 to competitively classify business services via DS1 or larger capacity circuits in 23 wire centers in Bellevue, Spokane and Vancouver. *Ex. 1063 at 3*. Qwest also counters Public Counsel's criticism that Qwest's 98 percent market share indicates that local market competition is "virtually non-existent." Qwest asserts that the FCC has rejected market share tests in considering applications for section 271 authority. *Id.* at 23.

248 Qwest states that there will always be failures by firms to survive in any market, and that CLEC failures are not attributable to Qwest. *Id.* at 8, 28. Qwest rejects AT&T's argument that Qwest will remonopolize the local market if the FCC grants it section 271 authority. Qwest notes that it would likely be subject to payment for violating the QPAP and could be at risk for the FCC to rescind its grant of section 271 authority. *Id.* at 9.

249 **AT&T.** Through its witness, Ms. Diane Roth, AT&T asserts that Qwest's market data show a very small percentage of residential customers being served by CLECs, and asserts that the demise of market entrants in Washington and in Qwest's region is evidence that Qwest's local market is not open to competition. *Ex. 1075 at 20-23; see also Ex. 1086*. AT&T asserts that allowing Qwest to enter the long-distance market now will only allow Qwest to remonopolize the local market, because CLECs

have not been able to obtain more than a small percentage of market share in Washington. *Ex. 1075 at 27.*

250 In its brief, AT&T asserts that the lack of competition is a factor directly relevant to whether the local market is open to competition. *Brief of AT&T Regarding Public Interest at 3.* AT&T recognizes that the FCC has declined to use a market share approach, but states that it is relevant that no CLEC has been able to establish a meaningful level of competition against Qwest in the state. *Id.* AT&T contests the method by which Qwest reaches its estimates of CLEC operations, and notes that the estimate of CLEC penetration in Washington is a fraction of the CLEC residential penetration in North Dakota. *Id. at 4.* AT&T asserts that the prospects for facilities-based and UNE-based residential competition are not good. *Id. at 10-13.*

251 **WorldCom.** WorldCom is concerned that Qwest will use its “market power,” or control of local bottleneck facilities, to monopolize other products such as broadband and long-distance. *WorldCom’s Brief Addressing Loops, NIDs, Line Sharing, Line Splitting, Emerging Services, Public Interest, Section 272 and General Terms and Conditions at 15 (WorldCom Brief).* WorldCom asserts that if Qwest is allowed to enter the long-distance market prematurely, i.e., before the local market is irreversibly open, that there is a risk that Qwest will remonopolize the local market. *Id. at 17-19; see also Ex. 1090 at 16.*

252 **Sprint.** Sprint contends that the local market in Washington state is not irreversibly open to competition, and that competition in the residential sector is “virtually non-existent.” *Sprint Communications Company L.P.’s Brief Regarding Public Interest at 2.* Sprint notes that Qwest’s data fail to take into account CLEC and DLEC failures in the last year, and disputes that these failures are primarily attributable to general market downturn and a reduction in venture capital. *Id. at 3.* Based on the testimony presented by AT&T and WorldCom, Sprint asserts that Qwest has engaged in anti-competitive activity sufficient to undermine this Commission’s confidence that the local market could remain open. *Id. at 3-4.*

253 **Covad.** Covad argues that Qwest must demonstrate not only that the local market is open to competition, but also that the local advanced services market is open. *Post-Workshop Brief of Covad Communications Company on Disputed Loops, Line Splitting, Emerging Services and Public Interest Issues at 60-63 (Covad Brief).* Covad argues that it is the only DLEC remaining in the Washington market, in large

part due to Qwest's poor wholesale performance and anti-competitive activity. *Id. at 64*. Covad asserts that the advanced services market is not "irreversibly open" and that it is premature to find Qwest's application to be in the public interest. *Id. at 63*.

254 **ASCENT.** Although ASCENT states that Qwest has made "limited strides" in opening the local market in Washington, ASCENT believes that it is not in the public interest to grant Qwest's application. *Comments of ASCENT Regarding Qwest Corporation's Compliance with the Public Interest Requirements of Section 271 of the Telecommunications Act of 1996 at 1-3*. ASCENT argues that the Commission must consider Qwest's previous compliance record as well as the experience of competitors who have tried to enter the market in Washington. *Id.*

255 **Public Counsel.** Public Counsel's witness, Mark Cooper, responded to Mr. Teitzel's direct testimony, objecting to Qwest's focus on the benefits of competition in the long-distance market rather than focusing on the local exchange market. *See Ex. 1070*. Based upon year 2000 data, Mr. Cooper asserted that competition in the residential sector is "virtually non-existent" in Washington compared with that in New York prior to the grant of section 271 authority. *Id. at 28-29*. Mr. Cooper concluded that there is "not a base of competition to support [competition] in the long term." *Id. at 30*. Mr. Cooper concluded that viable competition in the residential market is necessary to meet the public interest standard, and that it is premature to make a decision in Washington because the OSS test, performance assurance plan and checklist review had not yet been completed as of the time Mr. Cooper filed his testimony with the Commission. *Id. at 41*.

256 Public Counsel urges the Commission to adopt the FCC's test in its *Ameritech Michigan Order* that the local market be "fully and irreversibly open." *Public Counsel Brief on Public Interest at 6*. Public Counsel argues that Qwest has failed to irrevocably open the residential market, citing to "token" competition in the residential market. *Id. at 8-10*. Public Counsel also argues that there are significant barriers to entry in Qwest's service area, i.e., Qwest's non-compliance with checklist items, a lack of an approved QPAP, cost-based UNEs, an OSS tested against commercial volumes, and the absence of actual performance data. *Id. at 13-18*.

257 **Discussion and Decision.** Qwest has demonstrated through the course of four workshops and its most recent SGAT compliance filing that it has complied with the requirements of the 14-point competitive checklist. Under the FCC's analysis, we

must presume that if Qwest has complied with the competitive checklist, then the local exchange market in Washington is open to competition, barring any facts that would overcome that presumption. The concerns and evidence raised by the parties, i.e., low CLEC market share, low level of access lines served by CLECs, financial failures of CLECs and DLECs in the Washington market, and market power held by Qwest, are not sufficient to rebut the presumption of an open local exchange market. The test is not whether Qwest still has market power in the local exchange market but rather whether it has opened its network to competitors. Concerns about Qwest's market power would certainly be relevant if Qwest were seeking competitive classification of its local services, since this would require a showing that Qwest has no significant captive customer base. Qwest does not need to make such a showing to obtain long-distance authority under section 271.

258 To gain a more complete picture of the state of local competition in the state of Washington for purposes of the Track A requirement and the public interest analysis, on February 28, 2002, the Commission issued Bench Request Nos. 43, 44, and 45 to CLECs registered in Washington as well as Washington ILECs. The bench requests, supplemented on March 4, 2002, requested data regarding CLEC operations and information regarding CLEC future marketing plans, in Qwest's serving territory in Washington. The bench requests were sent to 162 companies. Forty-two CLECs responded to the bench requests, with 17 stating that they did not conduct business in Washington state. The Commission believes, however, that all of the major providers in Washington responded to the bench requests.

259 The Commission has aggregated the data for the CLECs who responded to the bench requests. The data shows that 25 companies are actively operating in Qwest's territory, employing all three avenues of competition – facilities-based, resale, and UNEs. CLECs provide service to customers in both the residential and business markets in Qwest's serving territory. At the end of 2001, competitors held 101,127 customer accounts, serving a total of 311,957 access lines. Based on Qwest's 3,382,057 access lines⁸⁹ in Washington state as of December 2001, CLEC access lines represent 9.2 percent of the total access lines in Qwest's service territory. A more detailed report is contained in Appendix A to this order. This information provides a more recent snapshot of the level of competition in the local exchange market in Washington state. We believe it demonstrates that Qwest has opened its local

⁸⁹ Qwest ARMIS Report 43-08, Table III, 2001.

exchange market in Washington to competition. Qwest's efforts through this collaborative proceeding to develop the SGAT, as well as its recent action in asking the Commission to lower UNE rates in Washington, further demonstrate that the local exchange market in Washington is open to competition.

b. Entry to Long-distance Market Beneficial

260 The FCC has consistently stated that “BOC entry into the long-distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist.”⁹⁰

261 *Qwest.* During the fourth workshop, Qwest asserted that section 271 approval would stimulate competition at the local level and in the long-distance market, and focused on the consumer benefits of Qwest entering the long-distance market. *Ex. 1055 at 53-64.* Qwest asserts that the FCC has determined that once a BOC has proved compliance with the competitive checklist, it need not make any “substantial additional showing that its participation in the long-distance market will produce public interest benefits.” *Qwest’s Supplemental Brief at 6, quoting Bell Atlantic New York Order, ¶428.*

262 Qwest offers a paper summarizing the conclusions of a study by Dr. Hausman and other economists that asserts that there are consumer benefits to BOC entry in the interLATA market. *See Ex. 1656.* That paper, entitled, *The Consumer-Welfare Benefits from Bell Company Entry into Long-Distance Telecommunications: Empirical Evidence from New York and Texas*, concludes that consumers benefit from BOC entry through lower long-distance bills and the increased entry of CLECs in the intraLATA market. *Ex. 1656 at 4.* Qwest offered the paper as an exhibit only to respond to AT&T’s offer of a paper by Dr. Lee Selwyn, who wrote the paper in response to Dr. Hausman’s paper. *Ex. 1655 at 22; see also Ex. 1648.* Qwest asserts that the study discussed in Dr. Hausman’s paper indicates that residential and

⁹⁰ *Georgia/Louisiana II Order, ¶281; see also In the Matter of Application by Verizon New England 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 Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Rhode Island, Memorandum Opinion and Order, CC Docket No. 01-324, FCC 02-63, ¶103 (rel. Feb. 22, 2002); Verizon Vermont Order, ¶62; SBC Texas Order, ¶419.*

business consumers in Washington will save money in local and long-distance charges. *Qwest's Supplemental Brief at 6.*

263 Qwest counters Dr. Selwyn's arguments that Dr. Hausman's study cannot be replicated, and that decreases in long-distance rates in New York and Texas were due to decreases in access charges. *Id. at 7-8.* Qwest asserts that AT&T does not want additional competition in the long-distance market, noting that the three largest long-distance carriers in Washington, AT&T, WorldCom, and Sprint, recently raised prices for service at the same time. *Id. at 8.*

264 **AT&T.** AT&T asserts that unless access charges are reduced, Qwest's entry into the long-distance market will only serve to remonopolize the local and long-distance markets. *Ex. 1076 at 7-10; see also AT&T Public Interest Brief at 14-16.*

265 To counter Qwest's argument that its entry into the long-distance market would benefit consumers, AT&T offers a paper prepared by Dr. Lee Selwyn, entitled *BOC Long-distance Entry Does Not Benefit Consumers*. *See Ex. 1640 at 9-11; see also Ex. 1648.* AT&T asserts that Qwest's entry into the long-distance market will benefit its shareholders, not consumers. *Ex. 1640 at 11.*

266 Dr. Selwyn's study finds the "research methods and analysis techniques" of the Hausman study to be deficient, asserting that the Hausman study used undocumented and unreproducible econometric models. *Ex. 1648 at 1-2.* Dr. Selwyn asserts that the reductions in long-distance prices in the states discussed in the Hausman study were primarily due to reductions in access charges. *Id. at 13.* Dr. Selwyn asserts that long-distance entry actually harms consumers, as the price reductions in New York and Texas were not as large as those in California and Texas, states where BOC entry had not yet occurred. *Id. at 11.*

267 **Public Counsel.** Public Counsel's witness, Dr. Cooper, objects to Qwest's assertion that Qwest is disadvantaged in not being able to enter the long-distance market, that there is a lack of competition in the long-distance market, and that long-distance entry should come first to stimulate local competition. *Ex. 1070 at 9-10, 26.* Dr. Cooper asserts that the benefit of Qwest opening its local market is that Qwest will be allowed the benefit of price competition in the local and long-distance markets. *Id. at 9-10.* Dr. Cooper further states that prematurely allowing Qwest into the long-distance market will undermine the prospects for competition. *Id. at 26.*

268 ***Discussion and Decision.*** The parties essentially dispute whether it is in the public interest for BOCs, like Qwest, to enter the interLATA, or long-distance, market and whether premature entry by the BOC will harm consumers. The FCC presumes that long-distance entry will benefit consumers if the local market is open to competition. Given our finding that the local exchange market is open, we find no basis to rebut the presumption that Qwest’s entry will be in the public interest. We further find that it is not premature for Qwest to enter the long-distance market, given the market-opening efforts Qwest has made in this proceeding.

269 A review of Dr. Hausman’s and Dr. Selwyn’s papers indicates that their academic dispute centers on whether BOC entry in the long-distance market is in the public interest, and specifically the factors the FCC should use in determining whether to grant an application under section 271. Dr. Hausman asserts that the “decision rule” that the FCC uses to evaluate an application focuses incorrectly on rewarding BOCs for their market-opening measures, without considering the consumer benefits of lower prices and stimulating CLEC entry. *Ex. 1656 at 14, 27.* Dr. Selwyn disputes the methodology used by Dr. Hausman, and also asserts that BOC entry into the long-distance market harms, not benefits consumers. *Ex. 1648 at 1, 11.* This academic discussion does not alter our finding above.

c. Assurance of Compliance After Gaining Section 271 Authority

270 Another factor that the FCC considers in evaluating whether the grant of an application would be in the public interest is whether there is adequate assurance that the local market will remain open to competition after the section 271 application is granted.⁹¹ The Commission has reviewed Qwest’s QPAP in this proceeding and required Qwest to file a QPAP by June 25, 2002, in compliance with the Commission’s 30th, 33rd, and 37th *Supplemental Orders*. Public Counsel and AT&T request that the Commission not make a finding that Qwest’s application would be in the public interest until Qwest has filed a compliant QPAP. Based on our review of Qwest’s compliance filing in Section A of this order, we find that the QPAP should provide adequate assurance that the local market in Washington state will remain open to competition if the FCC were to grant an application by Qwest for section 271 authority.

⁹¹ *Bell Atlantic New York Order*, ¶429; *SBC Texas Order*, ¶420.

d. Unusual Circumstances

271 As discussed above, the FCC “views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open.”⁹² In testimony, exhibits, and briefs filed during the fourth workshop and the May hearings, the parties have submitted numerous examples of what they assert are unusual circumstances that individually and collectively weigh against a finding that granting an application by Qwest would be in the public interest. These examples of alleged unusual circumstances are discussed separately below.

1. Touch America Complaints

272 Touch America, the company that purchased Qwest’s in-region long-distance business under the divestiture requirements of the US WEST-Qwest merger, has filed two complaints with the FCC asserting that Qwest continues to offer in-region, interLATA services. Public Counsel and AT&T request that the Commission investigate the facts to determine whether Qwest is violating section 271(a) of the Act, and defer a decision on the issue of public interest until the conclusion of an investigation.

273 **Public Counsel.** In comments filed for consideration in the May hearing, Public Counsel asks the Commission to initiate an investigation concerning whether Qwest has circumvented the interLATA restrictions of section 271 through the use of Lit Capacity Indefeasible Right of Use (IRU) agreements. *Comments of Public Counsel on the Public Interest and Request for Additional Investigations at 2-3 (Public Counsel Comments)*; see also *Brief of Public Counsel on the Public Interest at 5*. Public Counsel offered as exhibits a number of documents concerning these IRU agreements, including pleadings filed with the FCC. *See Exs. 1625-34*. Public Counsel argues that the results of the investigation may demonstrate “unusual circumstances” under the FCC’s public interest inquiry, in particular whether Qwest has engaged in a pattern of anti-competitive behavior. *Id. at 2*.

⁹² *Georgia/Louisiana II Order*, ¶280.

274 Public Counsel asserts that any evidence that Qwest is violating section 271 should be “deeply disturbing” to the Commission, and that the Commission should fully investigate allegations of such violations before making a final determination concerning Qwest’s application. *Brief of Public Counsel on the Public Interest at 4.* Public Counsel asserts that the evidence presented shows that Qwest has entered into IRU agreements with Washington state specific elements. *Id.* Public Counsel also asserts that two of the parties to the IRU agreements are not telecommunications or Internet service providers with whom network “capacity swaps” would traditionally be conducted. *Id. at 4-5.*

275 **AT&T.** AT&T’s witness, Ms. Roth, identifies the Touch America complaints with the FCC as information demonstrating that Qwest “continues to exhibit both anti-competitive behavior and attitude.” *Ex. 1640 at 2, 7.* AT&T asserts that the Touch America complaints are “highly unusual,” because they relate to allegations of violations of section 271 by a company seeking section 271 authority. *AT&T’s Supplemental Brief at 22.* AT&T asks that the Commission grant Touch America’s motion to reopen the proceeding to take additional evidence on the allegations and complaints before the FCC. *Id. at 22-23.*

276 **Qwest.** Qwest urges the Commission to reject the arguments by Public Counsel and AT&T concerning the IRU transactions, as the complaints are currently before the FCC. *Ex. 1655-T at 8-9.* Qwest asserts that the Touch America complaints concern disputes over the scope of the FCC’s Qwest-US WEST merger approval order and related questions of federal law that are appropriately before the FCC. *Qwest’s Supplemental Brief at 9.* Qwest argues that the FCC has stated that disputes arising from BOC merger orders should be resolved in the merger docket, not in the FCC’s consideration of section 271 proceedings. *Id. at 9.* Further, Qwest cites to the most recent FCC section 271 decision, the *Georgia/Louisiana II Order*, as stating that a section 271 proceeding is not the forum to resolve fact-specific disputes concerning a BOC’s statutory obligations. *Id. at 9-10, citing Georgia/Louisiana II Order, ¶¶208-209, 305.* Qwest asserts that it would be inappropriate to resolve the Touch America complaints in this proceeding. *Id. at 11.*

277 **Discussion and Decision.** The parties have presented this Commission with a set of allegations concerning Qwest’s conduct in its IRU agreements, but with no proof. As such, the parties have not demonstrated the necessary threshold of *primaefacie* evidence sufficient for this Commission to find that Qwest has violated section 271(a)

through its IRU agreements. Allegations are not sufficient for this Commission to find that unusual circumstances exist that weigh against a public interest finding.

278 In evaluating section 271 applications, the FCC has refused to address fact-specific complaints, such as obligations under interconnection agreements and complaints regarding BOC statutory obligations, that are more appropriately addressed in other fora.⁹³ The FCC has explained that the section 271 process could not function within the 90-day timetable established by Congress if the FCC were required to resolve all complaints as a precondition to granting a section 271 application.⁹⁴

279 We decline to initiate an investigation into Qwest's actions under its IRU agreements. Touch America has filed its complaints with the FCC and not with the Commission. It does not make sense for this Commission to initiate a parallel investigation on the issue, given that the issue arises out of the FCC's merger order and another proceeding would cause duplication of effort and cost by all parties involved. The FCC will be reviewing both the Touch America complaints and Qwest's section 271 application. We defer to the FCC the question of whether Qwest has violated federal law or acted contrary to the public interest. If the FCC finds that Qwest has violated section 271, we expect that the FCC will take appropriate enforcement action.

2. Agreements Not Filed with the Commission

280 In February 2002, the Minnesota Department of Commerce filed a complaint against Qwest alleging that Qwest had entered into "secret agreements" with certain CLECs to provide those CLECs preferential treatment. Public Counsel offered as exhibits in this proceeding copies of several agreements between Qwest and CLECs obtained from the Minnesota proceeding that were not filed with this Commission. AT&T and Public Counsel are concerned that Qwest is violating or has violated section 252(i) of the Act, which requires state commission approval of any interconnection agreement. Specifically, Public Counsel and AT&T are concerned that other CLECs have not been able to obtain interconnection, services, and network elements on the same terms and conditions as other CLECs, contrary to the terms of the Act.

⁹³ *Georgia/Louisiana II Order*, ¶209.

⁹⁴ *Id.*

- 281 *AT&T*. AT&T's witness, Ms. Roth, describes the Minnesota complaint alleging that Qwest has entered into "secret agreements" with competitors and has not filed those agreements with state commissions. *Ex. 1640 at 3-4*.
- 282 AT&T asserts that the agreements Qwest has provided in response to Bench Request No. 46 demonstrate Qwest's unwillingness and inability to provide interconnection to CLECs on a nondiscriminatory basis. *AT&T's Supplemental Brief at 3*. Further, AT&T asserts that the existence of the agreements shows that granting Qwest's application is not in the public interest. AT&T asserts that the agreements show that Qwest has violated state and federal law and that the negotiation of at least one of the agreements was contrary to the collaborative process for examining its section 271 application. *Id. at 16-17*.
- 283 Specifically, AT&T objects to provisions in agreements Qwest entered into with Eschelon and Covad, asserting that these provisions demonstrate that Qwest engaged in discriminatory and preferential treatment of one group of CLECs over another. *Id. at 4*. AT&T also alleges that, by failing to file the agreements, Qwest has violated the terms of section 252(e). *Id. at 5*. AT&T requests that the Commission initiate an investigation based on these allegations and reach a determination before making any decision about Qwest's application for section 271 authority. *Id. at 5*.
- 284 AT&T asserts that the FCC looks to BOC compliance with state and federal regulations in evaluating applications for section 271 authority. *Id.* AT&T asserts that the fact that Qwest has not filed the agreements undermines Qwest's assertions that it provides nondiscriminatory interconnection throughout Washington state. *Id. at 6*. AT&T further argues that one of Qwest's critics was removed from the collaborative dialogue on interconnection issues by its agreement not to oppose Qwest's section 271 application. When Qwest and Eschelon entered into a secret agreement, AT&T asserts that other CLECs were precluded from benefiting from the same treatment given to Eschelon. *Id. at 8-9*.
- 285 AT&T asserts that the Commission has a statutory obligation to address discriminatory practices by Qwest, and that state law prohibits discrimination with respect to prices, terms, and conditions of interconnection. *Id. at 13, citing RCW 80.36.186*. AT&T asserts that the standards for filing agreements under section 252 is clear, and that the Commission should reject Qwest's request to wait for the FCC to establish a national standard for filing agreements with state commissions. *Id. at 9-*

13. Finally, AT&T asserts that Qwest's promise to file all agreements with the Commission is something that Qwest should have done all along. *Id. at 16.*

286 **Public Counsel.** Public Counsel asks the Commission to investigate whether Qwest has violated federal law by entering into "secret" agreements with competitors that should have been publicly filed as interconnection agreements. *Public Counsel Comments at 3-5.* Public Counsel believes the results of the investigation may demonstrate "unusual circumstances" under the FCC's public interest inquiry, in particular whether Qwest has engaged in a pattern of anti-competitive behavior. *Id. at 5.*

287 In reviewing Qwest's conduct in opening local markets to competition, Public Counsel alleges that Qwest has engaged in anti-competitive conduct and violated state and federal law. *Brief of Public Counsel on the Public Interest at 2-3.* Public Counsel notes that the Iowa Department of Commerce Utility Board has entered an order finding that Qwest violated the Iowa Board's rules by failing to file certain of the agreements. *Id. at 3.* Public Counsel asserts that the Commission should defer making a decision on the issue of public interest and exercise its authority to investigate which of the unfiled agreements should have been filed in the past and which should be filed in the future. *Id. at 3-4.* Public Counsel asserts that although Qwest may be taking remedial actions to prevent any possible future violations of federal law, past violations of federal law may have had an "aggregate negative impact on the development of competition in Washington." *Id. at 4, n.1.*

288 **Qwest.** Qwest objects to AT&T and Public Counsel bringing the Minnesota complaint to this Commission, asserting that AT&T did not introduce any facts on the matter or explain why Qwest was required to file the agreements under section 252. *Qwest's Supplemental Brief at 11-12.* Qwest asserts that this is a question of legal interpretation that is now before the FCC in a petition for declaratory ruling. *Id. at 13.* Qwest notes that until the matter is resolved, it has committed to file with the Commission "all future contracts, agreements, and letters of understanding with CLECs that create obligations to meet the requirements of sections 251(b) or (c)." *Id. at 13-14.* Qwest has also formed a committee of senior managers to review all future agreements for compliance with the commitment Qwest has made, and with any FCC ruling on Qwest's petition. *Id. at 14.*

289 *Discussion and Decision.* The Commission became aware of the unfiled agreements after inadvertently receiving a copy of Qwest's response to a data request from Public Counsel. On March 28, 2002, the Commission issued Bench Request No. 46 to Qwest, requesting copies of the same agreements that Qwest had provided in response to Public Counsel's data request.

290 Since April 17, 2002, Qwest has filed copies of the agreements it provided to Public Counsel, and has also provided numerous copies of other agreements that have not previously been filed with the Commission. Given the number of agreements filed with the Commission pursuant to Bench Request No. 46, it appears that Qwest is meeting its recent commitment to file "all future contracts, agreements and letters of understanding with CLECs" with the Commission.

291 A review of the agreements filed in response to Bench Request No. 46 indicates that several were executed at the time of the merger resolving disputes between the parties, including positions about the merger. Of the others, the majority include settlement agreements and billing settlement agreements. We do not find sufficient evidence in these agreements to delay or defer this proceeding while waiting for the outcome of a separate investigation. In addition, we observe that it is not good public policy to prohibit companies from negotiating with each other to resolve disputes.

292 We note that no party has filed a complaint with this Commission as in Minnesota and other states. If the parties have concerns about a specific agreement, the parties should bring a complaint, as in Minnesota.

293 The parties have made no showing or demonstration that interconnection agreements should have been filed or are discriminatory, or that this Commission should delay or cease our review of Qwest's compliance with the requirements of section 271. This Commission will not presume that the agreements are invalid or unlawful.

294 We note that the agreement over which AT&T and Public Counsel raise the most concern is a November 15, 2000, agreement between Eschelon Telecom Inc. (Eschelon) and Qwest, in which Eschelon agrees not to oppose Qwest's efforts to obtain section 271 approval, conditioned upon an implementation plan being in place by April 30, 2001. During the hearing, it became clear that the agreement was later terminated. *Tr. 7650-51, 7655-57.*

295 We decline to defer our decision in this proceeding while waiting for the results of an investigation into the unfiled agreements. Should any party wish the Commission to address the issue of whether agreements should have been filed with the Commission, it can properly file a complaint with the Commission. Because Qwest has stated that it will continue to file these agreements with the Commission, the Commission directs Qwest to cease filing agreements in response to Bench Request No. 46 in this docket, and instead file them with the Commission in a docket the Commission will establish for that purpose. In that docket, we will discuss how the Commission will address the agreements.

3. Minnesota UNE-P Testing Complaint

296 **AT&T.** In supplemental testimony, Ms. Roth described a complaint that AT&T filed in Minnesota concerning the testing of UNE-P ordering and provisioning in Minneapolis. *Ex. 1640 at 4-7.* AT&T offers a copy of an administrative law judge's decision that finds that Qwest engaged in a pattern of anti-competitive behavior in rejecting AT&T's request to conduct cooperative testing of UNE-P ordering and provisioning in Minneapolis. *Ex. 1642 at 33, ¶14.*

297 In its brief, AT&T asserts that the Minnesota commission concurred in the administrative law judge's findings that Qwest failed to act in good faith and committed knowing, intentional and material violations of its obligations under its interconnection agreement with AT&T. *AT&T's Supplemental Brief at 17-19.* AT&T asserts that the Minnesota commission's decision demonstrates that Qwest has engaged in a pattern of anti-competitive behavior. *Id.* AT&T asserts that such behavior makes Qwest's application under section 271 contrary to the public interest. *Id. at 20.*

298 AT&T notes that the SGAT language that Qwest relies upon to resolve future disputes over cooperative testing has been stricken from the SGAT by agreement of the parties. *Id., n.21.* AT&T objects to the requirement in Qwest's proposed language that a new entrant share its business plan or operational needs with Qwest before Qwest will agree to cooperative testing. *Id. at 20.* AT&T argues that Qwest should not be allowed to be the gatekeeper for determining which CLECs may compete in the local market. *Id. at 21.*

299 *Qwest*. Qwest notes that the UNE-P testing issue is not new in the context of the discussion of the public interest requirement: AT&T raised the issue during the fourth workshop, and also during discussions concerning Checklist Item No. 2. *Qwest's Supplemental Brief at 15*. Qwest notes that the matter is still under consideration by the Commission. *Id.* Qwest asserts that the only new element of the dispute is the decision by the ALJ and commission in Minnesota. *Id. at 16*. Qwest disputes that the Minnesota commission agreed wholly with the administrative law judge's findings. *Id.* Qwest requests that the Commission find the Minnesota complaint irrelevant to the public interest inquiry in Washington, as other states have done. *Id. at 17*.

300 ***Discussion and Decision.*** AT&T first raised the issue of premarket testing with the Commission during the third workshop, in the context of discussion of SGAT language concerning testing environments. *13th Supplemental Order at ¶34*. The parties disagreed about SGAT language, in particular AT&T's proposal for comprehensive production testing, "which would allow the CLECs to conduct pre-market testing using test accounts rather than actual customer accounts and would allow testing on a larger scale." *Id.* Noting that the parties would be discussing testing language in the context of change management, and that the issue would be examined in the ROC OSS test, the administrative law judge determined that:

We believe it would be appropriate to consider the results of that testing, and evidence regarding the CICMP in Workshop 4 before deciding this issue. Parties at that workshop should be prepared to discuss in detail the scope of testing, including how the scope(s) proposed in this proceeding compare with those provided by RBOCs in other states that have received Section 271 approval.

Id., ¶39.

301 As we note above, change management issues were not discussed in detail during the fourth workshop, due to Qwest's decision to redesign its change management process. The parties did not address the issue in the fourth workshop except in the context of the issue of public interest. The parties never presented to the Commission how the scope of testing proposed in the SGAT compares with testing provided by other RBOCs that have received section 271 approval. However, there is language in the SGAT at section 12.2.9.3 describing the testing environments that Qwest will

provide to CLECs. *See Ex. 1806*. That section does not include AT&T's comprehensive testing proposal.

302 Whether or not Qwest's SGAT language concerning testing environments is acceptable, the issue we must decide is whether the Minnesota commission's decision demonstrates that Qwest has engaged in a pattern of anti-competitive behavior such that Qwest's application to provide long-distance service in Washington State under section 271 is contrary to the public interest. The Minnesota decision arises from events that occurred in Minnesota, not Washington state, and are therefore not relevant to our evaluation in this proceeding. This matter is state-specific, and requires us to determine whether an application by Qwest for interLATA authority *in Washington* state would be in the public interest. Had the events occurred in Washington, then the matter would be relevant and evaluated based on the specific facts presented in the case.

4. Covad E-mail

303 On August 7, 2001, a Qwest employee e-mailed over 190 other Qwest employees following news that Covad had announced that it would file for bankruptcy protection. *See Ex. 1645*. In the e-mail, the employee wrote: "Third batter down. End of the national DLEC game." *Id.* Referring to Covad plans to reorganize and resume operations, the e-mail stated that "They are delusional. Too much Kool-Aid." *Id.*

304 **Covad.** Covad attached a copy of the e-mail to its brief following the fourth workshop. Covad asserted that Qwest has provided poor performance to its wholesale DLEC customers and acted anti-competitively in the advanced services market, such that Covad is the only remaining DLEC in the Washington market. *Covad Brief at 65*.

305 **AT&T.** AT&T alleges that the e-mail demonstrates a pervasive anti-competitive attitude by Qwest and its employees. *AT&T's Supplemental Brief at 24*. AT&T alleges that the extent of the distribution list suggests both the pervasiveness of the anti-competitive attitude and that such comments were an accepted pattern of behavior in the company. *Id.* AT&T recommends that the Commission take steps to eliminate Qwest's anti-competitive corporate attitude prior to recommending approval of a grant of section 271 authority. *Id. at 25*.

306 **Qwest.** Qwest asserts that the employee who drafted the e-mail had no authority to
establish Qwest policy, and was reprimanded for sending the e-mail because her
comments violated Qwest’s policies. *Qwest’s Supplemental Brief at 19.* Qwest
asserts that the e-mail in question was never sent to any person outside of Qwest and
therefore no outside person was prejudiced by any statements in the e-mail. *Id.*

307 **Discussion and Decision.** The e-mail in question is just one e-mail, and by itself,
does not establish a “pattern” of behavior by Qwest. Qwest appears to have taken the
appropriate steps in response to the e-mail, and does not appear to condone the
employee’s behavior. We do not find this e-mail by one Qwest employee to be proof
of whether an entire corporation has an anti-competitive attitude or has engaged in
anti-competitive behavior. We do not find this e-mail to be the kind of unusual
circumstance that would weigh against a public interest finding.

5. Local Service Freeze complaint

308 On March 29, 2002, AT&T filed a complaint with the Commission in Docket No.
UT-020388 alleging, in part, that Qwest’s local service freeze practices violate WAC
480-120-139(5), the Commission’s rule governing preferred carrier freezes. The
proceeding is currently pending before the Commission.

309 **AT&T.** AT&T alleges that Qwest’s local service freezes prevented AT&T from
successfully placing orders for customers, undermined competition, and has caused
AT&T to expend resources unnecessarily to resolve the issue and file the complaint.
AT&T’s Supplemental Brief at 23. AT&T urges the Commission to defer its decision
on the issue of public interest until the Commission enters a ruling on AT&T’s
complaint. *Id. at 23-24.*

310 **Qwest.** Qwest argues that the Commission should not delay its decision on whether
Qwest’s application is consistent with the public interest because AT&T has filed a
complaint about Qwest’s local service freeze practices. *Ex. 1655 at 18-19.* Qwest
asserts that granting AT&T’s request to stay the section 271 proceeding due to
AT&T’s filing of a complaint before the Commission would create improper
incentives for CLECs to manufacture unusual circumstances. *Qwest Supplemental
Brief at 18.* Qwest notes that the FCC rejected a similar request to delay proceedings

due to BellSouth's implementation of a local service freeze in the *Georgia/Louisiana II Order*. *Id.*, citing *Georgia/Louisiana II Order*, ¶304.

311 ***Discussion and Decision.*** We decline to stay our review in this proceeding pending resolution of AT&T's complaint. As we note above in the context of the Touch America complaints, the FCC has declined to address in its evaluation of section 271 applications fact-specific complaints that are more appropriately addressed in other fora or in a separate proceeding.⁹⁵ AT&T's local service freeze complaint is a fact-specific complaint, addressing in part, whether Qwest has violated the requirements of WAC 480-120-139(5). This is not an omnibus proceeding requiring that any and all complaints and allegations of competing carriers be resolved before the Commission may make a final determination on Qwest's compliance with section 271 requirements. Should the Commission find that Qwest has failed to comply with the requirements of WAC 480-120-139(5), the Commission will impose appropriate sanctions.

6. Other Complaints Against Qwest

312 ***AT&T.*** AT&T argues that Qwest has engaged in a pattern of anti-competitive conduct and disobeyed state and federal regulations, demonstrating that Qwest has not cooperated in opening its local market to competition. *Ex. 1075 at 11-20*. AT&T believes that Qwest has acted and continues to act in a discriminatory manner. *AT&T Public Interest Brief at 16-21*. Specifically, AT&T identifies four FCC proceedings in which the FCC has found Qwest in violation of section 271. *Id. at 10-13*. AT&T also cites to U S WEST (now Qwest's) attempt to remove the LATA boundary in Arizona. *Id. at 13-14*. AT&T cites to two complaints filed by CLECs against Qwest in Washington, two in Colorado, and AT&T's complaint against Qwest in Minnesota concerning UNE-P testing. *Id. at 14-19*. The complaints filed in Washington are AT&T's complaint concerning access to inside wiring in multiple dwelling units, and MCIMetro's complaint alleging deliberate delay in providing interconnection, both of which are resolved. *Id. at 20-21*.

313 ***WorldCom.*** Through its witness, Mr. Price, WorldCom identifies the same complaints filed against Qwest in Washington, Minnesota, and Colorado, as well as WorldCom's experiences under its interconnection agreements with Qwest and

⁹⁵ *Georgia/Louisiana II Order*, ¶209.

purchasing special access circuits from Qwest. *Ex. 1090 at 41-49*. Mr. Price recommends that the Commission adopt a set of commitments that Qwest must meet for opening its markets, similar to requirements set in Texas for SBC. *Id. at 49-54*; *WorldCom Brief at 26-30*.

314 **Qwest.** Qwest asserts that the unusual circumstances identified by AT&T are beyond the scope of this proceeding and do not warrant further discussion. *Ex. 1063 at 7-8*. Qwest further asserts that it has settled most of these to the satisfaction of the complaining CLEC. *Qwest Public Interest Brief at 36*. Qwest further asserts that the question of whether Qwest has opened its markets to competition should be based on the record in this proceeding, not upon past cases. *Id.*

315 **Discussion and Decision.** Similar to our discussion above of AT&T's complaint in Minnesota, we find that complaints filed in other states about matters in other states are not relevant to this proceeding. The complaints filed in Washington have either been resolved or settled. We do not find such matters to be evidence of a pattern of anti-competitive behavior. While the FCC's decisions do address violations of section 271, the fact that Qwest may have violated section 271 in the past does not cause the Commission concern about lack of compliance in the future. The fact that Qwest will be subject to payments under the QPAP and potential enforcement by the FCC should be sufficient incentive to comply with the requirements of section 271 on an ongoing basis. We do not find the cases and complaints cited by AT&T and WorldCom sufficient to weigh against a public interest finding.

7. Timely and Accurate Special Access Provisioning

316 Through its witness, Mr. Price, and in its brief, WorldCom asserts that the public interest provision requires that Qwest include performance measures for special access circuits in the performance assurance plan to ensure that Qwest does not behave in an anti-competitive manner in providing special access circuits. *Ex. 1090 at 54-66*; *WorldCom Brief at 30-35*. The Commission has addressed this issue at length in its 30th, 33rd, and 37th *Supplemental Orders*, requiring Qwest to report to the Commission and CLECs on its performance in provisioning and repairing special access circuits. Whether the performance measures should be included in the QPAP should be addressed at the six-month review of the QPAP.

8. Structural Separation

317 **AT&T.** AT&T asserts that Qwest has an inherent conflict of interest in that it is both
the operator of the local telephone network, and the primary competitor of the CLECs
in the same market. *Ex. 1075 at 29-41.* AT&T argues that only structural separation
will remove the conflict and allow competition to occur.

318 **WorldCom.** Like AT&T, WorldCom advocates structural separation as a means to
prevent monopoly abuses. *Ex. 1090 at 66-67.* In its brief, WorldCom recommends
that, in the absence of structural separation, the Commission should require SGAT
terms and conditions that provide economically viable access to UNEs and UNE
combinations, a “fully functional, stress-tested and integratable” OSS, and a
performance assurance plan. *WorldCom Brief at 41-42.*

319 **Qwest.** Qwest objects to the efforts of CLECs to seek additional regulatory
requirements, such as structural separation, as a condition of section 271 approval.
Qwest Public Interest Brief at 37-45. Qwest asserts that the Commission has no
authority under federal or state law to impose involuntary structural separation as a
precondition to granting a section 271 application. *Id. at 38-43.* Qwest asserts that
the FCC has never required such additional regulatory requirements. *Id. at 38.*
Qwest asserts that no state has required structural separation in the context of a
section 271 approval, and notes that the FCC rejected structural separation in
approving the U S WEST-Qwest merger. *See Ex. 1063 at 10-16.*

320 **Discussion and Decision.** Under section 271(d)(4) of the Act, the FCC is prohibited
from limiting or extending the terms of the competitive checklist in its review of
whether an application would be in the public interest. 47 U.S.C. §271(d)(4).⁹⁶ The
question this Commission must answer is whether to recommend to the FCC that an
application by Qwest is in the public interest. In answering that question, we look to
see if there are any unusual circumstances that would weigh against a public interest
finding.

321 The inherent conflict of interest about which the CLECs complain is not unique to
Qwest. It exists for all BOCs that seek in-region, interLATA authority under section
271. Section 271 envisions that BOCs will provide service both in the local exchange

⁹⁶ See also *Georgia/Louisiana II Order*, ¶281.

market and the interLATA long-distance market, and provide services to the CLECs upon request. Congress did not establish structural separation requirements as a part of section 271 in enacting the Telecommunications Act of 1996. Whether such a requirement should have been included as a part of the Act is an issue to bring before Congress, not this Commission. Therefore, we will not require structural separation of Qwest's retail and wholesale operations as a condition of finding an application by Qwest to be in the public interest.

9. UNE Rates/Price Squeeze

- 322 **AT&T.** AT&T asserts that CLECs cannot effectively compete with Qwest for residential customers because access rates and UNE rates, specifically the UNE-P monthly recurring charges, are too high. *Ex. 1075 at 5-10.* AT&T believes that Qwest's UNE-P pricing is in excess of economic cost and creates a barrier to CLEC entry. *AT&T Public Interest Brief at 6-9.*
- 323 **WorldCom.** WorldCom asserts that pricing issues are a critical component of the public interest inquiry. *Ex. 1090 at 25-38.* Arguing that UNE pricing is one of the most important tools to open the local market, WorldCom asserts that UNE-P recurring and non-recurring rates are too high to allow competitors to compete with Qwest. *Id. at 33; see also WorldCom Brief at 25.* Mr. Price also requests that the Commission look at the issue of price squeeze, i.e., Qwest may charge CLECs access charges, while using its own network at economic cost to provide the same service. *Ex. 1090 at 37-38; see also WorldCom Brief at 26.*
- 324 **Covad.** Covad asserts that Qwest seeks to price its high frequency portion of the loop at 50 percent of the loop rate, a rate Covad asserts would artificially inflate the cost of xDSL service to Washington consumers. *Covad Brief at 66.* Covad argues that the Commission cannot find a section 271 application in the public interest without cost-based rates. *Id. at 66-67.*
- 325 **Qwest.** In response to concerns by AT&T, WorldCom, and Sprint that UNE prices are too high to support competition, Qwest states that the rates in Washington have been established through the Commission's cost docket and are not appropriate for review in this proceeding. *Ex. 1063 at 5-6.* Further, Qwest asserts that switched access pricing is beyond the scope of the proceeding, and should not be a precondition for section 271 entry. *Id. at 7.*

326 *Discussion and Decision.* The parties' concerns about UNE rates have been addressed by two recent events. First, on June 21, 2002, the Commission entered its *32nd Supplemental Order: Part B Order; Line Splitting, Line Sharing over Fiber Loops; OSS; Loop Conditioning; Reciprocal Compensation; and Nonrecurring and Recurring rates for UNEs* in Docket UT-003013, the Commission's continued costing and pricing docket. That order builds upon the UNE rates established in the *17th Supplemental Order* entered in the Commission's Generic Costing and Pricing Proceeding in Docket Nos. UT-960369, 960370, and 960371, and establishes prices for additional UNEs.

327 Second, on June 10, 2002, Qwest filed new tariff pages with the Commission in Docket No. UT-020724, reducing rates for existing 2-wire and 4-wire deaveraged unbundled loop rates and including rates in the tariff for the following UNEs: DS1 capable unbundled loops; DS3 capable unbundled loops; DS1 capable feeder sub loops; and DS0 sub loops. Qwest filed the tariff pages with an effective date of July 10, 2002. The Commission took no action on Qwest's filing at its the June 26, 2002, open public meeting, allowing the tariff pages to become effective on July 10, 2002, absent any intervention by this Commission or a court.

328 Given these recent events, we find that the level of UNE rates in Washington state does not weigh against a public interest finding.

329 As to the question of whether access charges are too high, we note that no CLEC has filed a complaint against Qwest alleging that access charges are excessive. AT&T has filed with this Commission a complaint against Verizon Northwest in Docket No. UT-020406 complaining that Verizon's access charges are excessive.

5. Overall Public Interest Recommendation

330 As we have discussed above, the question this Commission must answer is whether to recommend to the FCC that an application by Qwest for in-region interLATA service in Washington state is in the public interest. Specifically, we must consider whether the local exchange market is open to competition, whether there is adequate assurance that the local market will remain open to competition after a section 271 application is granted, and if there are any unusual circumstances that might weigh against a public

interest finding. For the reasons set forth above, we find that such an application would be in the public interest.

331 The Commission is the regulatory body with oversight of Qwest's operations in Washington state. There will always be complaints about Qwest's behavior, competitive or anti-competitive, and this Commission has resolved and will continue to resolve those complaints. The issue here is whether there is anything that is sufficient to delay or give pause to our review of an application by Qwest under section 271. We do not find the evidence presented by the parties, individually or collectively, sufficiently unusual or disturbing to preclude a finding that an application would be in the public interest. We are not saying this Commission should not evaluate complaints filed by the parties or independently investigate particular matters, and if appropriate, order sanctions. We simply do not find that such matters should weigh against a public interest finding.

332 Finally, Public Counsel asks that this Commission require Qwest to establish its performance under the QPAP for 90 days prior to filing with the FCC, asserting that 90 days of compliance with the QPAP would be strong evidence that Qwest has fully and irrevocable opened its local markets to competition. *See Brief of Public Counsel on the Public Interest at 5-6.* We deny Public Counsel's request. The Commission has already determined that that the QPAP is effective on the date of FCC approval of a section 271 application, not before. *30th Supplemental Order, ¶ 172.* Further, Qwest has demonstrated its actual performance through its monthly filings with the Commission and CLECs.

333 On a related issue, the Commission heard argument on June 6, 2002, about whether to require Qwest to file its application for section 271 authority with the Commission 90 days in advance of filing with the FCC. The Commission entered the *36th Supplemental Order* on June 14, 2002, finding that a 90-day filing requirement is not necessary.

E. FINAL CONCLUSION AND RECOMMENDATION

334 This order culminates a two-year process to ensure that Qwest fairly opens up its network to use by local competitors and would-be competitors through its physical operations and wholesale business practices. We conclude in this order that Qwest has met all of the requirements under section 271 of the federal Telecommunications

Act of 1996. It is now up to Qwest to seek approval from the FCC, which will decide, in consultation with the Department of Justice, whether Qwest may enter the interstate long-distance business. We trust the ample record of our proceedings here will provide the FCC with much of the information it needs to make its important decision.

V. FINDINGS OF FACT

335 Having discussed above in detail the oral and documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse among the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

- 336 (1) Qwest Corporation, formerly known as and sometimes referred to in this Order as U S WEST Communications, Inc., is a Bell operating company (BOC) within the definition of 47 U.S.C. section 153(4), providing local exchange telecommunications service to the public for compensation within the state of Washington.
- 337 (2) The Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, to verify the compliance of Qwest with the requirements of section 271(c) of the Telecommunications Act of 1996, and to review Qwest's Statement of Generally Available Terms, or SGAT, under section 252(f)(2) of the Act.
- 338 (3) Section 271 of the Act contains the general terms and conditions for BOC entry into the interLATA market.
- 339 (4) Pursuant to 47 U.S.C. section 271(d)(2)(B), before making any determination under this section, the FCC is required to consult with the state commission of any state that is the subject of a BOC's application under section 271 in order to verify the compliance of the BOC with the requirements of section 271(c).

- 340 (5) Pursuant to 47 U.S.C. section 252(f)(2), any BOC statement of terms and conditions filed with the state commission under section 252(f)(1) must comply with sections 251 and 252(d) and the regulations thereunder, in order to gain state commission approval.
- 341 (6) In October 1997 and in March 2000, the Commission issued Interpretive and Policy Statements addressing the process and evidentiary requirements for the Commission's verification of Qwest's compliance with section 271(c).
- 342 (7) On March 22, 2000, and on April 28, 2000, Qwest submitted its SGAT for review and approval by this Commission.
- 343 (8) On June 6, 2000, the Commission consolidated its review of Qwest's SGAT in Docket No. UT-003040 with its evaluation of Qwest's compliance with the requirements of section 271(c) in Docket No. UT-003022.
- 344 (9) Qwest filed with the Commission a revised SGAT with exhibits, including and an Exhibit K (the QPAP), on June 25, 2002. In that filing, Qwest proposed language for a new section 16.1.2 of the QPAP.
- 345 (10) Qwest's performance measures, referred to as Performance Indicator Definitions or PIDs, were collaboratively developed by the ROC TAG for use in the regional OSS test, as well as for inclusion in the QPAP and for general performance reporting. The most recent set of PIDs, version 5.0, is included as Exhibit B to the SGAT.
- 346 (11) Liberty Consulting Group was retained by the ROC to perform an audit of the performance measures to ensure that Qwest could report performance data in conformance with the PIDs. Liberty issued its Final Report on the Audit of Qwest's Performance Measures on September 25, 2001.
- 347 (12) Liberty was subsequently retained to perform a reconciliation of alleged discrepancies between Qwest and CLEC data. Liberty opened 14 observations and exceptions to address problems with Qwest data, including system errors and human errors, and closed all observations and exceptions after either verifying or observing Qwest's proposed improvements. Liberty issued its Report on Data Reconciliation of Qwest's Performance Measures on

April 19, 2002, finding that “Qwest’s performance reporting accurately and reliably report Qwest’s actual performance.” *Ex. 1372 at 9.*

- 348 (13) During the OSS test, KPMG identified discrepancies between data reported by Qwest and data reported by the pseudo-CLEC, and opened Observations 3089 and 3099. KPMG retested certain items and opened Observation 3110 to address problems that appeared during the retest with human error on manually handled orders.
- 349 (14) During the OSS test KPMG, and HP opened and closed 75 observations and exceptions concerning problems with manually handled orders. These observations and exceptions were closed, and KPMG opened Observation 3086. As a result of that observation, the ROC requested that KPMG conduct a study to determine if existing performance measures relating to manual order handling are adequate or whether new PIDs must be developed.
- 350 (15) Qwest has agreed to develop and present a proposal for new PIDs addressing manual order accuracy.
- 351 (16) During the workshops in this proceeding, the Commission made its determinations of checklist compliance conditional on a review of Qwest’s performance results and the findings in the Final OSS Test Report.
- 352 (17) No performance measures, or PIDs, are associated with Checklist Items No. 3, 6, and 12.
- 353 (18) In September 1999, the Regional Oversight Committee and Qwest agreed to pursue a regional approach to OSS third-party testing. The ROC hired Maxim Telecom Group as the Project Manager, the National Regulatory Research Institute as the Project Administrator, KPMG Consulting as the Test Administrator, Hewlett Packard as the pseudo-CLEC, and Liberty as the Performance Measure Auditor.
- 354 (19) The ROC established a strong governance structure for planning, design and oversight of the testing effort, establishing an executive committee, steering committee and the ROC-Technical Advisory Group. The ROC TAG developed the Technical Requirements Document, which KPMG and the

ROC TAG later used to develop the Master Test Plan, which governed the OSS test.

- 355 (20) The OSS test, for which actual testing began in April 2001, was conducted as a “military-style” test in which KPMG conducted tests and retests until Qwest either satisfied the test criteria or either KPMG or Qwest determined that further testing would not be productive.
- 356 (21) KPMG and HP conducted a total of 32 tests, consisting of 711 evaluation criteria of which 26 were diagnostic.
- 357 (22) KPMG issued its Final OSS Test Report on May 29, 2002. In that report, KPMG identified that Qwest had not satisfied a number of test criteria, and that KPMG was unable to determine whether Qwest had satisfied a number of other test criteria.
- 358 (23) On February 28, 2002, the Commission issued Bench Request Nos. 43, 44, and 45, requesting information from all CLECs registered in Washington state to gain a better understanding of the state of local competition and CLEC market share in Washington. A summary of the responses to these bench requests is attached to this order as Appendix A.
- 359 (24) In February 2002, the Minnesota Department of Commerce filed a complaint against Qwest alleging that Qwest had entered into “secret agreements” with certain CLECs to provide those CLECs preferential treatment. The Iowa Board has entered an order finding that Qwest violated the Iowa Board’s rules by failing to file certain agreements. No party has filed a complaint in Washington concerning these agreements.
- 360 (25) On March 28, 2002, the Commission issued Bench Request No. 46 to Qwest, requesting copies of the agreements not filed in Minnesota that were also not filed in Washington state.
- 361 (26) The Minnesota commission concurred in an initial order finding that Qwest failed to act in good faith by violating the terms of its interconnection agreement with AT&T by refusing to provide testing of UNE-P ordering and provisioning in Minneapolis.

- 362 (27) On August 7, 2001, a Qwest employee sent a derisive e-mail to over 190
Qwest employees following news that Covad had announced it would seek
bankruptcy protection.
- 363 (28) On March 29, 2002, AT&T filed a complaint with the Commission in Docket
No. UT-020388 alleging that Qwest's local service freeze practices violate
WAC 480-120-139(5).
- 364 (29) On June 21, 2002, the Commission entered its *32nd Supplemental Order: Part
B Order; Line Splitting, Line Sharing over Fiber Loops; OSS; Loop
Conditioning; Reciprocal Compensation; and Nonrecurring and Recurring
rates for UNEs* in Docket UT-003013, the Commission's continued costing
and pricing docket.
- 365 (30) On June 10, 2002, Qwest filed new tariff pages with the Commission in
Docket No. UT-020724, reducing rates for existing 2-wire and 4-wire
deaveraged unbundled loop rates and establishing rates for the following
UNEs: DS1 capable unbundled loops; DS3 capable unbundled loops; DS1
capable feeder sub loops; and DS0 sub loops, and requesting that the new
rates become effective on July 10, 2002. At its June 26, 2002, open public
meeting, the Commission took no action with respect to the tariffs. Absent
any intervention by this Commission or a court, these new rates will become
effective on July 10, 2002.
- 366 (31) No CLEC has filed a complaint before the Commission alleging that Qwest's
access charges are excessive.

VI. CONCLUSIONS OF LAW

367 Having discussed above in detail all matters material to this decision, and having
stated general findings and conclusions, the Commission now makes the following
summary conclusions of law. Those portions of the preceding detailed discussion
that state conclusions pertaining to the ultimate decisions of the Commission are
incorporated by this reference.

- 368 (1) The Commission has jurisdiction over the subject matter of this proceeding
and the parties to the proceeding.

- 369 (2) In its June 25, 2002, QPAP compliance filing, Qwest has modified its performance assurance plan, or QPAP, to comply with the Commission's 37th Supplemental Order.
- 370 (3) In its June 25, 2002, SGAT compliance filing, Qwest has modified its SGAT to comply with the Commission's 37th Supplemental Order.
- 371 (4) Even though it appeared during the hearing that Mr. Stright and Liberty may have a comfortable working relationship with Qwest, Mr. Stright is a credible witness and neither he nor Liberty appear to have given testimony biased towards Qwest.
- 372 (5) Liberty's explanations of verifying Qwest's code fixes to correct programming errors are credible and satisfactory.
- 373 (6) Qwest's performance data are sufficiently accurate and reliable to demonstrate Qwest's performance in the state of Washington.
- 374 (7) The problems with human errors found by Liberty and KPMG may affect the accuracy of data for measure OP-4, and possibly measures OP-3 and OP-6. Data reported for those measures should be given lesser weight for purposes of evaluating Qwest's compliance with the competitive checklist in section 271.
- 375 (8) Qwest has demonstrated through its commercial performance that it complies with the requirements of the fourteen-point checklist in section 271(c)(2)(B).
- 376 (9) Qwest has met the requirements of Checklist Item No. 2 by providing OSS functions in a nondiscriminatory manner, in the same time and manner as it provides to its retail customers and in a manner that allows competitors a meaningful opportunity to compete.
- 377 (10) Under the FCC's analysis of the public interest requirements, we presume that Qwest has opened its local exchange market to competition because Qwest has demonstrated its compliance with the competitive checklist. This presumption is supported by data Qwest provided during the fourth workshop and data gathered from CLEC responses to Bench Request Nos. 43, 44, and 45.

- 378 (11) Because we find that Qwest has opened the local exchange market to competition, we find no basis to rebut the FCC's presumption that Qwest's entry in the long-distance market will be in the public interest.
- 379 (12) Qwest's performance assurance plan, or QPAP, as filed on June 25, 2002, should provide adequate assurance that the local market in Washington state will remain open to competition if the FCC were to grant an application by Qwest for section 271 authority.
- 380 (13) AT&T and Public Counsel have not offered sufficient evidence for this Commission to find that Qwest has violated section 271(a) through its IRU agreements. In addition, initiating a state investigation parallel to the FCC's review of Touch America's complaints would cause duplication of effort and cost by all parties.
- 381 (14) The agreements provided in response to Bench Request No. 46 do not provide sufficient evidence to delay or defer this proceeding while waiting for the outcome of a separate investigation.
- 382 (15) The Minnesota commission's decision concerning Qwest's refusal to test UNE-P ordering and provisioning in Minneapolis is a state-specific decision, and is not relevant to our determination of whether an application by Qwest for interLATA authority in Washington would be in the public interest. Nor are other complaints filed against Qwest in other states relevant to this proceeding.
- 383 (16) The e-mail written by a Qwest employee about Covad seeking bankruptcy protection does not establish a pattern of behavior by Qwest.
- 384 (17) AT&T's local service freeze complaint in Docket No. UT-020388, and other complaints pending in this state, are fact-specific proceedings that are more appropriately addressed in fora other than a section 271 proceeding.
- 385 (18) Complaints against Qwest that have been resolved before the Commission are not evidence of a pattern of anti-competitive behavior.

- 386 (19) Congress did not establish structural separation requirements as a part of section 271 in enacting the Telecommunications Act of 1996. Structural separation requirements are not an appropriate condition of recommending section 271 approval.
- 387 (20) Because the Commission recently entered its 32nd *Supplemental Order* in the Continued Costing and Pricing docket, establishing prices for certain UNES, and because the Commission, at its June 26, 2002, open public meeting took no action on Qwest's tariff filing to reduce certain UNE prices, allowing the lower rates to become effective on July 10, 2002, the level of UNE rates in Washington state does not weigh against a public interest finding.
- 388 (21) The evidence presented by the parties concerning unusual circumstances is not sufficient to weigh against a finding that Qwest's application for section 271 approval is in the public interest.
- 389 (22) Qwest has complied with the requirements of section 271 by demonstrating compliance with the competitive checklist, filing an SGAT that complies with Commission orders, filing a QPAP that complies with Commission orders, successfully participating in a third-party test of its OSS functions, supplying evidence of its commercial performance, demonstrating that its application is in the public interest, and satisfying the requirements of section 272.

VII. ORDER

IT IS ORDERED THAT,

- 390 (1) The Commission approves Qwest's QPAP, as filed on June 25, 2002, for inclusion as Exhibit K to the SGAT, including Qwest's proposed language for section 16.1.2 of the QPAP.
- 391 (2) The Commission approves Qwest's SGAT and all Exhibits, as filed on June 25, 2002, and allows the SGAT to become effective on July 10, 2002.
- 392 (3) The Commission denies AT&T's and Public Counsel's requests that the Commission defer making a public interest finding in this proceeding in order to initiate investigations into whether Qwest's actions under IRU agreements violate section 271(a), and whether Qwest should have filed certain

agreements with the Commission under section 252. The Commission also denies AT&T's and Public Counsel's requests that the Commission initiate investigations into these matters.

- 393 (4) The Commission denies AT&T's and Public Counsel's requests that the Commission defer making a public interest finding in this proceeding while the Commission resolves AT&T's complaint about Qwest's local service freeze.
- 394 (5) The Commission denies Public Counsel's request that the Commission require Qwest to perform under its QPAP for a 90-day period prior to filing with the FCC.

DATED at Olympia, Washington and effective this 1st day of July, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner