BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996	Docket No. UT-003022
In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	Docket No. UT-003040

QWEST'S LEGAL BRIEF

REGARDING DISPUTED WORKSHOP #2 ISSUES:

CHECKLIST ITEMS 1, 11, AND 14

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INTRODUCTION

Qwest Corporation ("Qwest"), formerly U S WEST Communications, Inc., submits this brief to the Washington Utilities and Transportation Commission ("Commission") in support of its compliance with three of the competitive checklist items in Section 271(c)(2)(B) of the Telecommunications Act of 1996 (the "Act"): checklist items 1 (Interconnection),[1] 11 (Local Number Portability ("LNP")), and 14 (Resale).[2] As set forth in Qwest's testimony and demonstrated in this brief as well as in the various phases of Workshop 2, Qwest meets the requirements of these checklist items.

Several parties filed testimony with this Commission and participated in Workshop 2 addressing Qwest's compliance with checklist items 1, 11, and 14.[3] Qwest made significant efforts to resolve disputes with participating CLECs regarding these checklist items and has modified its SGAT to accommodate many of its competitors' requests. In several instances, Qwest has agreed to modifications that were unnecessary for compliance purposes, but which avoided disputes or promoted the competitive goals of competitive local exchange carriers ("CLECs"). Although disputes remain, the Commission should note that many of these issues relate to the mechanics of Qwest's SGAT as opposed to the nature of Qwest's compliance with Section 271 of the Act. Because Section 271 proceedings are not the proper forum for the creation of new requirements under the Act, the Commission should approve

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[1] Qwest's legal brief does not address collocation. Collocation will be briefed separately pursuant to the ALJ's decisions in workshop 2.

[2] 47 U.S.C. § 271(c)(2)(B)(i), (xi), and (xiv).

[3] The following parties filed comments or testimony in this proceeding regarding Qwest's compliance with checklist items 1, 11, and 14: AT&T of the Pacific Northwest, Inc. ("AT&T"), WorldCom, Inc. ("WCom"), Covad, XO Washington, Inc., Electric Lightwave, Inc., MetroNet, and Rhythms Links, Inc. The following parties participated in Section 271 Workshops addressing these checklist items: AT&T, WCom, Sprint, MetroNet, Covad, ICG, MPower, Rhythms Links, Inc., XO Washington, Inc., Electric Lightwave, Inc., Advanced Telecom Group, Inc., Focal Communications of Washington, Inc., Allegiance Telecom, McLeod USA and Public Counsel.

such language if it comports with the Act, FCC regulations, and Commission rules even if the CLECs favor slightly different wording.[4]

Qwest believes that it has drawn the lines properly. Qwest's competitors, however, demand more of Qwest especially with respect to interconnection. In passing the Act, Congress intended to "open[] up local markets to competition, and permit[] interconnection on just, reasonable, and nondiscriminatory terms."[5] The FCC has recognized that incumbent LECs and CLECs alike will benefit from competition resulting from operating efficiencies: "We believe they [economies of scale] should be shared in a way that permits the incumbent LECs to maintain operating efficiency to further fair competition, and to enable the entrants to share the economic benefits of that efficiency in the form of cost-based prices."[6] Accordingly, Congress did not intend to create a vehicle by which new entrants could gain an unfair advantage by misusing the Act's requirements. Qwest submits that, at least with respect to some of the impasse issues, this is precisely what is occurring. CLECs in these proceedings have made demands upon Qwest that have no foundation in the Act, such as, for example, a demand for blanket indemnification from Qwest.

Despite the parties' ability to reach consensus on most issues, several issues have arisen that have eluded resolution. These issues are discussed below. As this brief demonstrates, none of these disputed issues refutes Qwest's showing that it complies with the requirements of checklist items 1, 11, and 14.

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[4] *See* Memorandum Opinion and Order, *Application 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*, CC Docket No. 00-65, FCC 00-238 ¶¶ 22-26 (June 30, 2000) ("*SBC Texas Order*").

[5] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, 11 FCC Rcd 15499 ¶ 167 (Aug. 8, 1996) ("*Local Competition Order*").

[6] Id. ¶ 11.

A. CHECKLIST ITEM 1: INTERCONNECTION

Section 251(c)(2) of the Act provides that Qwest must provide interconnection to CLECs for purposes of telephone exchange service and exchange access at any technically feasible point and at parity with that it provides to itself. CLECs interpret this provision to mean that they have unilateral authority to determine where and how to interconnect with Qwest. In CLECs' opinion, neither Qwest nor its network architecture have any bearing on these issues. Qwest believes otherwise. Qwest allows interconnection at any technically feasible point; however, interconnection is a mutual responsibility under the Act.[7] As such, Qwest's planning and network architecture are both integral to the interconnection process.

Qwest submitted direct, supplemental direct, and rebuttal testimony of Thomas R. Freeberg to establish Qwest's compliance with the *prima facie* requirements of the interconnection aspects of checklist item 1. Mr. Freeberg testified in both prefiled testimony and during the Section 271 Workshops that Qwest meets all of the requirements of checklist item 1 and the FCC's rules governing interconnection. The following issues with respect to interconnection remain in dispute.

1. CLECs Have Interconnection Obligations Under the Act, and Qwest Has A Say In Determining Its Own Interconnection With CLECs.

A number of impasse issues relate to whether CLECs can unilaterally determine the scope and methods of interconnection, and whether CLECs must offer services on terms that are comparable to those Qwest offers. In a nutshell, the CLEC theme is that the CLEC is always in the driver seat. Qwest, on the other hand, contends that interconnection is a collaborative effort. Qwest has grouped issues that involve these themes and discusses each of related impasse issue below.

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[7] See 47 U.S.C. §§ 251(a)(1) and 251(b)(5).

a. Qwest Offers Interconnection and Exchange of Local Traffic at Its Access Tandems, Where Local Tandems are Unavailable.

Initially, Qwest proposed that CLECs avoid interconnection at the access tandem because of the network inefficiencies associated with that approach. At the urging of CLECs, however, Qwest modified its position to allow interconnection at the access tandem, but proposed that where other equally viable options exist that would promote network efficiency, those options would be preferred.

Checklist item 1 requires that Qwest provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[8] Section 251(c)(2) requires incumbent LECs to provide requesting carriers with interconnection to their networks on a nondiscriminatory basis and equal in quality to that provided to itself and others "for the transmission and routing of telephone exchange service and exchange access; . . . at any technically feasible point within the carrier's network."[9] Section 252(d)(1) provides guidance to state commissions in determining just and reasonable rates for interconnection under Section 251(c)(2).

Contrary to CLECs' claims, Qwest allows interconnection at any technically feasible point, including at its access tandems. The real issue concerns the manner in which CLECs want to unilaterally control the process of interconnection in a manner that increases Qwest's costs and creates unnecessary trunk blockage. Where a CLEC has equally viable options of interconnecting at a local tandem or direct trunk, on the one hand, or at an access tandem, on the other, Qwest should not be forced to use the more limited capacities of its access tandems

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[8] 47 U.S.C. § 271(c)(2)(B)(i).

[9] 47 U.S.C. § 251(c)(2)(A)-(D).

for interconnection.[10] Where CLECs are not disadvantaged by requiring interconnection at the local tandem, Qwest should not be forced to reconstruct its toll network to accept local traffic.[11]

The FCC has expressed concern over situations in which carriers "could be forced to make inefficient use of their own and incumbent LEC facilities, with anticompetitive effects."[12] Furthermore, legitimate threats to network reliability must be considered in determining the technical feasibility of a particular point of interconnection.[13] Qwest's access tandem is designed to carry toll traffic. If this switch is the default switch for CLECs to route their local traffic, significant blocking can occur that will affect network reliability.

To be clear, Qwest will permit local interconnection at its access tandem when the option to interconnect at a local tandem is unavailable and where multiple individual direct end office trunk groups might otherwise be necessary.[14] However, where CLECs choose a technically feasible POI that unnecessarily creates inefficiencies for which Qwest alone incurs costs and that creates the risk of network blockage, such demands must be viewed in the context of the FCC's concern that the inefficient network use serves no "competitive"

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[10] Exhibit 331, Direct Testimony of Thomas R. Freeberg for Checklist Item 1, at 10-18.

[11] CLECs will surely repeat the mantra that interconnection must be made available "at any technically feasible point." The flaw of CLECs' argument is the inconsistency between their position on interconnection as a technical matter, and establishing a point of interconnection within the meaning of Section 251. The point of interconnection marks the demarcation of each carrier's network. If a CLEC wanted to establish a POI at Qwest's access tandem, it would need to extend transport from its switch location to a point on a Qwest access tandem. In situations where direct trunking or access through a local tandem is an equally viable alternative from a technical perspective, by demanding interconnection at the access tandem, CLECs in essence want to force traffic to be routed through Qwest's access tandem without the concurrent establishment of a POI there. In so doing, CLECs are overextending the definition of a POI.

[12] *Local Competition Order* ¶ 205.

[13] Id. ¶ 203.

[14] AT&T has admitted in the Colorado Workshops that this is a reasonable compromise. Docket 98I-198T, 8/2/00 Transcript, at 17-23.

purpose.[15] Requiring CLECs to forego inefficient interconnection when other equally viable (and cost-effective) options exist, is consistent with the FCC's overarching policy supporting the efficient use of networks. Furthermore, it is entirely consistent with this Commission's past decisions. In a complaint proceeding between Qwest and MCImetro Access Transmission Services, Inc., the Commission required the former U S WEST to permit interconnection at its access tandem, but did not require this means of interconnection as the presumptive interconnection point for the exchange of local traffic. Rather, it required U S WEST to permit such interconnection under the conditions that Qwest proposes in its SGAT such as, for example, when there is lack of capacity at the local tandem, at the end office where the CLEC seeks interconnection, or when facilities are unavailable.[16]

For these reasons, the Commission should verify that Qwest's policies regarding interconnection comply with Section 271 of the Act.

b. Qwest Provides for Both One-Way and Two-Way Trunking to Transport Local Traffic (7.2.2.1.2.1; Issues Log ID No. WA-I-12).

Qwest offers CLECs the opportunity to utilize either one-way or two-way trunks to carry their traffic. Two-way trunks allow Qwest traffic and CLEC traffic to traverse in both directions. One-way trunks, as their name suggests, only carry the traffic of one party in one direction. SGAT Section 7.2.2.1.2.1 allows local traffic to be transported by either one-way or two-way trunking, consistent with FCC requirements.[17] Where one party elects to

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[15] See *U S WEST Communications, Inc. v. Jennings*, 46 F. Supp. 2d 1004, 1020 (D. Ariz. 1999) (a relevant consideration in interconnection is "whether a CLEC is purposely structuring its point(s) of interconnection to maximize the cost to the ILEC or to otherwise gain an unfair competitive advantage. The purpose of the Act is to promote competition, not to favor one class of competitors at the expense of another.").

[16] Commission Decision and Final Order Denying Petition to Reopen, Modifying Initial Order, in Part, and Affirming, in part, *MCImetro Access Transmission Services, Inc. v . U S WEST Communications, Inc.*, Docket UT-97-1063, at ¶¶ 121, 275, 276 (Feb. 10, 1999).

[17] *Local Competition Order* ¶ 219.

terminate traffic on the other party's network using one-way trunking, the other party must also provision one-way trunking.[18]

The impasse issue with respect to this provision is whether CLECs have the unilateral right to decide all issues surrounding how, and where, interconnection trunks will be routed and terminated. Specifically, AT&T requests that an interconnecting CLEC be entitled, as a matter of right, to determine not only the joint point of interconnection ("POI") for two-way trunking, and the CLEC's own POI for one-way trunking (both of which Qwest is willing to agree to), but also *Qwest's* POI for the one-way trunks that *Qwest* provides itself to return traffic to the CLEC. Furthermore, AT&T claims that it can dictate the route of Qwest's one-way trunks. If a CLEC may choose its own POI for its one-way trunks, Qwest should be entitled to do the same. Similarly, if Qwest must provision one-way trunks for its own traffic, and pay for those trunks, it should be permitted to determine the most cost-effective and efficient means for it to provide that trunk.

AT&T's demands go beyond the bounds of reason and fairness. Qwest should be allowed to choose the POI for the one-way trunking carrying traffic from Qwest to the CLEC and the route that traffic follows.[19] All carriers, not just incumbent LECs, are required to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[20] Furthermore, although Qwest acknowledges that CLECs are not subject to the obligations in Section 251(c)(2), the Act does require them to accommodate interconnection under Section 251(a)(1) and to negotiate in good faith with Qwest under Section (c)(1). These twin obligations suggest that, at a minimum, carriers should collaborate

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[18] Id. ¶ 1062.

[19] Transcript Volume XVIII at 2428.

[20] 47 U.S.C. § 251(a).

on interconnection issues.[21] Furthermore, when a CLEC chooses one-way trunks, the CLEC owns and bears the entire costs of its trunking to Qwest, and Qwest owns and bears the entire cost of its trunking that delivers Qwest traffic.[22] Because Qwest owns these one-way facilities, and must pay for them, it must be given some control in the configuration of those facilities to ensure that its own costs are minimized.[23] Nothing in the Act gives the CLEC the right to choose the incumbent's POI for purposes of returning one-way traffic.

c. Reasonable Limits to the Distance Qwest Must Build Out Facilities to Accommodate Interconnection are Appropriate.

As a result of Qwest's agreement to exchange local traffic at its access tandems, direct trunked transport now must be built to span distances of up to several hundred miles to carry local CLEC calls. Although the Act requires incumbent LECs to permit CLECs the opportunity to interconnect with an incumbent's network at any technically feasible point, that obligation is not without reasonable limits. While the Act anticipated that some modifications to an incumbent's network would be encompassed within its duties under Section 251(c)(2), Congress also recognized that there would be some reasonable boundary on this obligation.[24]

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[21] *Cf. Local Competition Order* ¶ 220 ("We also conclude that MCI's POI proposal, permitting interconnection carriers, both competitors and incumbent LECs, to designate points of interconnection on each other's networks, is at this time best addressed in negotiations and arbitrations between the parties.") (footnote omitted).

[22] Id. ¶ 1062.

[23] This is especially true for the route for Qwest's trunk. AT&T claims that if it creates a one-way trunk between its end office and Qwest's access tandem, it can require Qwest to one-way trunk back from the access tandem even if the traffic is destined for a remote central office. In that circumstance, Qwest should be entitled to elect a one-way direct trunk from the remote central office check to the CLEC switch.

[24] E.g., *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 812-13 (8th Cir. 1997), *rev'd on other grounds*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("*Iowa Utils. Bd. I*"), *followed on remand*, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 758 (8th Cir. 2000) ("*Iowa Utils. Bd. II*") (although Act requires incumbent LECs to provide interconnection at any technically feasible point, it does not require superior quality interconnection").

The FCC noted, "[i]f incumbent LECs were not required, *at least to some extent*, to adapt their facilities to interconnection or use by other carriers, the purposes of sections 251(c)(2) and 251(c)(3) would often be frustrated."[25] Incumbents such as Qwest are required, for example, to condition loops and activate vertical features in order to accommodate access to UNEs.[26] With respect to the latter, the FCC stated, "[a]ctivating a vertical feature loaded in the software of a switch, constitutes a modification to the BOC's facility necessary to accommodate access to unbundled local switching. Activating vertical features *does not require a BOC to alter its network substantially*; instead, it merely requires the BOC to allow competing carriers to obtain access to parts of its existing network that the BOC has decided not to use."[27] These are the sorts of network modifications encompassed within an incumbent LEC's duty to afford interconnection and access to UNEs under 251(c)(2) and 251(c)(3). They do not, however, require an incumbent LEC to substantially alter its network.[28] With respect to access to UNEs, the FCC does not require incumbents to "build out" or ". . . construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own

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[25] *Local Competition Order ¶* 202 (emphasis added).

[26] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, at ¶ 173 (rel. Nov. 5, 1999)*("UNE Remand")*; Memorandum Opinion and Order, *In the Matter of Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Service in Louisiana*, CC Docket No. 98-121, FCC 98-271, 13 FCC Rcd 20599 ¶ 218 (1998) ("*Second BellSouth Louisiana Order*").

[27] *Second BellSouth Louisiana Order* ¶ 218 (emphasis added).

[28] *Iowa Utils. Bd. I*, 120 F.3d at 813 n. 33 (the court strikes down "the [FCC's] rules requiring incumbent LECs to alter substantially their networks," and endorses the FCC's statement that incumbent LECs must make modifications to accommodate interconnection).

use."[29] Furthermore, with respect to both UNEs and interconnection, CLECs obtain access to Qwest's existing network, not to an unbuilt one.[30]

Consistent with these limits, in SGAT § 7.2.2.1.5 (Issues Log ID No. WA-I-16) Qwest has proposed language that allows the parties to construct transport facilities to the midpoint of a direct span in excess of 50 miles, where neither party has the facilities existing in its network and they cannot agree on who should provide them. AT&T objects to the inclusion of this section, arguing that because interconnection is technically feasible at any point in a LATA, Qwest should be obligated to bear the burden of constructing such facilities on behalf of CLECs for hundreds of miles if necessary. Importantly, Qwest does not object to the placement of such transport facilities across a LATA, Qwest simply asks that the CLEC share in the responsibility of installing such facilities.[31]

The FCC has specifically acknowledged that some reasonable end point to an incumbent LEC's obligation in this context is appropriate, stating, "[r]egarding the distance from an incumbent LEC's premises that an incumbent should be required to build out facilities for meet point arrangements, we believe that the parties and state commissions are in a better position than the Commission to determine the *appropriate distance that would constitute the required reasonable accommodation of interconnection.*"[32] Moreover, in defining meet point arrangements, the FCC stated: "the 'point' of interconnection for the purposes of Sections 251(c)(2) and 251(c)(3) remains on 'the local exchange carrier's network (e.g. main distribution frame, trunk-side of the switch), and the *limited build-out* of facilities

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[29] *UNE Remand Order* ¶ 324.

[30] *Iowa Utils. Bd. I*, 120 F.3d at 813.

[31] Transcript Volume XI at 1308.

[32] *Local Competition Order* ¶ 553 (emphasis added).

from that point may then constitute an accommodation of interconnection."[33] If incumbent LECs were required to build out their facilities to any distance to accommodate interconnection, the FCC's use of the word "limited" in this context, and its statement regarding deferral to state commissions to determine the reasonable distance for mid-span meet points, would have no meaning. If the FCC has limited an incumbent's obligations in a meet-point arrangement, in which carriers share the duty to build out, surely it would endorse similar, reasonable limitations on the accommodations Qwest must make when providing direct trunk transport. Qwest suggests that a reasonable limit should be 50 miles, and requests that the Commission approve the language in Section 7.2.2.5 of Qwest's SGAT.

d. Reciprocal Obligation of CLEC to Offer Transport to Qwest on Same Terms That Qwest Offers To CLECs (7.2.2.1.2.2; Issues Log ID No. WA-I-13).

Interconnection, as described above, is generally a two-way street. As Mr. Freeberg described, approximately 99 percent of all trunk groups are two-way and, as such, are jointly monitored and paid for by both sides.[34] The payments made by each carrier are referred to as reciprocal compensation. Reciprocal compensation applies to all LECs, both incumbent LECs and CLECs alike.[35] Both call transport and call termination fall into the rubric of reciprocal compensation. Specifically, reciprocal compensation "terms and conditions [must] provide for the mutual and reciprocal recovery by each carrier of costs associated with the

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[33] Id. (emphasis added).

[34] See *Local Competition Order* ¶ 1062 (each carrier pays forward-looking cost of two-way facilities based upon relative use).

[35] 47 U.S.C. § 251(b)(5).

transport and termination on each carriers network facilities of calls that originate on the network facilities of the other carrier."[36]

AT&T asserts that Qwest is not entitled to be charged the same rates, terms and conditions that Qwest offers such services to CLECs. AT&T asserts that it is entitled to charge Qwest retail tariff rates for the transport it provides. The FCC has refuted this exact argument. In its *Local Competition Order*, the FCC has been clear that interconnection facilities can be provided in a number of different ways by either carrier.

> Many alternative arrangements exist for the provision of transport between the two networks [of interconnecting carriers]. These arrangements include: dedicated circuits provided by the incumbent LEC, the other local service provider, separately by each, or jointly by both; facilities provided by alternative carriers; unbundled network elements provided by incumbent LECs; or similar network functions currently offered by the incumbent LECs on a tariffed basis. Charges for transport and termination subject to section 251(b)(5) should reflect the forward-looking cost of the particular provisioning method.[37]

Accordingly, whichever carrier actually provides the facility should recover "the forward-looking economic cost of providing the portion of the facility that is used for terminating traffic that originates on the network of the competing carrier."[38] This obligation to charge cost-based, forward-looking rates, is not limited to the incumbent provider; rather, "the carrier actually providing the facility" is entitled to recover a cost-based, forward-looking rate. Furthermore, as discussed at length in briefing on reciprocal compensation, rates for transport and termination, as a general matter, should be symmetrical (i.e., each carrier pays the same rate) and, according to the FCC's plain rules, based upon the incumbent LEC's

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[36] See 47 U.S.C. § 252(d)(2)(A)(i).

[37] *Local Competition Order* ¶ 1039; see also id. ¶ 1063.

[38] Id. ¶ 1063; id. ¶ 1054 ("transport of traffic should be priced based on the same cost-based standard, whether it is transport using unbundled network elements or transport of traffic that originated on a competing carrier's network").

forward-looking costs.[39] CLECs do not have blanket authority to depart from this requirement.

> If a competing local service provider believes that its cost will be greater for transport and termination, then it must submit a forward-looking economic cost study to rebut this presumptive symmetrical rate. In that case, we direct state commissions, when arbitrating interconnection arrangements, to depart from symmetrical rates only if they find that the costs of efficiently configured and operated systems are not symmetrical and justify a different compensation rate.[40]

Furthermore, even if a state commission adopts asymmetrical rates, it is required to base the rates on the FCC's cost methodology, not the CLEC's tariff rates.[41] Because the Act and FCC rules are clear that transport costs under Section 251(b)(5) and 252(d)(2) must be symmetrical and cost-based, whichever carrier provides the transport facility, CLECs cannot unilaterally charge Qwest tariff rates for transport facilities.

e. Local Routing Numbers ("LRN") (7.2.2.1.6).

An LRN is a ten-digit number used to identify an end office switch (owned by either a CLEC or Qwest) for call routing purposes. LRNs became necessary with the introduction of number portability. To conserve telephone numbers, all carriers are expected to efficiently use LRNs, which requires as few LRNs as possible. Problems can arise, however, when a CLEC's switch to which an LRN is assigned covers a broad geographic area. In such circumstances, Qwest's network will view calls originating in one local calling area and being transported to another local calling area as a toll call that should be routed through the access tandem. Of course, all parties would prefer that the call be routed along direct trunks rather

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[39] Id. ¶ 1039 ("[c]harges for transport subject to section 251(b)(5) should reflect the forward-looking cost of the provisioning method"); ¶ 1085 (incumbent LEC's rates to be used as reasonable proxy rates and endorsing symmetrical rates).

[40] Id. ¶ 1089.

[41] Id.

than alternate tandem trunks when direct trunks are available. This is a more efficient use of the network and can prevent blockage at the access tandem. The current routing tables, however, will not place the calls on the direct trunks until Qwest modifies its systems to account for the change.

AT&T proposed SGAT language that Qwest will accept. The agreed upon language reads as follows:

> 7.2.2.1.6 Regardless of the number of location routing numbers (LRNs) used by a CLEC in a LATA, Qwest shall route traffic destined for CLEC customers via direct trunking where direct trunking has been established. In the event that direct trunking has not been established, such traffic shall be routed via a Qwest tandem.

2. For Those Impasse Items Unrelated To Qwest's Compliance with Sections 251, 252(d), and 271, The Commission Should Accept Qwest's SGAT Language.

As noted above, AT&T, in particular, has raised issues with various provisions of the SGAT that have no bearing on whether the SGAT meets the requirements of Sections 251, 252(d), or the competitive checklist in Section 271. These disputes, which at times boil down to word choice, have no place in this proceeding. Moreover, these issues pattern a recurring theme in AT&T's comments on Qwest's compliance with competitive checklist in Section 271(c)(2)(B): AT&T believes that Qwest must accede to each and every AT&T demand to obtain Commission approval of the SGAT and Qwest's Section 271 application, regardless whether that demand is grounded in the Act or Washington law. Under Section 252(f), Qwest's SGAT must only comply with Section 252(d), Section 251 and FCC implementing regulations, and any applicable state law.[42] Nothing in either the Act or Washington law requires Qwest to "indemnify" AT&T, as it demands. Accordingly, Qwest

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[42] 47 U.S.C. § 252(f)(2).

need not include AT&T's indemnification language for its SGAT to comply fully with Section 252(f).

Similarly, Qwest is not required to accept AT&T's language to obtain Section 271 approval. The FCC's Section 271 orders are clear that a BOC need only comply with the Act and settled FCC rules to obtain Section 271 approval. A BOC is not required to accede to every demand of its competitors, nor are CLECs permitted to "doom" a BOC's application by raising novel issues of industry-wide implication.[43]

As Qwest has argued in prior submissions, the SGAT is Qwest's standard contract offering. No CLEC is required to adopt it, and this Commission's approval of it will not alter Qwest's duty to negotiate and arbitrate an interconnection agreement with any requesting CLEC.[44] Accordingly, where disputes (such as these) center on an issue that is not a requirement of federal or state law, Qwest should be permitted to determine its own standard contract offering.

a. AT&T's Proposed Indemnification Language Specific to Interconnection (7.1.1.2).

AT&T's request for additional indemnification commitments is unfounded. First, in Section 5.9 of the SGAT Qwest has made extensive indemnification commitments already. Thus, a separate indemnification provision will be duplicative and may even create confusion regarding Qwest's obligations. Second, and most importantly, Qwest is engaged in a series of distinct workshops before the Regional Oversight Committee ("ROC") on a Post-Entry

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[43] Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, FCC 01-29 ¶ 230 (rel. Jan. 22, 2001) ("*SBC Kansas-Oklahoma Order*") ("As we have found in past section 271 proceedings, the section 271 process simply could not function if we were required to resolve every interpretive dispute about the precise content of an incumbent LEC's obligations to its competitors, including fact-intensive interpretive disputes"); *SBC Texas Order* ¶ 23-26.

[44] 47 U.S.C. § 252(f)(5).

Performance Plan ("PEPP"), which will result in self-executing fines against Qwest when its performance drops below a certain level. Despite these assurances of performance, AT&T has demanded a *third* type of indemnification specific to interconnection that would require Qwest to indemnify CLECs for damages incurred as a result of its failure to meet individual provisioning requirements of Section 7.1.1.1 (Issues Log ID No. WA-I-1).[45] AT&T's request simply goes too far.

The PEPP workshops are the appropriate forum to discuss how Qwest will compensate CLECs for a failure to perform up to expectations, and AT&T is an active participant in those workshops. The FCC has already determined how CLECs should be compensated for such failures in a 271 environment by endorsing the use of "backsliding" provisions such as those proposed in the Qwest PEPP.[46] There are, however, no parallel FCC or Washington requirements requiring Qwest to allow indemnification for a failure to timely install such interconnection trunks. Nor is there any mention of such indemnification in any FCC Section 271 orders. Because AT&T is fully protected under the SGAT as well as the PEPP, there is no legal justification for AT&T's "piling on."

b. CLEC Forecasts (7.2.2.8.6; Issues Log ID No. WA-I-24).

CLECs have demanded and Qwest has agreed to "ensure that capacity is available to meet CLECs' [interconnection] needs as described in the CLEC forecasts."[47] In many instances, this will require Qwest to construct new facilities and thereby incur substantial expense. Once a CLEC submits its forecast, however, it has no obligation to order interconnection trunks consistent with its forecast. This could leave Qwest in the

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[45] Exhibit 371, Affidavit of Kenneth L. Wilson Regarding Interconnection, Collocation and Resale on behalf of AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services, at 16.

[46] FCC SBC Kansas-Oklahoma Order para. 269, SBC Texas Order para. 420 and Bell Atlantic New York Order para. 429.

[47] SGAT § 7.2.2.8.4.

unacceptable position of having incurred cost to build new facilities, which then lay underutilized, or worse dormant or dark.

CLECs' utilization rates of interconnection trunks ***that they have ordered*** is well under 50% in Washington and CLECs have ordered a fraction of what they have forecast.[48] This under-utilization has already cost Qwest an unnecessary $300 million region-wide.[49] If the forecasting practices of CLECs continues, this number will only grow.

To provide CLECs with the incentive to make their forecasts more accurate, Section 7.2.2.8.6 of the SGAT states that CLECs will pay Qwest "50% of the estimated capital cost to provision new trunks, if CLECs trunk utilization over the prior 18 months is less than 50% of forecast each month." This deposit will be refunded if they achieve a 50% utilization rate on the new trunks within six months. AT&T objects to this provision, claiming it is inappropriate for (1) CLEC to pay a deposit and (2) if a deposit is paid it should be refunded if Qwest ever uses the facility. AT&T's claim should be rejected.

i. Qwest is entitled to recover its costs.

While CLECs demand that Qwest build to forecasts, there is no financial mechanism by which Qwest can recover its cost of constructing these facilities without obtaining a deposit.[50] CLECs do not pay anything for a LIS trunk until they order a trunk. If the order never comes because the CLEC over-forecasts, Qwest builds facilities that the CLEC never utilizes, and Qwest never gets paid. Similarly, the nonrecurring charges associated with interconnection trunks, if charged or paid at all, are a fraction of the actual cost of

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[48] Exhibit 508-C, Response to Bench Request No. 31.

[49] Transcript Volume XVIII at 2561.

[50] Such deposits are commonplace. For example, CLECs pay a 50% deposit every time it orders a collocation. Qwest is only seeking a deposit for interconnection trunks when the CLEC has a history of abusing the forecasting process.

constructing the facility.[51] The presumption is that Qwest will be compensated for the trunks through customer usage and reciprocal compensation payments when the trunks become fully utilized. Thus, even when a CLEC orders a trunk, payment is not made in full unless and until the trunk is fully utilized.

It hardly needs stating that the Act entitles Qwest to recover its costs of providing interconnection.[52] Qwest's requirement that it receive some compensation for trunks it is asked to build ensures that Qwest recovers its costs as the Act requires.

ii. The process should provide CLECs the incentive to give Qwest accurate forecasts

AT&T's second argument is that CLEC should be refunded the deposit if Qwest ever has occasion to use the facility. In other words, AT&T is trying to find ways to avoid being financially responsible for its inflated forecasts. More problematic, it is whipsawing Qwest. On the one hand, CLECs demanded that the SGAT contain provisions that Qwest build to their forecasts. They argue this is necessary for historical reasons because in the past forecasted facilities have not always been available. AT&T makes this demand even though Qwest already has a tremendous incentive to act on CLEC's forecasts; namely, the very real and severe self executing penalties through the PEPP if it fails to provision trunks timely and in sufficient volume to avoid trunk blocking. Qwest agreed to the CLECs' demands in this regard.

On the other hand, however, CLECs argue against SGAT language and financial incentives to forecast accurately even though, as described above, CLECs' malfeasance on forecasting has cost Qwest $300 million region wide. This historical problem cannot be ignored. The repeated failure of CLECs to provide accurate forecasts should lead to payment

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[51] See WN U-42, Interconnection Services Washington, § 3.1(A) (Dec. 2, 2000).

[52] 47 U.S.C. § 252(d)(1)(A); *Iowa Utils. Bd. I*, 120 F.3d at 810 ("Under the Act, an incumbent LEC will recoup the costs involved in providing interconnection and unbundled access from [requesting carriers]").

of a deposit and, when a deposit is paid, CLECs should be financially responsible if, in the very order where a deposit is required, they continue their history of over-forecasting.

c. Ownership of Jointly Constructed Property (7.2.2.8.16; Issues Log ID No. WA-I-30).

The parties have agreed to language that will permit Qwest to charge special construction charges when a CLEC requests Qwest to provide interconnection facilities in extraordinary circumstances. Nevertheless, AT&T has concerns regarding the ownership of such facilities once constructed.[53] Because Qwest and the CLEC will share the costs of construction in proportion to each party's use of the overall capacity of the facilities built, AT&T suggests that ownership should not lie completely with Qwest.[54]

With respect to the issue of ownership, projects involving special construction charges are no different than those that do not involve such charges. Qwest is compensated with a non-recurring construction charge in the same way it would be compensated by a retail end-user pursuant to a retail tariff. For example, pursuant to § 4.2.2 of Qwest's Washington intrastate tariff, Qwest charges end-user customers special charges for line extensions to premises outside of the base rate area, but "[a]ll line extensions are owned and maintained by the Company."[55] In addition, Qwest's Washington tariff provides that while applicants may elect to furnish and set required poles or provide a trench on their own property to avoid charges, "in all instances the ownership of facilities shall be entirely vested in the Company."[56] Thus, just as in a retail setting, Qwest owns the facilities built. This

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[53] Transcript Volume XI at 1354-55.

[54] Id. at 1351.

[55] See Terms, Conditions, Rates and Charges Applying to the Provision of Intrastate Exchange and Network Services Within the Operating Territory of Qwest Corporation in the State of Washington, WN U-40, effective August 30, 2000, at 4.2.2 (A)(1).

[56] Id. at 4.2.2 (B)(2).

relationship is not unique to retail: under the Act, CLECs lease facilities owned by incumbents.[57] Moreover, when confronted with a similar issue involving the construction of facilities for CLECs, the Colorado Commission held: "[w]e do not find it reasonable to require Qwest to construct facilities for ownership by ICG."[58]

d. There is No Duty to Provide Multi-Frequency Trunking Between Switches for Redundancy (7.2.2.6.3; Issues Log ID No. WA-I-19).

AT&T has demanded that Qwest establish multi-frequency trunking to increase signaling link diversity and to provide for additional levels of redundancy in the trunking between two carriers' switches. AT&T argues that such a requirement would address the hypothetical situation of a failed signaling link, and should that hypothetical occur, promote a more equal flow of traffic while the signaling link is being repaired. Quite apart from the tortured nature of the hypothetical (even if AT&T's demands were satisfied, for the brief span during which signaling was interrupted, both sets of customers served by the respective local switches of AT&T and Qwest would be severely restricted in their ability to place calls) AT&T has provided no authority whatsoever that would require Qwest to establish this type of signaling link redundancy. Indeed, Qwest has searched for an FCC order or court decision that requires an incumbent to provide multi-frequency trunks, and has found nothing.

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[57] See, e.g., *Local Competition Order* ¶ 258 ("Carriers requesting access to unbundled elements within the incumbent LEC's network *seek in effect to purchase the right to obtain exclusive access to an entire element, or some feature, function or capability of that element*. For some elements, especially the loop, *the requesting carrier will purchase exclusive access to the element for a specific period, such as on a monthly basis*. Carriers seeking other elements, especially shared facilities such as common transport, *are essentially purchasing access to* a functionality of the incumbent's facilities on a minute-by-minute basis."); id. ¶ 268 ("We further conclude that a telecommunications carrier purchasing access to an unbundled network facility *is entitled to exclusive use of that facility for a period of time*, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled *to use of that feature, function, or capability for a period of time.* The specified period may vary depending on the terms of the agreement between the incumbent LEC and the requesting carrier.") (emphasis added).

[58] Decision No. C00-858, *In Re ICG Telecom Group, Inc.*, Docket No. 00B-103T, at 7 (Colo. PUC Aug. 7, 2000).

The FCC has been clear that BOCs are only required to meet the "reasonably foreseeable" demand of CLECs even for checklist items.[59] The hypothetical concerns of a single carrier do not rise to a level of a "reasonably foreseeable" demand for an antiquated product. Qwest's position is that in the very unlikely event that this situation should occur, Qwest would place the repair of the failed signaling link on the highest priority and the signaling would be restored as soon as possible, reducing any parity issue to the level of *de minimus*.[60] Furthermore, Qwest is not refusing to provide multi-frequency trunks outright. If a potential AT&T customer is actually concerned about this hypothetical situation, AT&T could request this capability. Qwest is simply asking that if AT&T or any other CLEC it believes that it is necessary, it submit a bona fide request for this kind of extraordinary level of signaling diversity, and Qwest will consider such requests on a case-by-case basis.[61]

3. Entrance Facilities Must be Made Available and Continue to be Priced Separately from Direct Trunked Transport (7.1.2.1).

a. Entrance facilities are required.

Qwest offers CLECs several options on how to interconnect with Qwest, one of which is the use of an "entrance facility." An entrance facility is a transport facility from a Qwest Serving Wire Center to the CLEC's switch location or POI. Qwest offers to construct entrance facilities, share the cost of the entrance facility when two-way traffic is carried based upon the relative use of each carrier, and charge TELRIC rates for the entrance facility. This is the scope and bounds of Qwest's obligation under Section 251 of the Act. AT&T, however, demands that references to entrance facilities be removed from the SGAT. AT&T's

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[59] *Second BellSouth Louisiana Order* ¶ 54.

[60] Transcript Volume XVIII at 2539.

[61] Id. at 2548.

request should be rejected because entrance facilities are a recognized and necessary component of interconnection.

Numerous authorities, including the FCC and this Commission, have recognized and endorsed the use of entrance facilities. For example, In its *Local Competition Order, Appendix B,* the FCC designated proxy prices for entrance facilities. Were these facilities improper or unnecessary, the FCC obviously would not have engaged in such an exercise. Furthermore, at least two other BOCs, BellSouth and Verizon, utilize entrance facilities.[62] Finally, and most importantly, in its cost docket, this Commission set endorsed the use of and set rates for entrance facilities.[63] The Commission specifically rejected use of AT&T's Hatfield model to calculate these rates.[64]

Despite the clear line of authority, AT&T alone argues that entrance facilities should be removed from the SGAT, and all other carriers must be forced to rely upon direct trunked transport. AT&T makes this argument because it wants the pricing associated with direct trunked transport to apply to entrance facilities as well. This issue has already been litigated before and decided by the Commission in its cost docket where the Commission rejected AT&T's argument and set rates for entrance facilities.[65] Clearly, the Commission did so because rates for entrance facilities are different from those for direct trunked transport. If

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[62] See http://www.interconnection.bellsouth.com/products/spa/Point-to-Point.html (describing BellSouth's Point-to-Point network and listing local channel as a separate, mileage sensitive, fixed rate element); Reply Comments of Massachusetts Department of Telecommunications and Energy, 00-176, at 3-5 (Nov. 3, 2000).

[63] The Commission approved rates for entrance facilities are contained within Washington Interconnection Services Tariff § 3.1(A) (Supp. Dec 2, 2000).

[64] In the Matter of Pricing Proceeding . . ., Docket No. UT-960370, 14th Supp. Order at ¶¶ 27-30 (Sept. 30, 1998).

[65] Commissions throughout the region (Arizona, Colorado, Oregon, and New Mexico cost dockets) and country have utilized the pricing structure set by this Commission. See, e.g., footnote 61, supra.

AT&T has concerns about the current entrance facility rates, the proper forum to seek redress is the Washington cost docket, not this 271 docket.[66]

Moreover, the reasons for pricing entrance facilities different from direct trunked transport are readily apparent. Entrance facilities and direct trunked transport are both central to Qwest's interconnection offering, which must be combined to deliver traffic between different carriers' switches.[67] Entrance facilities are a high-speed digital loop, as opposed to direct trunked transport, which is a high-speed interoffice span.[68] The transport connecting Qwest offices is usually contained in conduit between manholes. When Qwest is requested to provide transport, and where excess electronics do not exist, Qwest places new electronics or cable in the conduit between the points requested.[69] Entrance facilities, however, are fundamentally different because they often entail arranging a new digital facility by placing buried or aerial cable in a new location, as opposed to adding a cable to existing conduit or adding electronics to existing fiber.[70] Irrespective of this rationale, this issue is *res judicata* in Washington. AT&T's arguments are misplaced.

b. The Commission already rejected CLEC's ratcheting argument.

In providing interconnection, Qwest does not limit CLECs to entrance facilities alone. Qwest offers several additional interconnection methods as well. For example, Qwest also allows CLECs to use existing transport capacity or excess capacity on an existing private line

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[66] Transcript Volume XI at 1257.

[67] Qwest notes that there is a distinction between the provisioning of transport in the context of interconnection as opposed to where a CLEC is accessing UNEs. Transcript Volume XI at 1262.

[68] Exhibit 348, Rebuttal Testimony of Thomas R. Freeberg for Checklist Item 1, at 23.

[69] Id.

[70] Id.

as an interconnection trunk group. This second option allows CLECs to use spare capacity to maximize the efficient use of their network in lieu of installing new facilities. SGAT Section 7.3.1.1.2 states that "if CLEC chooses to use an existing facility purchased as Private Line Transport Service from the state or FCC access tariffs, the rates from those Tariffs will apply." On this point, just as in Workshop 1, AT&T and WCom argue that if they choose the private line option, Qwest should "ratchet" its rates downward and charge TELRIC (or Section 252(d)(1)) rates for the percentage of the traffic on the private line that is local, and private line rates for the remainder. In other words, AT&T and WCom want Qwest to convert a percentage of their special access circuits to TELRIC rates. The ALJ has already rejected this AT&T/WCom argument in the Revised Initial Order on checklist item 13.[71] Rather than rebrief this issue again, Qwest refers the Commission to Qwest's Workshop 1 disputed issues briefs and comments on the ALJ's proposed orders.[72]

4. Mid-Span Meet Points May Be Used for Interconnection But Not to Obtain Access to UNEs.

Another form of interconnection available to CLECs is the "mid-span meet." Section 7.1.2.3 (Issues Log ID No. WA-I-7) of the SGAT recognizes that interconnection may be achieved at a negotiated location between the parties' switches, otherwise called a mid-span meet. Each party is responsible for its portion of the build to the POI. The parties have reached impasse with respect to the last sentence of this section, which states: "A Mid-Span Meet POI shall not be used by CLEC to access unbundled network elements."[73] AT&T

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[71] Revised Initial Order, *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; In the Matter of U S West Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996,* Docket No. UT-003022, UT 003040 ¶¶ 243-52 (Aug. 31, 2000) ("*Revised Initial Order*").

[72] Qwest's Legal Brief Regarding Disputed Workshop 1 Issues (Checklist Items 3, 7, and 13) at 18-23; Qwest's Comments on Staff's Draft Initial Order on Workshop 1 Issues at 13-16.

[73] Exhibit 271, SGAT § 7.1.2.3.

argues that that the facilities used in mid-span meets "should be usable for unbundled element transmission."[74] Qwest has proposed this very modest restriction on the use of the mid-span meet point to interconnection for several reasons.

First, the FCC expressly sanctioned this limitation in its *Local Competition Order*:

> We believe that, although the Commission has authority to require incumbent LECs to provide meet point arrangements upon request, such an arrangement only makes sense for interconnection pursuant to section 251(c)(2) *but not for unbundled access under section 251(c)(3)***.** New entrants will request interconnection pursuant to section 251(c)(2) for the purpose of exchanging traffic with incumbent LECs. In this situation, the incumbent and the new entrant are co-carriers and each gains value from the interconnection arrangements. Under these circumstances, it is reasonable to require each party to bear a reasonable portion of the economic costs of the arrangement. In an access arrangement pursuant to section 251(c)(3), however, the interconnection point will be a part of the new entrant's network and will be used to carry traffic from one element in the new entrant's network to another. *We conclude that in a section 251(c)(3) access situation, the new entrant should pay all of the economic costs of a meet point arrangement*.[75]

Thus, the FCC clearly concluded that it only makes sense for the parties to share the costs of a mid-span meet point arrangement when both parties will benefit from the arrangement, which is only in the context of interconnection.

Second, Qwest will provide mid-span meet point arrangements only for interconnection because to permit access to UNEs through the mid-span meet point would result in commingled local and access traffic on the same trunking system. The FCC has, at least temporarily, prohibited the commingling of traffic in two supplements to its *UNE Remand Order*. In Qwest's Legal Brief Regarding Disputed Workshop 1 Issues as well as its comments on the Workshop 1 orders, referenced above, Qwest addressed the issues of

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74 Transcript Volume XVIII at 2386.

75 *Local Competition Order* ¶ 553 (emphasis added).

commingling of local and access traffic on the same trunk group and the corresponding ratcheting of prices that CLECs demand of Qwest and incorporates that briefing by reference. Briefly, the FCC stated in its *Supplemental Order* to the *UNE Remand Order*:

> [I]nterexchange carriers (IXCs) may not convert special access circuits to combinations of unbundled loops and transport network elements, whether or not the IXCs self provide entrance facilities (or obtain them from third parties). This constraint does not apply if an IXC uses combinations of unbundled network elements to provide a significant amount of local exchange service, in addition to the exchange access, to a particular customer.[76]

In its *Supplemental Order Clarification*,[77] the FCC extended the term of this restriction, clarified the phrase "a significant amount of local exchange service," and further emphasized that the restriction on conversion of special access circuits to TELRIC-rate based facilities includes "commingling" of special access services with TELRIC-rated facilities.[78] Based on these restrictions, Qwest respectfully submits that it would be inappropriate to allow local and exchange access traffic to be commingled on the same trunk groups and has reflected this prohibition in its SGAT. The ALJ agreed with this analysis in the Workshop 1 *Revised Initial Order*.[79] As a result, CLECs are permitted to use excess private line capacity for interconnection of local traffic; however, they cannot ratchet the rates to pay TELRIC on the local portion.[80]

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[76] Supplemental Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-370 ¶ 2 (rel. Nov. 24, 1999) (emphasis added) ("*Supplemental Order*").

[77] Supplemental Order Clarification, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183 (June 2, 2000) ("*Supplemental Order Clarification*").

[78] Id. ¶ 28.

[79] *Revised Initial Order* ¶¶ 243-44.

[80] Id. ¶¶ 243-51, 322.

For these reasons, the Commission should approve of the language in Section 7.1.2.3 that prohibits the mid-span meet POI from being used by CLECs to access UNEs.

5. Commingling of Local and Access Traffic on the Same Trunk Group (7.2.2.9.3.2; Issues Log ID No. WA-I-35).

Qwest has designed its network with distinct trunks for access and local traffic. Allowing CLECs to commingle local and access traffic on the same trunk group causes Qwest concern about potential trunk blockage. CLECs demand commingled traffic on these trunk groups, claiming it is technically feasible. In its *Second BellSouth Louisiana Order*, the FCC held that commingled traffic is not a 271 requirement:

> BellSouth also states that it offers, as a standard arrangement, local tandem interconnection for carrying traffic destined for BellSouth end offices that subtend a local tandem. BellSouth offers routing of local and intraLATA traffic over a single trunk group. *Access traffic, as well as other as well as other traffic utilizing BellSouth's intermediary tandem switching function, is routed via a separate trunk group. BellSouth states that competitive LECs may order two-way trunks for the exchange of combined local and intraLATA toll traffic at BellSouth end offices or access tandems. BellSouth, therefore, establishes that it has a legal obligation to provide interconnection consistent with our rules.*[81]

Thus, the FCC has held that checklist item 1 is satisfied even when a BOC refuses to commingle local and access traffic on the same trunk group.

Nonetheless, this Commission has already determined that such commingling is permissible.[82] Qwest, therefore, agrees to allow such commingling in the state of Washington. This concession will not flow to additional states, but is limited to Washington.

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[81] *Second BellSouth Louisiana Order* ¶ 75 (emphasis added; footnote omitted).

[82] *U S WEST Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1124-25 (9th Cir. 1999).

6. Qwest's Right to Charge Separately for Expanded Interconnection Channel Termination ("EICT") (7.3.1.2.1; Issues Log ID No. WA-I-43).

As discussed in Workshop 1 in connection with checklist item 13 (reciprocal compensation), WCom and AT&T dispute Section 7.3.1.2.1 of the SGAT, which requires CLECs to pay for EICT. WCom claims that Qwest should share the costs of EICT with CLECs, and AT&T goes farther to claim that Qwest should absorb the entire cost.[83] Neither CLEC position can be reconciled with the Act's requirement that CLECs alone must bear costs related to collocation.[84]

By way of background, EICTs are the cables that connect the CLEC's collocated equipment to the incumbent LEC's network within the incumbent's premises. During Workshop 1, Qwest explained that EICT and multiplexing costs are not properly shared through reciprocal compensation because they are costs associated with collocation.[85] As AT&T admitted, the primary driver of a CLEC's decision to use collocation is access to

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[83] 7/6/00 Transcript at 837-38.

[84] 47 U.S.C. § 251(c)(6); see also First Report and Order and Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 99-48, 14 FCC Rcd 4761 ¶ 51 (rel. Mar. 31, 1999) (discussing allocation of space preparation costs and determining that all collocating CLECs must bear their pro rata share of space preparation costs. The FCC makes no mention of the incumbent LEC sharing these costs; *UNE Remand Order* ¶¶ 262, 263 & 265 (generally discussing collocation costs as the costs requesting carriers incur to obtain access to unbundled network elements) and ¶ 263 n. 521 ("We recognize, however, that *the costs of collocation in a given central office will be spread between a requesting carriers['] total service offerings*, including services other than circuit switched services") (emphasis added); *U S WEST Communications, Inc. v. AT&T Corp.*, Case No. A1-97-085, slip op. (D.N.D. Jan. 8, 1999) ("The Act and the [interconnection] Agreement mandate the provision of interconnection, again, on a non-discriminatory basis. *That does not mean that the incumbent LEC must pay a portion of the costs involved in providing the interconnection for the use of a competitor*") (emphasis added).

[85] E.g., Qwest's Legal Brief Regarding Disputed Workshop 1 Issues (Checklist Items 3, 7, and 13) at 39-44; Qwest's Comments On Staff's Draft Initial Order On Workshop 1 Issues at 23-26.

unbundled network elements, not interconnection.[86] Qwest should not subsidize CLECs' UNE access costs, nor should costs of UNE access be allocated to interconnection.[87]

Furthermore, collocation for purposes of interconnection is optional; therefore, EICT costs, as they relate to interconnection, are costs that the CLEC can avoid.[88] Because CLECs are the sole determinants of whether collocation is used for interconnection, and can avoid those costs if they choose, they should properly absorb its costs. Accordingly, Section 7.3.1.2.1 properly requires CLECs to bear EICT costs.

WCom presented no testimony on this point in either Workshop 1 or Workshop 2, only its proposed revisions in Exhibit 188. AT&T disputed Qwest's ability to charge for EICTs separately from the trunking provided with it, asserting that EICTs are "transport to the switch or part of termination costs, and it should not be a separate charge."[89] AT&T's assertion is factually incorrect. It may be that some of AT&T's confusion surrounding the separate charge for the EICT is due to its similarity to Interconnection Tie Pairs ("ITP"). In defining EICT, however, Qwest has made a point of distinguishing EICTs from ITPs. EICTs, unlike an ITP, are bundled with regeneration electronics, and are used to provide the service of interconnection. ITPs are used to reach an unbundled element from a collocation space, and they are not bundled with underlying regeneration electronics.

AT&T claims that because it provides EICT at no cost, Qwest should do likewise. The Act permits Qwest to recover its costs of providing collocation, its costs of providing

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86 Transcript Volume IV at 464, 467.

87 *Local Competition Order* ¶ 743 ("We conclude, as a general rule, that incumbent LECs' rates for interconnection and unbundled network elements must recover costs in a manner that reflects the way they are incurred"); id. ¶ 691 ("Costs must be attributed on a cost-causitive basis").

88 Transcript Volume IV at 466; 7/6/00 Transcript at 837-38.

89 Transcript Volume XI at 1376.

interconnection, and its costs of providing access to UNEs.[90] Therefore, whether AT&T chooses to provide EICT at no separate charge, or include the cost in other rates, has no bearing on Qwest's ability to recover its costs, particularly where AT&T has no obligation to provide collocation or access to UNEs on the same terms and conditions as Qwest. Section 271 proceedings are narrowly focused proceedings to determine whether Qwest complies with established FCC rules, and no FCC rule requires Qwest to pay CLEC costs of collocation or accessing UNEs. Because this proceeding is not the forum to resolve an interpretive dispute between carriers or to address a novel request that affect the entire industry,[91] the Commission should reject the CLECs' claim that Qwest must share or absorb EICT costs.

7. Individual Call Record Charges and Transit (7.5.4 and 7.6.3; Issues Log ID No. WA-I-62 and WA-I-63).

This issue is simply one of fairness. Section 7.5.4 of the SGAT requires that where carriers are required to exchange records in order to bill an interexchange carrier for jointly provided switched access services and 8XX database queries, carriers providing such information should be fairly compensated for the costs of producing those records. Similarly, Section 7.6.3 requires that carriers requesting information necessary to bill an originating carrier for transit pay for the information provided. In both situations, there is no requirement that the carrier terminating a call seek compensation from the intermediary carriers; however, if they do wish to be paid, they will need access to certain information. Qwest's proposal simply covers the costs of the party that produces that necessary information. It is a reciprocal charge that applies to Qwest and CLECs alike.

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[90] 47 U.S.C. §§ 251(c)(2), (c)(3), and 252(d)(1).

[91] *SBC Kansas-Oklahoma Order* ¶ 230; *SBC Texas Order* ¶¶ 23-26.

WCom opposes these provisions on one ground alone: that Qwest has not charged for this service in the past – i.e., it has underwritten the cost. First, WCom's assertion is incorrect. Qwest has, in fact, charged for this service in agreements with CLECs. According to Qwest witness, Mr. Freeberg, a quarter cent charge has commonly been applied in contract accounting services agreements.[92] Whether WCom has had to pay this charge in the past should not determine whether it is appropriate for carriers to collect this charge from each other now. Furthermore, a cornerstone of the Act is that incumbent's will recover their costs of providing interconnection.[93] If WCom has an issue with the actual rate that is reciprocally charged, it can raise those concerns in the Commission's ongoing cost docket.

B. CHECKLIST ITEM 11: LOCAL NUMBER PORTABILITY

Both the Act and the FCC define number portability as the ability of customers to retain, at the same location, existing telephone numbers when switching from one service provider to another.[94] Section 271(c)(2)(B)(xi), checklist item 11, provides: "Until the date by which the Commission issues regulations pursuant to section 251 to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations." Once long-term number portability ("LNP") has been deployed in an area, then interim methods ("INP") may no longer be used. Because all of Qwest's access

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[92] Transcript Volume XIX at 2759.

[93] 47 U.S.C. § 252(d)(1)(A); *Iowa Utils. Bd. I*, 120 F.3d at 810. Indeed, the FCC has consistently recognized that carriers should be compensated for the work they perform. *E.g.*, *UNE Remand Order* ¶ 193 (recognizing incumbent LEC's right to recover costs, even if network today would not require incumbent to incur them).

[94] 47 U.S.C. § 153(30); 47 C.F.R. § 52.1(k).

lines in Washington are now LNP capable, comments and discussion during the Workshops focused on LNP, as opposed to INP.[95]

Unlike most provisions of the Act in which the FCC and state commissions have joint authority over the issue, the FCC has exclusive authority over LNP. The express language of Section 251(b)(2) so states: all LECs shall have the "duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." In its Third and Fourth Orders on Telephone Number Portability, the FCC itself recognized that it has primary jurisdiction over LNP.[96] Thus, state commissions are not free to impose LNP obligations beyond FCC rules.

In the Direct and Rebuttal Testimony of Margaret S. BumgarnerQwest demonstrated its compliance with the FCC's number portability requirements and that it has implemented these requirements in its SGAT and Commission-approved interconnection agreements. Qwest has made substantial revisions to its SGAT provisions relating to LNP to accommodate most of AT&T's and WCom's suggestions. A few issues, however, remain at an impasse. However, unless these impasse issues demonstrate that Qwest does not comply with FCC number portability rules, that is the end of the matter. The Commission cannot supplement those rules.

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[95] FCC regulations required LNP deployment in the 100 largest metropolitan statistical areas (MSAs) according to a phased implementation schedule that extended through December 1998. The FCC's LNP schedule included ten MSAs in Qwest's region, including the Seattle and Tacoma MSAs. 47 C.F.R. § 52.23(b)(1). For exchanges outside the top 100 MSAs, beginning January 1, 1999, LECs were to make LNP available within six months after a bona fide request was received. 47 C.F.R. § 52.23(c).

[96] Fourth Memorandum Opinion and Order on Reconsideration, *In the Matter of Telephone Number Portability*, 14 FCC Rcd 16459 ¶ 9 n.31 (stating that the FCC determined in Third Memorandum Opinion and Order that it had exclusive jurisdiction over long term number portability).

1. Disconnection of Qwest Service on the Date of the Number Port (10.2.2.4.1, 10.2.5.3 and 10.2.5.3.1; Issues Log ID No. WA-11-1).

Number portability can occur in one of two ways: (1) with a Qwest unbundled loop and (2) when the CLEC uses its own loop. In either circumstance, it is Qwest's policy and practice to disconnect the customer from Qwest's systems late on the day of the number porting. This is industry standard and practice, ensures that updated information is sent to the 911 database, and avoids double billing the customer.

Qwest's disconnection process has worked well for all carriers that complete their side of the number porting on time. Carriers that fail to complete their work as scheduled and fail to timely notify Qwest, however, have their customers disconnected from Qwest before the number porting is complete making it impossible for them to receive incoming calls. AT&T has proposed language in SGAT Section 10.2.5.3.1 that would require Qwest to disconnect the customer at 8:00 p.m. ***on the day after the due date***. Qwest objects to this change.

By way of background, to port a number when the CLEC is providing the loop, all Qwest must do is preset an AIN trigger notifying the network that the number is about to port. The CLEC must then complete the number port and connect its loop to the customer's inside wire so calls can complete. In essence, the capability to port numbers is pre-provisioned by Qwest, and Qwest relies on the CLEC to provide the service on time. When the CLEC cannot complete its work as scheduled, all it must do to avoid problems is notify Qwest that it cannot complete the port before 8:00 p.m. on the due date. The CLEC has virtually all day to notify Qwest. Once it gets to 8:00 p.m., however, it is too late to manually stop the disconnect.

Qwest opposes AT&T's proposal for several reasons. First, there is no authority that would require Qwest to take this extra measure in provisioning LNP. It is not required of

Qwest as a prerequisite to compliance with a checklist item. Second, Qwest incurs costs in providing this service and should be compensated by the CLEC who benefits from the service. Qwest should not be required to provide this costly service for free as AT&T requests. Third, AT&T's suggested alternative is contrary to accepted industry practice. It causes downstream service order completion problems involving billing, and, and perhaps most importantly, prevents the 911 emergency service database from being updated in a timely manner. All service providers participating in the North American Numbering Council's Local Number Portability Working Group (LNPA) and LNPA's National Number Porting Operations Team use procedures similar to Qwest's. Moreover, the National Emergency Number Association ("NENA") has raised concerns with the FCC's North American Numbering Council's LNPA regarding updating of the 911 database when numbers are ported. A voluntary NENA standard requires that the 911 database be updated on the business day of Number Portability Administration Center ("NPAC") activation (i.e., service order completion date).[97] Finally, the level of coordination requested by AT&T is unprecedented. As AT&T concedes, is beyond that which any ILEC in the industry currently offers. Indeed, the technology for such coordination does not currently exist.[98]

Only two CLECs in Qwest's entire region have experienced difficulties with this process – AT&T is one. Qwest asserts that it is AT&T's processes that must change, not Qwest's. Qwest's current practice is appropriate and comports in all respects with industry standardss and FCC requirements.

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97 See NENA's Issue Statement to NANC LNP Administration Working Group, March 27, 2000, www.fcc.gov/ccb/Nanc and www.nena9-1-1.org).

98 Transcript Volume X at 1170-71. The other option of course is to have technicians monitor the cutover manually, but AT&T claims that the managed cut is too costly in that it requires CLECs to pay for Qwest personnel to be present by phone during the cutover.

2. Porting of Unassigned Numbers ("UNP") (10.2.2.13 and 10.2.2.15; Issues Log ID No. WA-11-2A).

The parties are also at impasse with respect to SGAT §§ 10.2.2.13 and AT&T's proposed § 10.2.2.15. AT&T claims that contrary to FCC standards, Qwest should be required to port "unassigned numbers" and "reserved numbers." Contrary to AT&T's assertions, not only has the FCC refused to require such number porting, but the FCC has refused to allow state commissions to order such number porting in their states. Qwest relies on the following FCC language in support of its refusal to port unassigned numbers:

> 229. In our orders considering state petitions for delegations of authority to implement ITN and UNP, we declined to grant state commissions the authority to implement these two optimization measures. Our determination in this regard was based on the lack of final technical and administrative standards for both these methodologies and the potential for disruptions in carrier systems.
>
> 230. *We reiterate our finding that UNP and ITN are not yet sufficiently developed for adoption as nationwide numbering resource optimization measures and conclude that ITN and UNP should not be mandated at this time*. We also remain concerned with the impact of UNP on carriers' ability to control their own number inventories and forecast future numbering needs. We are also concerned with UNP's and ITN's potential impact on companies' switching systems and OSS mapping logic, if these methodologies lead to significant number porting. Furthermore, we are concerned that implementing UNP now might complicate the effort to move to thousands-block pooling, and carriers' efforts to preserve uncontaminated, or minimally contaminated, blocks of numbers may be undermined. *For the aforementioned reasons, we also decline to delegate to state commissions authority to order UNP and ITN in their states.*[99]

As stated above, LNP is a matter in which the FCC rules control.[100] Thus, states are not free to create LNP requirements. Moreover, here the FCC has specifically denied the

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[99] Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Numbering Resource Optimization,* CC Docket No. 99-200, (FCC 00-104), at ¶229-230 (rel. March 31, 2000) (emphasis added). See generally, Exhibit 299.

[100] See 47 U.S.C. § 251(b)(2).

states authority to order the use of UNP as a numbering resource optimization measure. Also, UNP was not required by the FCC when it authorized Texas and New York's Section 271 applications. The FCC has not required UNP in any of its orders. To the contrary, to date it has rejected UNP altogether. Because the provision of this service is not required, Qwest's choice not to provide it has no effect on its compliance with checklist item 11.[101]

3. Service Intervals for LNP (10.2.5.2; Issues Log ID No. WA-11-3).

SGAT Section 10.2.5.2 provides standard due date intervals for the provisioning of LNP. AT&T agrees with most of the intervals, but disagrees with a few. Qwest's proposed intervals as compared to AT&T's demands are as follows:

NUMBER OF LINES	QWEST INTERVAL	AT&T INTERVAL
1-24 Lines	5 business days	4 business days
25-49 Lines	10 business days	4 business days
50 Lines or More	ICB	ICB[102]

The parties are at virtually the same interval, except the middle provisioning interval, which Qwest believes should be 10 days, and AT&T claims should be 4 days.

Qwest's intervals reflect the amount of time that Qwest believes is necessary to accurately verify the information contained in LNP orders.[103] Qwest witness Margaret Bumgarner presented a table establishing that the LNP intervals contained in the SGAT are

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[101] To the extent that WCom and AT&T argue that UNP for reserved numbers must be afforded to CLECs as a matter of parity, Qwest notes that it has added language to its SGAT that provides that Qwest will no longer reserve numbers for its customers. See SGAT § 10.2.2.13.

[102] AT&T states that a project basis is appropriate for orders of 51 lines or more. Exhibit 381, Wilson Affidavit on Number Portability at ¶ 20.

[103] Transcript Volume X at 1159-60.

comparable to those being offered by Verizon and BellSouth.[104] AT&T, on the other hand, did not present any evidence justifying its intervals. Instead, it simply argued that Qwest should be able to complete the work more quickly. Given that the FCC has already considered and accepted similar intervals of other BOCs, the Commission should adopt Qwest's intervals.

In sum, Qwest has successfully deployed long-term number portability according to the Act and the FCC's rules and schedule. LNP is currently available to all of Qwest's access lines in Washington. Qwest has documented processes and procedures for implementation of number portability and has continued to evolve those processes to improve the provisioning of number portability. The Commission should therefore verify Qwest's compliance with checklist item 11.

C. CHECKLIST ITEM 14: RESALE

Section 271(c)(2)(B)(xiv) requires BOCs to make telecommunications services "available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)."[105] Pursuant to Section 251(c)(4), incumbent LECs must "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers," and may not place any "unreasonable or discriminatory conditions or limitations" on the services that they offer for resale.[106] Section 252(d)(3) provides that wholesale rates should be determined by the state commission based on retail rates less costs avoided by the LEC. Qwest has demonstrated

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[104] SGAT Exhibit C. See generally, January 3-5 Workshop Exhibt 492.

[105] 47 U.S.C. § 271(c)(2)(B)(xiv).

[106] 47 U.S.C. § 251(c)(4)(A)-(B). The FCC rule regarding restrictions on resale is contained in 47 C.F.R. § 51.613. Subpart (a) of that rule permits specific restrictions on resale with respect to cross-class selling and short term promotions. Subpart (b) provides that additional restrictions are permitted if the incumbent proves to the state commission that they are reasonable and nondiscriminatory.

through the Direct and Rebuttal Testimony of Lori A. Simpson that Qwest complies with these requirements and has implemented these duties through its SGAT and Commission-approved interconnection and resale agreements.

1. Issues Raised by MetroNet Regarding SGAT Sections 6.2.2.7 and 6.2.2.9 (Issues Log ID No. WA-14-3 and WA-14-B).

MetroNet has raised several issues regarding Qwest's compliance with its resale obligations under the Act and has proposed changes to SGAT §§ 6.2.2.7 and 6.2.2.9. MetroNet's central claim is that Qwest's *retail tariffs and price lists* contain an unreasonable restriction on resale because the features associated with Centrex Plus service are discounted based on the number of Centrex Plus feature packages that are provided at a single geographic location rather than across an entire Centrex Plus system. MetroNet's claims are without any legal basis for the simple reason that MetroNet purchases services from Qwest's *retail tariffs*, not as a wholesale customer pursuant to an interconnection agreement. Accordingly, MetroNet's complaints are entirely unrelated to checklist item 14 – resale.

Even if MetroNet were complaining as a wholesale purchaser under the Act, Qwest disputes MetroNet's claim that Qwest's retail terms and conditions operate as an unreasonable or discriminatory limitation on resale. Qwest allows reseller CLECs to resell Centrex Plus at the 14.74% wholesale discount the Commission approved. Additionally, Qwest offers all other products in the Centrex family of services for resale at the Commission-ordered discount, including Centrex Prime and Centrex 21.

MetroNet suggested for the first time in the January 2001 follow-up workshop that SGAT § 6.2.2.7 should be deleted. Section 6.2.2.7 provides:

> Qwest will make Contract Service Arrangements (CSA) available for resale at the wholesale discount rate specified in Exhibit A of this Agreement. All terms and conditions (except prices) in Qwest's applicable Tariffs, Catalogs, Price Lists, or other retail Telecommunications Services offerings will apply to resale of CSAs, including early termination liability. Nothing in this Agreement shall affect any obligation of any Qwest retail end user that early terminates a CSA, including payment of any early termination charges.

The basis for MetroNet's proposal is not clear on the record. However, it appears from MetroNet's comments that there is concern that Section 6.2.2.7 might be duplicative of MetroNet's proposed revised Section 6.2.2.9. Qwest disagrees with the proposal to delete Section 6.2.2.7 because these sections are not duplicative, and because Section 6.2.2.7 contains lawful and proper terms with regard to resale of CSAs.

Even if MetroNet's inappropriate changes to the terms and conditions for resale of Centrex Plus service were accepted (discussed in greater detail below), Section 6.2.2.7 applies *in addition* to Section 6.2.2.9. In Section 6.2.2.7, Qwest agrees to make retail CSAs available for resale at the wholesale discount rate. Section 6.2.2.7 states that nothing in the SGAT affects any obligation of any Qwest retail end user to pay early termination charges that might be present in a CSA if the retail end user elects to terminate service early and transfer to a CLEC. This Commission has previously approved termination liability provisions in CSAs and has rejected requests by CLECs to institute a "fresh look" provision.[107] Furthermore, the FCC has approved at least two applications for interLATA authority under Section 271 wherein the incumbent imposed termination liability on retail

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[107] See Docket No. UT-991476.

end users in a manner similar to Qwest.[108]

Additionally, Section 6.2.2.7 contains terms and conditions related to resale of any and all retail CSAs, not just CSAs for Centrex service. Thus, nothing in Section 6.2.2.7 of the SGAT is duplicative of any of the issues raised by MetroNet under Section 6.2.2.9. It is clear that Qwest SGAT language in Section 6.2.2.7 applies in addition to language in Section 6.2.2.9, even if modified, and Section 6.2.2.7 is compliant with applicable law. It is not necessary to change or delete that section.

Section 6.2.2.9 of the SGAT contains the provisions regarding resale of Centrex services. MetroNet's proposed changes to this section reflect its desire to be permitted to aggregate features for purposes of obtaining a volume discount in a way which is not currently authorized by Qwest's retail tariffs or price lists. MetroNet claims that unless it is permitted to obtain a volume discount based on the aggregated quantity of all its Centrex Plus features that terminate in each Qwest wire center ("per-system" aggregation), as opposed to obtaining a volume discount based on the aggregated quantity of its Centrex Plus features that terminate at each of its end user geographic locations ("per-location" aggregation), then Qwest has imposed an unreasonable restriction on resale. It is important to note that aggregation of features on a "per-system" basis rather than on a "per-location" basis is contrary to the terms and conditions sets forth in Qwest's retail price list for Centrex Plus Service, Section 9.1.16 B.12.

Centrex Plus features have been competitively classified for many years and are

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[108] *SBC Kansas-Oklahoma Order* ¶ 253; Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, 15 FCC Rcd 3953 ¶¶ 384-91 (Dec. 22, 1999) ("*Bell Atlantic New York Order*").

therefore price listed rather than tariffed.[109] A Commission determination that a telecommunications service should be competitively classified means that the Commission has determined that there is effective competition for the service at issue.[110] Furthermore, such a Commission finding must be accepted as conclusive for purposes of this proceeding, since those orders were not appealed and have long since become final. The fact that the Centrex Plus features in question have been competitively classified and are thus being provided in a market that has been determined to be effectively competitive is an important factor in determining whether any terms and conditions associated with those features unduly or unreasonably limit resale. As stated above, the FCC has determined that certain restrictions on resale are permissible, where the incumbent proves to the state commission that such restrictions are reasonable and non-discriminatory.

The price listed terms and conditions are not, of course, a *per se* restriction on resale. The terms and conditions contained in the price list are applicable to all purchasers under that price list, resellers and end users alike. Indeed, Qwest is being entirely non-discriminatory when it allows/requires MetroNet to purchase from its tariffs and price lists under precisely the same terms and conditions as its retail end users. MetroNet agrees that it currently purchases services for resale as a "retail" Qwest end user, and not as a CLEC under a "wholesale" resale contract. MetroNet further agreed that the price listed terms and conditions regarding aggregation of features on a per-location basis for purposes of pricing would apply to a retail purchaser in exactly the same manner as they apply to MetroNet.[111]

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[109] 1987 Wash. UTC LEXIS 112; 83 P.U.R. 4th 380 (4th Supplemental Order in Cause No. U-86-34, et al., April 7, 1987); 1993 Wash. UTC LEXIS 106 (4th Supplemental Order in Docket Nos. UT-911488 et al., November 18, 1993).

[110] RCW 80.36.330.

[111] Transcript Volume XIX at 2674-5.

Thus, the terms and conditions which MetroNet claims are unreasonably limiting or discriminatory are not *per se* "restrictions on resale."

Nevertheless, MetroNet argues that those terms and conditions operate as an effective limitation on resale, citing the FCC's *Local Competition Order* ¶ 953.[112] Qwest believes that the more applicable discussion in the FCC's *Local Competition Order* is contained in ¶ 939. There, the FCC discussed restrictions on resale in general, noting that the policy reason behind prohibiting such restrictions had to do with controlling an incumbent LEC's exercise of market power. The FCC stated:

> [T]he ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position. *In a competitive market, an individual seller (an incumbent LEC) would not be able to impose significant restrictions and conditions* on buyers because such buyers turn to other sellers.[113]

This discussion provides valuable guidance in resolving the issues raised by MetroNet. The FCC recognized that a competitive market would not support unreasonable or discriminatory restrictions on buyers. Thus, it was the exercise of LEC market power in a non-competitive market that the FCC sought to constrain by establishing the presumption that resale restrictions are unreasonable. Directly relevant to this discussion is the conclusion noted above that Centrex Plus features are *competitive* services. As further noted above, such competitive classification establishes for purposes of this proceeding that those services are subject to effective competition. From that premise, it follows that terms and conditions that can be imposed upon buyers in a competitive market are presumptively reasonable because a

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[112] There, the FCC stated that it believes that restrictions on resale of volume discounts will frequently produce anti-competitive results without sufficient justification. The FCC concluded that such restrictions should be considered presumptively unreasonable. This paragraph is not applicable to Qwest's pricing of Centrex Plus features because the cited provision discussed only volume discounts and not limitations which require volumes to be at a single location.

[113] *Local Competition Order* ¶ 939 (emphasis added).

competitive market would not allow unreasonable terms and conditions. As such, it must be concluded that because Centrex Plus features are competitive, the terms and conditions associated with the purchase of Centrex Plus features are reasonable.

Additionally, MetroNet claims that Exhibits 475-C through 486-C support its allegation that Qwest's pricing of Centrex Plus features is an intentional and discriminatory limitation on resale. Qwest disagrees completely with this allegation. As pointed out in Qwest's earlier filing, many of these documents date from the 1995, 1996 and 1997 time frame. As such, they cannot operate four, five, and six years later to show any current thinking or strategy with regard to Centrex Plus or resale. Further, although many of the documents appear to contain preliminary discussions about possible strategies, there is no evidence that any of them were either adopted or implemented in Washington. Indeed, there are indications that some were not. For example, Exhibit 481-C shows a proposal for repricing Centrex Plus in Washington, dating from 1997. A comparison of the rates contained in that document with the current rates in effect in the price list and tariff shows that the proposed prices were never implemented.

The documents do show that then-U S WEST recognized resellers as a source of effective competition for Centrex and 1FB customers. Additionally, it is clear that some of these documents contain discussions with regard to competitive response or "winback" strategies. However, the 1996 Act anticipated and encouraged competition in the local telecommunications market. It would be quite surprising if Qwest's internal documents dating from that time period did not make mention of and acknowledge the existence of competitors. Further, they, not surprisingly, contained lawful strategies to retain retail customers and/or increase Qwest's retail revenues.

Additionally, some of these documents may acknowledge, either expressly or implicitly, that Centrex Plus resellers enjoyed two separate opportunities for discount: the wholesale discount ordered by the Act; and, the opportunity to purchase lower priced Centrex

Plus services and resell those services to end user customers who might otherwise subscribe to the higher priced business lines. None of that is improper, and none of that demonstrates an attempt to unreasonably restrict resale or to impose discriminatory limitations on resale. Indeed, as noted in some of the documents (Ex. 478-C, first paragraph, "there are no restrictions on [Centrex 21] resale"), and as acknowledged by MetroNet's witness, all of the Centrex services that Qwest offers are available for resale, including Centrex 21 and Centrex Prime. While MetroNet's witness expressed concerns about whether or not Centrex 21 and Centrex Prime were good products to resell relative to Centrex Plus, those concerns relate to MetroNet's own business considerations and opinions, its marketing strategies, and its end user customers' needs; there are no legal impediments to the resale of those services. Thus, Qwest reiterates that MetroNet's claims about these documents are simply unfounded, and any support for its contentions that MetroNet thinks it gains from these exhibits is illusory.

MetroNet has also suggested that Qwest's previous attempts to "grandfather" its Centrex Plus service should be viewed as an attempt to unreasonably restrict resale and competition. Qwest strongly disagrees with this contention. MetroNet's position is not well founded and finds no support in FCC orders. To the contrary, in the *Local Competition Order*, the FCC specifically held that an attempt by an incumbent LEC to withdraw a service was exempt from the presumption of unreasonableness which generally applies to restrictions on resale.[114] The FCC stated "we conclude that our general presumption that incumbent LEC restrictions on resale are unreasonable does not apply to incumbent LEC withdrawal of service."[115] As such, this Commission should reject MetroNet's suggestion that Qwest's attempts to grandfather services is an attempt to unreasonably restrict resale.

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[114] Id. ¶ 968.

[115] Id.

MetroNet has proposed changes to Qwest's SGAT §§ 6.2.2.7 and 6.2.2.9 that are not required under the Act or the FCC's prior rules or rulings on resale, and those proposed changes should be rejected. In addition, MetroNet raised a number of issues not directly related to the SGAT or Qwest's compliance with Qwest's resale obligations under the Act or under the FCC's rules and orders. These issues are not sufficiently well developed on the record in this Workshop to form a basis for any Commission decision.[116] Qwest and MetroNet have stipulated that several of these issues, listed in the Commission Staff's 271 Workshop issues log, need not be discussed or resolved in this proceeding. These issues include the "featureless line", and the dispute regarding the $20 versus the $48 nonrecurring charge for conversion of customers.[117]

2. Stand-Alone Provisioning of Megabit Service (6.2.2.11; Issues Log ID No. WA-14-12).

DSL service is high speed Internet access over a twisted-pair telephone line. Several carriers in the market (called "DLECs") have devoted their entire business plan to offering such services to customers. Qwest's DSL product offering is called "Megabit," which is offered to customers with "plain old telephone service," or POTs, over the same loop. Qwest offers its Megabit product to CLECs pursuant to the resale provisions of the Act. Furthermore, Qwest agreed to delete SGAT § 6.2.2.11, which provided that Megabit service was available for resale to end-users from Qwest's interstate tariff, in response to AT&T claims that because the service may be resold from both the interstate and the intrastate tariff, Section 6.2.2.11 was unnecessary.

Since resolving this issue, however, AT&T has asked Qwest to offer its Megabit service for resale on a stand-alone basis -- i.e., without the voice portion of the line that

[116] See also the discussion in footnote 43 regarding the appropriateness of trying to resolve fact intensive interpretive disputes in 271 proceedings.

[117] See e-mail dated 1/19/01 from MetroNet's counsel, to all parties and Commission Staff.

always accompanies Qwest's retail product offering. Megabit service is provided over a portion of the high frequency spectrum of the line, which allows the voice service to be provided without degradation in voice service. These services are *always* provided to Qwest's retail end users bundled together. Qwest does not offer its retail subscribers a stand-alone version of Megabit.

The Act requires Qwest to offer to CLECs, at a wholesale discount, "any telecommunications service that [Qwest] provides at retail to subscribers that are not telecommunications carriers."[118] Thus, Qwest must only offer CLECs the *same* service that it offers its own retail end users, without placing "unreasonable or discriminatory conditions or limitations" on such services.[119] Stated differently, Qwest has no obligation to resell a product or service that it does not provide at retail to subscribers that are not telecommunications carriers.[120] The FCC has been crystal clear: "section 251(c)(4) *does not impose on incumbent LECs the obligation to dissaggregate a retail service into more discrete retail services*. The 1996 Act merely requires that any retail services offered to customers be made available for resale."[121] Because Qwest does not offer its Megabit service on a stand-alone basis to its retail end users, it is not required to dissaggregate it for CLECs.

3. Indemnification (6.2.3.1 and 6.2.3.2; Issues Log ID No. WA-14-14).

Section 6.2.3 of the SGAT describes Qwest's quality of service obligations. AT&T has proposed that language be added to this section that would require Qwest to indemnify

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118 47 U.S.C. § 251(c)(4)(B).

119 Id.; see also *SBC Texas Order* ¶ 389 (in discussing SBC's compliance with checklist item 14, the FCC notes that SBC commits to resell telecommunications services that are "identical" to those that it provides its own retail end users).

120 *Bell Atlantic New York Order* ¶ 394 ("As Bell Atlantic points out, it does not offer flat-rate telephone service in New York at retail to subscribers who are not telecommunications carriers, and therefore Bell Atlantic is under no obligation to provide such services for resale under the statute.").

121 *Local Competition Order* ¶ 877 (emphasis added).

CLECs from all damages and liability, should Qwest fail to meet its quality of service obligations.[122] Qwest already has discussed AT&T's request for indemnification on interconnection service above, and Qwest reiterates those points here. There is no legal precedent for subjecting an incumbent to such liability in the context of an SGAT and it is certainly not a requirement of checklist item 14 that Qwest be subject to this sort of liability. Accordingly, Qwest is opposed to the addition of this language to the SGAT.

Here, further indemnification is even more inappropriate. In an effort to accommodate AT&T's concerns regarding recourse for problems that are caused by services provided by Qwest, Qwest has agreed to modify its SGAT to provide to reseller CLECs, that are subject to a state's quality of service rules, reimbursement or credits for payment the CLECs may make to their end users under those rules, subject to the wholesale discount.[123] Qwest believes that this approach is appropriate under the Act because it places the reseller CLECs at parity with Qwest's retail end-users.

The parties have reached an impasse with respect to several aspects of Section 6.2.3.1. First, AT&T objects to subpart (a) which provides that fines and penalties paid to CLECs are subject to the wholesale discount. For instance, if it is determined that Qwest has violated its quality of service conditions, Qwest must credit the reseller CLEC with the amount that the reseller CLEC paid Qwest for the service; Qwest's retail rate minus the wholesale discount. AT&T argues that Qwest should be forced to credit the CLEC the amount of money that the CLEC charged the end-user. AT&T's demand is unreasonable. Qwest will stand behind the quality of its services to the extent that its CLEC customers pay for them. In a resale context, Qwest's customer is the CLEC, not the CLEC's end-user. Quality of service violations attributed to Qwest should trigger a credit in the amount that Qwest received in exchange for

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[122] Exhibit 371, Wilson Affidavit at para. 256.

[123] SGAT § 6.2.3.1.

providing that service, not an unknown marked-up price over which Qwest has no control. This Commission's own regulations provide that state service quality rules "are not intended to establish a standard of care owed by a telecommunications company to any consumer(s) or subscriber(s)."[124] To refund credit in the amount that the consumer paid would, in effect, establish a standard of care with respect to the end-user, as opposed to the party with which Qwest has a relationship (i.e., the CLEC).

AT&T also takes issue with subpart (e) of Section 6.2.3.1, which provides: "In no case shall Qwest be required to provide duplicate reimbursement or payment to CLEC for any service quality failure incident." Qwest asserts that this provision is both reasonable and necessary. The ROC is currently drafting a post-271 performance plan that will subject Qwest to fines and penalties for quality of service violations. It is unreasonable and unduly punitive to subject Qwest to two redundant penalties for one quality of service problem. Absent the limitation contained in Section 6.2.3.1(e), CLEC resellers would be permitted to recover twice: once through the PEPP and once through the SGAT. Section 6.2.3.1(e) avoids this improper double-recovery.[125]

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[124] WAC 480-120-500(3).

[125] The Settlement Order issued by this Commission in the U S West/Qwest merger proceedings contains a similar limitation. The Order provides that customer specific remedies for CLECs experiencing problems with Qwest's provisioning intervals, ". . . are not intended to duplicate any remedies available to a CLEC under an interconnection agreement between the CLEC and Company. A CLEC may, at its discretion, choose to receive remedies under this Agreement or its interconnection agreement for any Company failure to comply with provisioning intervals." Thus, this Commission has recognized that it would be unreasonable to allow a CLEC to receive duplicate remedies for a single incumbent LEC compliance failure. Settlement Agreement, *In Re Application Of U S WEST, Inc. and Qwest Communications International, Inc. for an Order Disclaiming Jurisdiction or, in the Alternative, Approving the U S WEST, Inc. – Qwest Communications International, Inc. Merger*, Docket No. UT 991358, at 20 (entered May 22, 2000).

4. Forecast Information (6.2.5; Issues Log ID No. WA-14-4, WA-14-5, and WA-14-6).

Section 271 is designed to ensure that Qwest's local markets are irrevokably open to competition before it begins offering long distance service. In addition to meeting the requirements of Track A or Track B, Qwest must meet all of the requirements of the competitive checklist in Section 271(c)(2)(B). To make its *prima facie* showing that it meets its obligations to provide each checklist item, Qwest must establish that it is currently furnishing, or is ready to furnish, the checklist item in quantities that comnpetitors may reasonably demand and at an acceptable level of quality.[126] Once Qwest has met its Section 271 burden and can offer interLATA services in Washington, the FCC expects Qwest to continue to comply with the checklist requirements, including its duty to meet CLEC demand.[127] As discussed above, the ROC is currently developing a PEPP that will prevent Qwest from "backsliding" on its commitments. Thus, failure to maintain its obligations will subject Qwest to substantial automatic fines and penalties under its PEPP. To assist Qwest with accommodating future demand, Section 6.2.5 of the SGAT requires reseller CLECs to provide Qwest with some basic information about the CLEC's expected demand for services subject to Section 251(c)(4).

The parties have reached impasse with respect to three aspects of Section 6.2.5, none of which affects Qwest's compliance with checklist item 14. First, AT&T proposes SGAT amendments requiring Qwest to provide forecasting information to CLECs.[128] Specifically, AT&T demands that Qwest provide it with information about the maximum number of service orders that Qwest's OSSs can manage in any given day. There is no justification for

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[126] *Second BellSouth Louisiana Order* ¶ 54.

[127] *Bell Atlantic New York Order* ¶ 16.

[128] Exhibit 371, Wilson Affidavit (Oct. 10, 2000) at para. 258.

requiring an incumbent LEC to provide forecasts to CLECs. As explained in Ms. Simpson's Rebuttal Testimony,[129] reseller forecasts provided to Qwest under Section 6.2.5 of the SGAT enable Qwest's wholesale and network operations staff to project the needs of CLECs so that Qwest is able to meet its obligations under Section 251(c)(4).[130] CLECs, in marked contrast, are not subject to the same requirements. Qwest has the obligation to expand the system capability to meet expected demand, and will comply with that obligation. Furthermore, the ROC testing process will ensure that Qwest's OSS can meet the reasonably foreseeable demand of CLECs.

AT&T claims that Qwest forecasting information is necessary to enable AT&T to ascertain the maximum number of orders that it could submit on any given day. Such information might be useful *if* AT&T were the only CLEC accessing Qwest's OSS. It is meaningless, however, when multiple CLECs (who have no obligation to provide AT&T with any information) are simultaneously accessing Qwest's OSSs. Whereas Qwest needs CLEC forercasting information to meet overall CLEC demand, AT&T cannot put its partial information to any appropriate use. Indeed, AT&T's request seemed designed more to badger Qwest or assist AT&T in formulating its arguments in opposition to Qwest's Section 271 application than to meet a legitimate competitive requirement.

Second, AT&T argues that it should not be required to provide forecasts of its POTS requirements. Qwest's obligation (and desire) to meet the reasonably foreseeable demand of CLECs, however, does not stop with POTS. Qwest's ability to meet the needs of its wholesale customers for *all* services is dependent on accurate forecasting. Without sufficient information, all carriers will be harmed: (1) Qwest could be forced to pay PEPP penalties for failing to meet demand it could not foresee without forecasts; (2) CLEC orders could be

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[129] Exhibit 414, Rebuttal Testimony of Lori A. Simpson re: Checklist Item 14, at 17-20.

[130] Id. at 20.

delayed for lack of system capability; and (3) end-user customers will suffer delayed service. Provision of basic CLEC forecast information, even for POTs, mitigates against all of these concerns.

Finally, even though AT&T agreed to Section 6.2.5 in other state proceedings, it refused to adopt the same language in Washington unless Qwest agrees to provide CLECs with its OSS volume and transaction capability information. These matters, however, are unrelated, and AT&T's position regarding the exchange of OSS information is not a valid reason to impede consensus on the resale forecasting issue. The Commission should see through AT&T's transparent attempt to hold this issue hostage and adopt Section 6.2.5 in its entirety.

5. Marketing Services and Products to End-Users Who Mistakenly Call a Carrier is Within a Carrier's Right to Commercial Free Speech.

Section 271 promotes competition across all segments of the telecommunications industry – local and long distance alike. Despite this universal recognition, AT&T asserts that Qwest should not be permitted to market its products and services to all customers, and specifically, CLEC customers who mistakenly contact Qwest's business or repair office. By definition, denying Qwest the ability to market to a subset of consumers constitutes a limitation on competition. AT&T cites no legal authority in support of this position. To Qwest, AT&T's position imposes an inappropriate restriction on commercial free speech.

AT&T demands that carriers discuss their products and services only with customers who call them specifically "seeking such information."[131] AT&T's restrictions would prohibit carriers from marketing services and products unless the caller specifically asks for such information. In response to CLEC concerns, Qwest made several SGAT revisions to Sections 6.4.1 and 6.6.3 (Issues Log ID No. WA-14-7) to address marketing issues. For

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[131] Transcript Volume XIII at 1718.

example, Qwest agreed that carriers must refer such callers to their current local service provider, and that carriers must refrain from making disparaging comments about that end user customer's current provider.[132] Nothing, however, should curtail any LEC's ability to disseminate truthful, accurate information about their products and services. The First Amendment to the Constitution requires nothing less.

Commercial speech is "expression related solely to the economic interests of the speaker and its audience."[133] If commercial speech is accurate, nonmisleading, and about a lawful activity, then the First Amendment protects its dissemination.[134] Constitutional protection for commercial speech is premised upon core First Amendment values and the free enterprise system:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[135]

Protection of commercial speech is vital not only to Qwest and CLECs as speakers, but also to consumers as the recipients of information. Freedom of commercial speech allows the decision-makers (here end-user customers) to be "intelligent" and "well-informed.[136] Even a regulated public utility enjoys full protection of its commercial speech,

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[132] Exhibit 414, Simpson Rebuttal, at 30.

[133] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York,* 447 U.S. 557, 561, 100 S. Ct. 2343, 2349 (1980).

[134] 447 U.S. at 561-64, 100 S. Ct. 2349-50 (1980).

[135] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 765, 96 S. Ct. 1817, 1827 (1976).

[136] *Virginia Pharmacy,* 425 U.S. at 765, 96 S. Ct. at 1827.

and any regulation promulgated by a public service commission must be invalidated if it violates that protection.[137] As the Court in *Central Hudson* stated, "[w]e have recognized that the speech of heavily regulated businesses may enjoy constitutional protection . . . Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters."[138]

The marketing of Qwest's products and services is commercial speech, as the ability to freely express Qwest's offerings is to the economic benefit of both Qwest and its potential customer. Qwest proposes to communicate only accurate, nonmisleading information, to which consumers need access to make informed decisions regarding who they will choose as their service provider. End users who mistakenly contact Qwest will not be misled into believing that Qwest is the only local service carrier – to the contrary, they will already be using the services of another LEC.

Qwest's right to speak involves much more than the right to respond to questions by customers; it also involves the right to affirmatively promote its products and services whether or not customers have sought out Qwest to request such information. In *Edenfield v. Fane*,[139] the United States Supreme Court stated:

> In the commercial speech context, solicitation may have considerable value. Unlike many other forms of commercial expression, solicitation allows direct and spontaneous communication between buyer and seller. A seller has a strong financial incentive to educate the market and stimulate demand for his product or service, so solicitation

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[137] *Central Hudson,* 447 U.S. at 534 n.1, 100 S. Ct. at 2331 n.1.

[138] Id.

[139] 507 U.S. 761, 766, 113 S. Ct. 1792, 1797-98 (1993). See also *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.,* 425 U.S. 748, 757, n.15, 96 S. Ct. 1817, 1823 n.15 (1976) (There is "no general principle that freedom of speech may be abridged when a speaker's listeners could come by his message by some other means, such as seeking him out and asking what it is."); *Martin v. City of Struthers,* 319 U.S. 141, 63 S. Ct. 862 (1943) (The first amendment protects right of solicitor to knock on door to summon inhabitants, rather than simply soliciting those who affirmatively invite speaker inside the house.).

> produces more personal interchange between buyer and seller than would occur if only buyers were permitted to initiate contact. *Personal interchange enables a potential buyer to meet and evaluate the person offering the product or service* and allows both parties to discuss and negotiate the desired form for the transaction or professional relation.[140]

The fact that other means of speech are available to Qwest, such as initiating its own calls to customers, does not justify limiting Qwest's ability to market its services to customers who call Qwest. For example, a bill insert or a telemarketing campaign may not reach the same group of customers who initiate calls to Qwest. That is one chief reason why "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[141] As stated by the Supreme Court in *City of Cincinnati v. Discovery Network, Inc.*,[142] the fact that a speaker may have alternative methods to disseminate its speech does not "minimize the significance of the burden" upon the Qwest's rights to free speech, and does not relieve the party seeking to impose the restriction from satisfying the test set out in *Central Hudson.* Moreover, in *Linmark Associates, Inc. v. Township of Willingboro,*[143] the Court rejected a ban on "For Sale" signs, despite the fact that the ban left open alternative channels of communication. The Court observed that advertising real estate in newspapers or agent listings could not *effectively* substitute for

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140 Id.

141 *Schneider v. State*, 308 U.S. 147, 163, 60 S. Ct. 146, 151-52 (1939); see also *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 556, 95 S. Ct. 1239, 1245 (1975) (same).

142 507 U.S. 410, 427, 113 S. Ct. 1505, 1515-16 (1993) (striking down a news rack ban even though the same commercial magazines could be distributed by other means).

143 431 U.S. 85, 97 S. Ct. 1614 (1977).

posting "For Sale" signs – not the least because such alternatives were "*less likely to reach persons not deliberately seeking sales information.*"[144]

The *Central Hudson* test is for an intermediate level scrutiny. First, the Commission must determine whether the speech concerns lawful activity and is not misleading. Second, the Commission inquires whether the government interest asserted in support of banning the speech is "substantial." If these answers are "yes," then the Commission must determine whether the proposed limitation "directly advances the government interest," and whether the restriction on speech is "not more extensive than is necessary to serve the government's interest." AT&T's proposed restrictions on Qwest's speech do not pass this test.

The Commission's purpose and interest in regulating the provision of telecommunications services is to promote competition and protect consumers. The record in these proceedings is devoid of any showing that limiting the *particular speech that Qwest wants to disseminate* during customer-initiated calls *to* Qwest advances the state interest of fostering of a competitive market or protecting consumers. Here, AT&T carries the burden of showing that limiting Qwest's commercial speech advances the state's interest "*in a direct and material way.*"[145] This element "is not satisfied by mere speculation or conjecture"; rather, AT&T must demonstrate that "the harms it recites are real and that its restriction will alleviate them to a material degree."[146]

In fact, AT&T's proposed restrictions affirmatively *disserve* Washington's goals. Prohibiting Qwest from asking consumers whether they want to hear about Qwest's services

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144 431 U.S. at 93, 97 S. Ct. at 1618 (emphasis added). See also *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2038 (1994) (Prohibition on residential signs invalid, even though it did not prevent homeowners from "taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign," or even from displaying flags with written messages.).

145 *Edenfield,* 507 U.S. at 767, 113 S. Ct. at 1798; *Rubin,* 514 U.S. at 486-87, 115 S. Ct. at 1592.

146 *Edenfield,* 507 U.S. at 770-71, 113 S. Ct. at 1800; *Rubin,* 514 U.S. at 487, 115 S. Ct. at 1592.

will not further the operation of a competitive market. Similarly, prohibiting an accurate description of the Qwest's telecommunications services, or the price of Qwest's service, does not foster a competitive environment. It is axiomatic that competition is furthered through the exchange of full information on price, discounts, conditions, and product availability because information gives consumers the tools to make informed choices. Limiting commercial speech limits informed choices. As stated by the Supreme Court in its recent discussion of commercial speech, a prohibition against price advertising "will tend to mitigate competition and maintain prices at a higher level than would prevail in a competitively free market."[147]

AT&T's position assumes that customers are incapable of deciding for themselves whether they even want to hear what Qwest has to say, and if told, might find the message persuasive. The Supreme Court repeatedly has rejected these paternalistic arguments as a basis for sustaining bans on truthful, nonmisleading, and lawful commercial speech. They should likewise be rejected here.

More to the point, AT&T's position rests on speculation. AT&T did not even attempt to put anything into the record (beyond speculation) about the harms that could flow from Qwest marketing to CLEC customers. As the Supreme Court has instructed, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[148] That burden "is not satisfied by mere speculation and conjecture,"[149] or by "anecdotal

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[147] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505, 116 S. Ct. 1495, 1509 (1996) (plurality opinion).

[148] *Edenfield*, 507 U.S. at 770-71, 113 S. Ct. at 1800 (1993).

[149] Id., 507 U.S. at 770, 113 S. Ct. at 1800.

evidence and educated guesses."[150] Qwest's supposed advantage and so-called "captive audiences" are irrelevant under the First Amendment. Indeed, the classic case of a "captive audience" are customers of electric utilities, yet the Supreme Court has made clear that electric utilities have full First Amendment rights in communicating with their customers.[151]

In sum, the Commission should reject AT&T's proposed language that would limit Qwest's ability to market its products and services to end users who call Qwest inadvertently. Regardless of the caller's intent, Qwest's ability to communicate truthful and nonmisleading information to him or her is protected by the First Amendment right to free commercial speech.

CONCLUSION

Qwest has demonstrated that it meets the requirements in the Act and FCC orders for compliance with checklist items 1, 11, and 14 in the direct and rebuttal testimony of Margaret S. Bumgarner, Thomas R. Freeberg, and Lori A. Simpson. The CLECs who commented on the checklist items cannot rebut Qwest's *prima facie* showing of compliance. Accordingly, Qwest requests that the Commission verify Qwest's compliance with Section 271(c)(2)(B)(i), (xi), and (xiv) of the Act.

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150 *Rubin,* 514 U.S. at 490, 119 S. Ct. at 1593.

151 See *Central Hudson*, 447 U.S. at 567-68, 100 S. Ct. at 2352 (1980) ("Even in monopoly makes, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment . . . [A]ppellant's monopoly position does not alter the Fist Amendment's protection for its commercial speech."). See also *Pacific Gas,* 475 U.S. at 17 n. 14, 106 S. Ct. at 912 n. 14 (1986) (plurality opinion) (expressly rejecting the argument that "appellant's status as a regulated utility company lessens is right to be free from state regulation that burdens its speech"); *Consolidated Edison,* 447 U.S. at 534 n.1, 100 S. Ct. at 2331 n. 1 (1980) ("We have recognized that the speech of heavily regulated business may enjoy constitutional protection . . . Consolidation Edison's position as regulated monopoly does not decrease the informative value of its opinions on critical public matters.").

DATED this 25th day of January, 2001.

Respectfully submitted,

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