BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application of QWEST COMMUNICATIONS INTERNATIONAL, INC. AND CENTURYTEL, INC. For Approval of Indirect Transfer of Control of Qwest Corporation, Qwest Communications Company LLC, and Qwest LD Corp. ……	)))))))))))	Docket No. UT-100820

EXHIBIT BJJ-2

TO THE

RESPONSIVE TESTIMONY

OF

BONNIE JOHNSON

ON BEHALF OF INTEGRA TELECOM

September 27, 2010

STATE OF MINNESOTA
BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

David Boyd	Chair
J. Dennis O'Brien	Commissioner
Thomas Pugh	Commissioner
Phyllis Reha	Commissioner
Betsy Wergin	Commissioner

In the Matter of a Commission Investigation into Qwest Corporation's Provision of Network Elements to CLECs and into Related Marketing Practices Targeting CLEC Customers	MPUC Docket No. P-421/CI-09-1066

JOINT CLEC INITIAL COMMENTS

November 24, 2009

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I. INTRODUCTION

A. Procedural Background

Pursuant to the September 17, 2009 Order Opening Investigation and Moving Complaint Issues into Investigatory Docket ("Order Opening Investigation") in this matter, Integra Telecom of Minnesota, Inc. and Eschelon Telecom of Minnesota, Inc.[1] (collectively referred to as "Integra"), Popp.Com ("Popp.com"), Velocity Telephone, Inc. ("Velocity"), US Link, Inc., d/b/a TDS Metrocom, LLC ("TDSM") and McLeodUSA Telecommunications Services, Inc., a PAETEC company ("McLeodUSA" or "PAETEC") (collectively "Joint CLECs") submit these Initial Comments. Joint CLECs raise the issues in these Comments pursuant to their interconnection agreements ("ICAs"), Sections 251 and 252 of the Telecommunications Act of 1996 (the "Act"),[2] and Minnesota Statutes Chapter 237, as well as the regulations promulgated under these laws. Except for PAETEC (which is currently negotiating a new ICA with Qwest) and Velocity, the Joint CLECs have the same terms in their Minnesota ICAs, unless otherwise noted.[3] The common ICA terms will be referred to in these Comments as the "Arbitrated ICA."[4]

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[1] Integra Telecom purchased Eschelon Telecom in August 2007. In these Comments, the company and its affiliates will be referred to as Integra. However, when addressing actions taken by Eschelon, including before being purchased by Integra, these Comments may refer specifically to Eschelon.

[2] The Telecommunications Act of 1996 amended the Communications Act of 1934, 47 U.S.C. §151 *et seq.* Eschelon refers to these Acts collectively as the "Act." Sections 251 and 252, when referenced in this pleading, refer to sections of the Act.

[3] See Attachment H to these Comments. Attachment H is a list of CLECs in Minnesota, of which Joint CLECs are aware, that have opted into the full Eschelon-Qwest interconnection agreement ("ICA") or have used substantially all of the Eschelon ICA as a base (except essentially Section 7, Interconnection). (Section 7 provides for bill-and-keep compensation for Eschelon; some CLECs use reciprocal compensation.) The Section 7 terms are not cited in these Comments. The remainder of the ICA terms shared by the Joint CLECs, except PAETEC and Velocity, are referred to as the "Arbitrated ICA." Although referred to as the "Arbitrated" ICA, many of the issues relate to language that was agreed upon (closed) without arbitration of that language.

[4] See Arbitrator's Report, *In the Matter of the Petition of Eschelon Telecom, Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. §252(b)*, MPUC Docket No. P-5340, 421/IC-06-768 ("Minnesota Arbitration"), adopted as modified by the MPUC in its Order Resolving Arbitration Issues (March 30, 2007). Integra and other CLECs have since opted in to the Qwest-Eschelon ICA. See Attachment H.

In addition, certain issues[5] are also raised pursuant to the dispute resolution provisions of Qwest's Change Management Process ("CMP") document.[6] The CMP was developed in connection with Qwest's request to enter the long distance market per Section 271 of the Act. A "re-design" team worked on development of the "CMP Document," which outlines the rules and procedures governing conduct of Qwest's CMP. The CMP Document is Exhibit G to the Arbitrated ICA. The "scope" provision of the CMP Document (§1.0) provides that "CMP provides a means to address changes that support or affect pre-ordering, ordering/provisioning, maintenance/repair and billing capabilities and associated documentation and production support issues for local services (local exchange services) provided by Competitive Local Exchange Carriers (CLECs) to their end users." The CMP Document provides that the ICAs control over CMP (including changes to Qwest's web-based Product Catalog, known as the "PCAT,"[7] made through CMP).[8] CMP was a subject of extensive testimony in the Qwest-Eschelon Minnesota

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[5] See Attachments D, E, and J.

[6] The CMP Document is Exhibit G to the Arbitrated ICA. The dispute resolution process of Qwest's CMP Document (Section 15.0) sets forth certain terms that a CLEC may pursue if the CLEC "does not agree with Qwest's reply or a CR [change request] is rejected." See October 2-3, 2001 CMP Redesign Meeting Minutes, Att. 4, p. 34, Action Item #72, available at http://www.qwest.com/wholesale/downloads/2001/011114/CMP_Redesign_Meeting_October_2_3_Final_Minutes.doc. The dispute resolution process of Qwest's CMP Document (Section 15) states that: "In the event that an impasse issue develops, a party may pursue the dispute resolution processes set forth below." Those dispute resolution processes include the following: "Without the necessity for a prior ADR Process, Qwest or any CLEC may submit the issue, following the commission's established procedures, with the appropriate regulatory agency requesting resolution of the dispute. This provision is not intended to change the scope of any regulatory agency's authority with regard to Qwest or the CLECs." The dispute resolution section includes this express provision: "This process does not limit any party's right to seek remedies in a regulatory or legal arena at any time." http://www.qwest.com/wholesale/downloads/2009/090723/QwestWholesaleChangeManagementDocument_07_23_09.doc

[7] In the Qwest-Eschelon Minnesota Arbitration, Qwest's witness (Renee Albersheim) testified in her Direct testimony (page 12, note 12): "The term PCAT is derived from the words Product CATalog. At Qwest, PCATs have evolved into documents that contain much more than product information. They include all the process and procedures necessary to enable CLECs to obtain pre-ordering, ordering, provisioning, billing and maintenance and repair services from Qwest. All of the Qwest's PCATs can be found on Qwest's Wholesale website at www.qwest.com/wholesale."

[8] The CMP Document (Arbitrated ICA Exhibit G) states in §1.0 ("Introduction and Scope"): "In cases of conflict between the changes implemented through this CMP and any CLEC interconnection agreement (whether based on the Qwest SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such interconnection agreement. In addition, if changes implemented through this CMP do not necessarily present a direct conflict with a

Arbitration. The arbitrators concluded: "Eschelon has provided ***convincing evidence*** that the CMP process does not always provide CLECs with adequate protection from Qwest making ***important unilateral changes*** in the terms and conditions of interconnection."[9] Since then, a witness for the Department also commented upon Qwest's unilateral conduct in CMP, stating: "The Commission should consider advising Qwest that if there is another incident of this type where Qwest takes unilateral action (without collaborating with the CLECs) that results in operational barriers for CLECs, then the Commission will require future Qwest processes and changes related to 251 UNEs . . . that affect Minnesota CLECs be submitted to the Commission for prior approval."[10]

Pursuant to the June 10, 2009 Notice of Extended Additional Comment Period in the KTF complaint case (MPUC Docket No. P-6312, 421/C-08-1381), Popp.Com, Integra, Eschelon, TDSM, and PAETEC submitted Reply Comments on July 20, 2009 in that case ("Joint CLEC Reply Comments"). Per the Order Opening Investigation,[11] the documents filed in KTF complaint case, including the Joint CLEC Reply Comments and the Reply Comments of Velocity Telephone, Inc. and Digital Telecommunications Inc., have been merged into this docket.

At the Commission open meeting on September 10, 2009, during discussion of the KTF complaint case and initiation of this docket, counsel for Qwest claimed confusion as to the basis for CLEC claims. With respect to Qwest's claims of confusion, Joint CLECs point out that the issues raised in these Comments have been raised previously with Qwest. Not only did the Joint

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CLEC interconnection agreement, but would abridge or expand the rights of a party to such agreement, the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such agreement." See also Arbitrated ICA §12.1.6.1.4.

[9] Minnesota Arbitrators' Report, ¶ 22 (emphasis added).

[10] See Attachment I, MN conversions/commingling docket, Dr. Fagerlund Reply Testimony (Sept. 25, 2009); p. 26, lines 11-16.

[11] Order Opening Investigation, p. 4, Ordering Paragraph No. 2.

CLECs provide a legal basis for their claims in the Joint CLEC Reply Comments that have been merged into this docket, but also Integra and PAETEC[12] have provided legal authority and examples directly to Qwest's legal and operational personnel. For example, Attachment C to these Comments contains notice letters dated April 9, 2009 that Integra sent to Qwest executives (including John Stanoch, President, Minnesota) and legal department (including Mr. Jason Topp, legal counsel in Minnesota) regarding xDSL-capable copper loops, along with the 26 enclosures to those letters. One of the enclosures [Attachment C(26)], for example, contains excerpts from the Qwest-Integra and Qwest-Eschelon Minnesota interconnection agreements ("ICAs") (*i.e.*, the Arbitrated ICA) to support CLECs' position regarding xDSL-capable copper loops. Integra has made Qwest well aware of the contractual and legal basis for its positions. In contrast, Qwest has not provided adequate citations in support of its position in response to Integra's requests to Qwest, as discussed in the next section.

B. Importance of the Issues

The Minnesota Department of Commerce ("Department") accurately observed in its July 8, 2009 Comments in the KTF case that the matter raises serious issues that should be fully explored. Joint CLECs agree with the Department that important issues have been raised concerning the competitive behavior of Qwest. This matter involves issues that adversely affect competition, CLECs, and end user customers. They involve Qwest's non-compliance with the law. For example, although asked repeatedly, Qwest has not provided legal citations in support of its policy of limiting High-Speed Digital Subscriber Line ("HDSL") over a two-wire

[12] See, *e.g.*, Attachments Q & R, discussed in Section III(B) below.

conditioned copper loop to a ***voice*** transmission parameter (*e.g.*, 1004 Hz) instead of testing to digital parameters (*e.g.*, 196 kHz),[13] in light of the following law (with emphasis added):

> "Insofar as it is technically feasible, the incumbent LEC shall test and report troubles for all the features, functions and capabilities of conditioned copper lines, and ***may not restrict its testing to voice transmission only***." 47 C.F.R. §51.319(a)(1)(iii)(C).
>
> Unbundling of the local loop includes "***two*** and four-wire loops conditioned to transmit the digital signals needed to provide xDSL service." TRO ¶ 249.

Similarly, although asked repeatedly, Qwest has not provided adequate legal citations in support of its position that it will ***not remove*** certain bridge taps (*e.g.*, near-end or far-end bridge taps),[14] even when those bridge taps interfere with service, in light of the following law (with emphasis added):

> Line conditioning is defined as "the ***removal*** from a copper loop of ***any*** device that ***could*** diminish the capability of the loop to deliver xDSL. Such devices include ***bridge taps***, load coils, low pass filters, and range extenders." 47 C.F.R. §51.319(a)(1)(iii)(A).
>
> Loops must be "***stripped*** of accretive devices." TRO ¶ 643.

Joint CLECs hope that their questions will finally be answered, and compliance with these laws will be obtained, as a result of the Commission's initiation of this investigation.

These are important issues, not only for CLECs but also for end user customers in Minnesota. For example, a particularly alarming Qwest position for both consumers and CLECs is Qwest's position that it has no obligation to restore a customer's previously working xDSL service. Qwest's attorney said it this way:

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[13] See section III(A)(2)(b) below; see also Attachment A to these Comments, at Row Nos. 1-2 [quoting Qwest Regional Vice President ("RVP") June 5, 2008 email to Integra]. Regarding ***196 kHz***, see section III(A)(2)(e).

[14] See Section III(A)(2)(f) below; see also Attachment A to these Comments, at Row No. 6 (quoting Qwest statements in CMP and email).

> ". . . turning to the maintenance issue, once an xDSL loop has been provisioned, if Integra has been able to put HDSL on the loop, Qwest has ***no obligation to repair*** it to the standard that HDSL will continue to work."[15]

Qwest maintains this position, even though Integra had asked Qwest beforehand specifically to review this Commission's decision regarding Issue Number 9-33 in the Qwest-Eschelon ICA Arbitration (MN Docket No. P-5340, 421/IC-06-768). The Commission found that Qwest ***does*** have an obligation to restore service, including data, in such situations and adopted language proposed by the Minnesota Department of Commerce (the "Department") to that effect.[16] On March 20, 2009, Integra pointed out this ruling to Qwest (including attorney Ms. Butler) and said: "The resulting Minnesota ICA went into effect, for example, on March 12, 2008 – more than a year ago – giving Qwest ample time to bring itself into compliance. Please review the testimony and explain how the position expressed by Qwest in the quote below (and confirmed more recently in CMP) complies with those arbitration rulings . . . ."[17] In Qwest's April 1, 2009 response (quoted above), Qwest specifically said that its letter was in response to Integra's March 20, 2009 letter. But, Qwest simply insisted it had no obligation to repair, with no discussion of this Commission's decision to the contrary. Instead, Qwest pointed to an Arizona ICA that has been in place since 2000 that uses the term "minor" without the Department's additional language,[18] from which Qwest suggested that a change in transmission parameters that

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[15] Qwest attorney Daphne Butler, 4/1/09 letter to Integra. See Attachment C(23), p. 107 & Attachment A, Row #5.

[16] MN Arbitrators' Report, MPUC Docket No. P-5340, 421/IC-06-768, ¶137 (Arbitration Issue Number 9-33) (aff'd by MPUC). See Attachment G.

[17] Integra March 20, 2009 notice letter to Qwest (Larry Christensen, Director, Interconnection, and Qwest Legal Department, with copies to attorney Daphne Butler, negotiator Kathleen Salverda, SVP Ken Beck, and Steve Dea and his assistant), at Attachment C(21), pp. 098-099, quoting Qwest RVP June 5, 2008 email. See also Integra's March 20, 2009 CMP Escalation (asking Qwest to "review the testimony and arbitration orders relating to Issue 9-33"), at Attachment C(19), p. 077. Integra's March 20, 2009 requests to review Issue No. 9-33 were included in the materials sent to Qwest (including Mr. Topp and Mr. John Devaney) on April 9, 2009. See Attachment C, p. 003. Mr. Topp and Mr. Devaney represented Qwest in the Qwest-Eschelon ICA arbitrations (including Issue No. 9-33), including the Minnesota arbitration.

[18] Although Eschelon also prevailed on Issue 9-33 in Arizona (see Attachment G), the new Eschelon ICA had not yet gone into effect at the time of Qwest's letter. The Arizona Commission recently voted to approve the ICA.

brings down a customer's HDSL service is "minor."[19] This is the very ICA language that Eschelon asked this Commission to clarify, however, because Eschelon anticipated that Qwest would unilaterally interpret the word "minor" in this overly narrow fashion, as reflected in the decision that Eschelon had asked Qwest to review.[20]

Based on the experiences described by CLECs, the concerns expressed by the Department, and the issues raised in the KTF Complaint, the Commission should investigate Qwest's compliance with the Commission's previous orders as well as state and federal law, as permitted by Minn. Stat. § 237.081. The investigation should include a determination as to whether Qwest's noncompliance has been knowing and intentional and subject to penalties under Minn. Stat. § 237.461.

II. ISSUES

Regarding the scope of the Commission's investigation, the Commission said it is opening an investigation "into Qwest's compliance with state and federal law in its provision of network elements to CLECs and in its related marketing practices regarding CLEC customers."[21] At least the following issues, all of which are within the scope of the investigation, should be addressed in the course of the investigation:

A. xDSL-Capable Copper Loops: Qwest's failure to consistently assign, design, provision, test, and repair fully conditioned loops for the provision of advanced services, and issues with Qwest's associated application of rates.

B. Network Maintenance and Modernization or Other Changes to UNEs Provisioned to CLECs: Qwest making unilateral changes in UNEs provisioned to CLECs -- *e.g.*, KTF's example of changing the size of cables available to the CLEC such

[19] Qwest attorney Daphne Butler, 4/1/09 letter to Integra. See Attachment C(23) & Attachment A, Row No. 5.
[20] The Minnesota arbitrators observed that Eschelon proposed network maintenance and modernization ICA language for Issue 9-33 because Eschelon needed "assurance that . . . ***minor changes*** to transmission parameters will not interfere with service to end user customers." MN Arbitrators' Report, MPUC Docket No. P-5340, 421/IC-06-768, ¶137 (Arbitration Issue Number 9-33) (aff'd by MPUC) (emphasis added).
[21] Order Opening Investigation, p. 3, Ordering Paragraph No. 1.

that it impacts the CLEC's ability to provide the bandwidth necessary to provision DSL or some other service.[22]

C. Advance Notice of Changes in Facilities/Maintenance Activity: Qwest failing to provide advance notice or adequate notice of service-affecting or network-affecting changes in the facilities Qwest provides to a CLEC.

D. Marketing Activities and Disparaging Remarks: Qwest inappropriately marketing its retail services, including by making disparaging remarks about its competitor, as part of its wholesale activities, including UNE installation or repair.

E. Other Discrimination: Qwest placing CLEC order on hold for lack of facilities and then serving the customer itself (*i.e.*, demonstrating that facilities were in fact available).

One or more of the Joint CLECs has experienced each of these problems with Qwest.[23] Although all of the Joint CLECs have not experienced all of these problems, each CLEC is nonetheless concerned that any or all of these problems may occur (for the first time, or again) prospectively. CLECs need business certainty. The positions that Qwest has taken with respect to xDSL, for example, are reflected per Qwest in Qwest's technical publications and online Product Catalog and therefore could impact any CLEC requesting those products going forward.

With respect to the above-listed issues by category, in some cases, a single example may fall within more than one of these categories. For example, Qwest may make a network change, with insufficient advance notice, that impacts service to the customer and Qwest either does not restore data service and/or its technician makes disparaging remarks or engages in other inappropriate marketing activity.[24] Each issue is described in more detail in Section III (Discussion) below.

The Commission ordered that the parties' Comments "shall include specific factual allegations, shall articulate applicable legal standards, and shall identify the issues the

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[22] Department's 7/8/09 Comments, pp. 1-2 (describing KTF complaint).
[23] Joint CLEC Reply Comments, p. 2.
[24] See, e.g., Velocity's Reply Comments in the initial KTF docket (7/20/09), p. 1 (third example falls within Issues B, C, and D).

commenting party believes should be addressed in the course of the investigation."[25] Regarding the factual allegations and applicable legal standards, Joint CLECs have provided with these Comments the following Attachments relating to the issues that should be addressed in the course of the investigation:

A	Matrix – Legal Authority Compared to Qwest Position: xDSL-Capable Copper Loops
B	Presentation – Overview: xDSL-Capable Copper Loops
C	Integra April 9, 2009 Notice Letters to Qwest, with Enclosures 1 through 26
D	CMP Change Request (CR) Detail for CR #PC082808-1IGXES ("Provision Loops per Request CR" or "NC/NCI CR")
E	CMP Change Request (CR) Detail for CR #PC020409-1EX ("Facilities Assignment USOC CR")
F	Optional Testing – CMP Materials
G	Excerpts from State Commission Orders Relating to Network Maintenance and Modernization (Issue Number 9-33 in Qwest-Eschelon ICA Arbitrations)
H	CLECs Known to have Taken Advantage of the Terms of the Qwest-Eschelon Minnesota Interconnection Agreement via Opt-In or as a Base
I	Excerpts from MPUC Docket Nos. P-421/C-07-370; P-421/C-07-371, including Department testimony regarding the Change Management Process ("CMP") and Qwest testimony regarding the importance of compliance with industry standards
J	Grandparenting ADSL compatible loops and Raw Loop Qualification – CMP Materials
K	xDSL Summary of Key Events Since October 2007 - Integra
L	xDSL Email Exchange – HDSL2 Repairs, Intervals, etc.
M	Matrix – xDSL Examples
N	Loop Assignment – Assigned and Unassigned Facilities
O	AdTran DSL Assistant Example

[25] Order Opening Investigation, p. 4, Ordering Paragraph No. 3.

P Excerpts from PAETEC Business Analysis and Quality Assurance – ADSL EDI - Confidential[26]

Q PAETEC-Qwest Communications Regarding ADSL & SDSL Troubles

R xDSL Summary of Key Events – PAETEC

S Marketing/Disparaging Remarks Examples

T Other Discrimination Example Chronology

U Marketing Example – Popp.com

V November 23, 2009 xDSL Example

Joint CLECs will discuss the information in these Attachments, and the facts and legal authority related to each issue, in the Discussion section below.

III. DISCUSSION

A. xDSL-Capable Copper Loops.

1. Legal Standards Generally

See Attachments A & B for Summaries of Legal Authority as Compared to Qwest's Position

Digital subscriber line technology, "commonly referred to as xDSL, permits high speed connections . . . over ordinary copper loops."[27] In other words, although the terms "broadband" (or "advanced services") and "fiber" are sometimes linked, fiber is not the only means of providing broadband to customers. Copper may be used to provide advanced services as well. This includes services "such as ISDN, ADSL, HDSL, and DS1-level signals."[28] Subject to certain distance limitations (which may change over time as technology changes[29]), a carrier can

[26] A protective order among the parties is not currently in place. The confidential version will be provided once the parties receiving Attachment P have entered into a protective agreement regarding confidentiality.
[27] TRO footnote 77 to ¶26.
[28] First Report & Order, ¶380.
[29] "Until recently, lines over 18,000 feet were not considered amenable to xDSL transmission. Commenters state, however, that these very long length loops are now compatible with certain xDSL transmission technologies, and represent an opportunity for further xDSL product development. Thus, we require incumbent LECs to condition

provide various types of xDSL[30] service over an appropriately conditioned copper loop.[31] The importance of using copper to provide broadband is apparent in the FCC's conclusion that CLECs are "impaired" without access to unbundled "***xDSL-capable*** stand-alone ***copper*** loops."[32] The FCC has found therefore that lack of access to unbundled xDSL-capable copper loops "***poses a barrier or barriers to entry*** . . . that are likely to make entry into a market uneconomic" for a reasonably efficient competitor.[33]

Consequently, Qwest must condition copper loops to enable CLECs to offer advanced services.[34] As indicated above, loop or "line" conditioning is defined as follows:

> Line conditioning is defined as the removal from a copper loop or copper subloop of ***any*** device that ***could*** diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders.[35]

Qwest's line conditioning obligation applies to "loops of any length."[36] If any device could diminish xDSL capability, it must be removed, or "stripped,"[37] from the xDSL loop when conditioning is authorized:

> We find that loop conditioning . . . in fact enables a requesting carrier to use the basic loop. Because competitors cannot access the loop with all its native 'features, functions, and capabilities' unless it has been stripped of accreted

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loops of any length for which competing carriers have requested line sharing, unless conditioning of that loop will significantly degrade the incumbent's voice service as described below. We believe that this requirement is technology-neutral and supports the further development and deployment of xDSL-based services." FCC Line Sharing Order, ¶84 (cited by FCC in TRO note 1946 to ¶642 as to line conditioning generally).

[30] FCC TRO ¶ 215, n. 661: "We use the term "xDSL" to refer to DSL as a generic transmission technology, as opposed to a specific type of DSL such as ADSL (asymmetric digital subscriber line), HDSL (high-speed digital subscriber line), UDSL (universal digital subscriber line), VDSL (very-high speed digital subscriber line), and RADSL (rate-adaptive digital subscriber line)."

[31] TRO footnote 661 to ¶ 215.

[32] TRO ¶ 642 (emphasis added).

[33] TRRO ¶ 22 (emphasis added).

[34] *E.g.*, TRO footnote 1925 to ¶ 635 ("to enable the requesting carrier to offer advanced services"); TRO at ¶ 7, p. 14, 2nd bullet ["for the provision of digital subscriber line (xDSL) services"].

[35] 47 C.F.R. §51.319(a)(1)(iii)(A) (emphasis added).

[36] TRO fn 1946 to ¶642, quoting the FCC's Line Sharing Order, which states at ¶83 that ILECs must condition loops "regardless of loop length."

[37] TRO ¶643

devices, we conclude that loop conditioning falls within the definition of the loop network element.[38]

The fact that unbundling of the local loop includes "two and four-wire loops conditioned to transmit the digital signals needed to provide xDSL service" has been repeatedly confirmed by the FCC over time.[39] The First Report and Order was released on August 8, 1996,[40] the UNE Remand Order was released on November 5, 1999,[41] and the TRO was released on August 21, 2003.[42] In 2005, in its Broadband Order, the FCC confirmed that, regardless of how the FCC classified wireline broadband Internet access service, CLECs are still "able to purchase UNEs, ***including UNE loops to provide stand-alone DSL telecommunications service***, pursuant to section 251(c)(3) of the Act."[43] To the extent that Qwest asserts it has not developed a "product" for xDSL capable loops, claims that its technical publications do not anticipate these rules, or otherwise creates operational barriers to assigning, ordering, provisioning, and repairing xDSL capable loops, the Commission should consider that the rules have been around for approximately ten years or more. Qwest has had plenty of time to put compliant processes in place, but has failed or refused to do so. To the contrary, Qwest has taken positions in direct opposition to the law.

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[38] UNE Remand Order, ¶173.
[39] TRO ¶ 249; UNE Remand Order ¶ 166; and First Report and Order, ¶ 380.
[40] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos.* 96-98, 95-185, 11 FCC Rcd 15499 (F.C.C., 1996) ("FCC First Report and Order" a/k/a "Local Competition Order"), available at http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1996/fcc96325.pdf
[41] Third Report and Order, *In the Matter of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, (F.C.C., 1999) ("FCC UNE Remand Order"). available at http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1999/fcc99238.pdf
[42] TRO, *vacated in part and remanded, USTA v. FCC,* 359 F.3d 554 (D.C. Cir., 2004), *cert. denied,* 125 S.Ct. 313, 316, 345 (2004).
[43] FCC Report and Order and NPPR, FCC 05-150 Adopted: 8/5/05 Released: 9/23/05 ["Broadband Order"], ¶126 (emphasis added). See discussion of the Broadband Order in Section III(A)(2)(d) below.

2. Factual Background in Context of Specific Legal Standards

Qwest's policies regarding xDSL-capable copper loops collide with the above-described legal standards in at least the following ways:

a. Qwest refuses digital level signals via conditioned copper loops;
b. Qwest restricts testing to voice transmission;
c. Qwest refuses digital signals for two-wire loops;
d. Qwest denies access to ADSL capable loops in some cases based on alleged grandparenting of ADSL and, even when it provides them, it says the service may be degraded or may not work at all;
e. Qwest refuses to repair/restore service to data/digital levels, leaving end user customers adversely impacted;
f. Qwest refuses to remove certain devices, including bridge tap;
g. Qwest charges CLECs for repairs, even though the trouble is in Qwest's network (e.g., due to bridge tap);
h. Qwest refuses to proceed with repair, unless a CLEC authorizes charges for testing that is supposed to be optional;
i. Qwest fails to assign the best available loop, and instead assigns loops to voice parameters for CLECs; and
j. Qwest ignores industry standards for NCI codes in the facilities assignment process, while blaming NCI codes for repair and spectrum management problems.

Given that there is a lot of history related to each of these issues and, at the Commission open meeting on September 10, 2009, counsel for Qwest requested specificity, Joint CLECs have provided several attachments to these Comments related to that background information. (See list of Attachments in Section II, Issues.) This information is not new to Qwest, and many of the documents were prepared by Qwest. Joint CLECs have tried to resolve their issues with Qwest. For example, Integra has made extensive efforts, including executive-level escalations and discussions since at least October of 2007 and CMP requests with escalations joined by PAETEC, TDSM, Velocity, and other CLECs (but denied by Qwest), to resolve these issues without litigation. A summary of key Qwest-Integra events since October of 2007 is provided in Attachment K to these Comments, and a summary of key Qwest-PAETEC events is provided in Attachment R to these Comments.

Attachment A to these Comments contains a summary in matrix form. For each of the above issues (a)-(j), the matrix in Attachment A contains one column that cites Qwest's legal obligation and a corresponding column that cites Qwest's stated position or practice that is contrary to that legal obligation. In addition, the examples in Attachment M to these Comments correspond as well to issues (a)-(j). Although Qwest has admitted its positions (as shown in the final column of Attachment A), specific examples are provided in part as a reminder that these issues have real, operational impacts that adversely affect CLECs, competition, and end user customers. The lettering of Rows A-J in Attachment A correspond to sub-sections (a) through (j) in this section III(A) of these Comments.

a. Qwest refuses digital level signals via conditioned copper loops.

The FCC has said that Qwest must provide nondiscriminatory access to unbundled loops, which include "two-wire . . . loops that are conditioned to transmit the digital signals needed to provide services such as ***ISDN***, ADSL, ***HDSL, and DS1-level signals***."[44] As outlined in Row No. 1 of Attachment A, Qwest's position, in contrast, is that Qwest must only condition copper loops to transmit the digital signals needed to provide ***ADSL*** services, and even then only in limited circumstances [see section (d) below]. Qwest's position is that, to otherwise receive a DS1-level signal and ensure that it continues to work, ***CLECs must order a DS1 capable loop***.[45] A DS1 capable loop is more expensive than a conditioned copper loop and is a fully leased line (*i.e.*, keeping CLECs fully dependent on ILEC facilities). In contrast, with a xDSL-capable copper loop, a CLEC leases only a portion (the loop) and invests in its own network by purchasing and using its own equipment. This provides CLECs with some measure of control

[44] First Report and Order ¶380 (1996) (emphasis added); see also UNE Remand Order ¶166 (1999); TRO ¶ 249 (2003).
[45] See Attachment C(3), p. 016 (Qwest email summarizing Qwest's technical publication and PCAT provisions); Attachment C(23), p. 107 (last paragraph).

and ability to gain efficiencies. For example, if a customer disconnects service with the CLEC, the CLEC may move its equipment and use it for another purpose/customer. Use of conditioned copper loops in this manner to provide high speed services to CLEC customers[46] is consistent with Minnesota's statutory goals of encouraging economically efficient investment for greater capacity for data transmission.[47]

Qwest's position is inconsistent with those state statutory goals and violates federal law, which requires availability of DS1-level signals using both DS1 capable loops (also known as "high-capacity lines") ***and*** xDSL capable loops.[48] CLECs may, at their discretion, order ***either*** type of loop where both types are available, and Qwest may not restrict that choice by making one type of loop (xDSL capable) unavailable as a practical matter. Qwest's position that it may unilaterally require CLECs to order DS1 capable loops instead of xDSL capable loops to ensure working service directly contradicts the FCC's finding that ILECs must provide access, on an unbundled basis, to xDSL-capable copper loops because CLECs "are ***impaired*** without such loops."[49] Where DS1 capable loops are unavailable, the FCC specifically recognized that copper loops remain available as UNEs to provide DS1 level service.[50]

Qwest may argue that there are circumstances when CLECs have ordered xDSL capable loops and CLECs are receiving DS1 level signals (*i.e.*, the service is working today). The critical flaw in that argument, however, is that Qwest has clearly said that CLECs have no certainty at all

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[46] CLECs are entitled to use UNEs in this manner, and Qwest "shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements for the service a requesting telecommunications carrier seeks to offer." 47 C.F.R. §51.309(a).

[47] Minn. Stat. §§237.011 & 237.082.

[48] TRO ¶23; see also First Report and Order ¶380; UNE Remand Order ¶166; TRO ¶ 249.

[49] TRO ¶642 (emphasis added).

[50] TRRO note 454 to ¶163.

that these services will "continue to work."[51] CLECs need certainty to plan and manage their business and compete effectively. CLECs' customers have a right to know that, if they order xDSL services from a CLEC, their services will continue to work. The right to order xDSL capable loops is meaningless if, once customers are receiving advanced services over copper loops, Qwest may make a change in its network that brings down the xDSL service for CLECs' customer, and Qwest may refuse to restore it. [See section (e) below.] Due in part to changes in technology that have led or will lead to more and better uses for copper loops,[52] CLECs may increasingly find efficient ways to use copper loops to deliver advanced services to their customers. Qwest should not be allowed to stop that progress by creating a threat that, if CLECs exercise their right to order xDSL capable loops, CLECs have no certainty that service to their customers will continue to work.

b. Qwest restricts testing to voice transmission.

Regarding conditioned copper loops, the federal rules provide: "Insofar as it is technically feasible, the incumbent LEC shall test and report troubles for all the features, functions and capabilities of conditioned copper lines, and ***may not restrict its testing to voice transmission only***."[53] As outlined in Row No. 2 of Attachment A, however, Qwest's policy is to restrict its testing to voice transmission.[54] Qwest's position is that it may limit testing to "core"

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[51] Attachment C(23), p. 107 (last paragraph); see also Attachment C(3), p. 016. See also PATETEC/McLeod example discussed in Row No. 12 of Attachment A.

[52] See, *e.g.*, TRO ¶218 ["Technological improvements have enabled carriers using DLC systems to deliver broadband (e.g., ADSL) in addition to narrowband services. In particular, manufacturers have developed 'line cards' that can be installed (along with other components) into a DLC system to provide broadband services, or a combination of broadband and narrowband service, to customers served by DLC systems. By deploying this DSLAM functionality in a DLC system, carriers can serve customers whose copper loop facility would otherwise be too long to support the provision of xDSL service."].

[53] 47 C.F.R. §51.319(a)(1)(iii)(C).

[54] See also Attachment C(3), pp. 013, 015-016, 018 (Qwest emails stating its position); Qwest CMP 11/12/08 Adhoc Meeting Minutes (Jamal Boudhaouia-Qwest), Attachment D, p. 022.

tests[55] at a voice transmission parameter (*e.g.*, 1004 Hz) because the loops are metallic, and it says these are the tests used for metallic loops. The FCC, however, obviously knew that the loops were metallic (given that the FCC expressly refers to "copper" lines) when issuing this rule prohibiting Qwest from restricting testing to voice transmission. With its rule, the FCC recognized that, although the loops are copper/metallic, special circumstances exist because the CLEC will be using the copper loop to provide advanced services, so additional or different ILEC testing appropriate for digital services may be required. When first adopting this rule, the FCC said:

> Not knowing whether or not the accessed line is functioning properly impairs a competitive LEC's ability to provide service, because subscribers may tend to blame the new competitor, rather than a familiar incumbent, for any lapse or degradation of service.[56]

It remains true today that end user customers blame the CLEC, though Qwest's refusal to test and repair to digital levels is the cause of the continuing service degradation. This harms the CLEC's reputation and competition.

The FCC said it agreed with commenters that the rule was needed to ensure that ILECs not limit trouble reports to voice-transmission trouble.[57] The specific commenter cited by the FCC was a CLEC called MGC. In MGC's Reply Comments, MGC complained that an ILEC (Pacific Bell) had refused to test loops beyond ensuring that the loop was voice grade quality.[58] Under the heading "xDSL Conditioned Loops," MGC said "the ILEC should be required to provide trouble reporting to CLECs (at TELRIC prices) to identify ***any*** trouble experienced on a

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[55] Qwest's "core" ***testing*** includes Actual Loss at only 1004 Hz and 40 kHz, Loop Noise, Foreign Voltage, Resistance to Ground, Conductor Loop Resistance. Regarding ***line conditioning***, Qwest refers to its "core" standards as "less than 2500 total bridge tap, with no single bridge tap greater than 2,000 feet." See Attachment L, p. 008 (discussed below in section (f)).

[56] Third Report and Order (Nov. 5, 1999) ¶195.

[57] Third Report and Order (Nov. 5, 1999) ¶195.

[58] MGC Reply Comments, p. 11, CC Docket No. 96-98, June 10, 1999 (cited in footnote 370 to ¶195 of the Third Report and Order).

CLECs' leased loop."[59] In response, the FCC adopted the language of the rule quoted above.[60] That was more than ***ten years*** ago. Yet, ten years later, an ILEC (Qwest) is still refusing to test loops beyond ensuring that the loop is voice grade quality. There is no legitimate basis for this, and certainly there is no reason Qwest should be allowed any further delay in implementing this rule. Integra has cited the FCC rule [47 C.F.R. §51.319(a)(1)(iii)(C)] to Qwest on numerous occasions, but Qwest has refused to comply. Commission action is needed.

c. <u>Qwest refuses digital signals for two-wire loops.</u>

The loop definition for conditioned loops that transmit digital signals quoted above specifically applies to "two-wire" loops.[61] As outlined in Row No. 3 of Attachment A, however, Qwest's position is that CLECs must order a 4-wire loop to receive a DS1 level signal.[62] In other words, this is just another way in which Qwest reinforces its position that CLECs must order the more expensive, fully leased DS1 capable loop[63] to receive a DS1-level signal that continues to work. [See section (a) above.]

d. <u>Qwest denies access to ADSL capable loops in some cases based on alleged grandparenting of ADSL and, even when it provides them, it says the service may be degraded or may not work at all.</u>

CLECs are impaired without access to xDSL capable loops, and Qwest's obligation to provide xDSL capable loops includes loops conditioned to transmit the digital signals to provide ADSL services.[64] As described in Row No. 4 to Attachment A, however, Qwest no longer consistently makes such loops available to CLECs. Qwest unilaterally grandparented ADSL

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[59] MGC Reply Comments, p. 11, CC Docket No. 96-98, June 10, 1999 (cited in footnote 370 to ¶195 of the Third Report and Order) (emphasis added).
[60] Third Report and Order (Nov. 5, 1999) ¶195 (citing MGC Reply Comments at 11 in footnote 370 to ¶195).
[61] First Report and Order ¶380; UNE Remand Order ¶166; TRO ¶ 249.
[62] Attachment C(3), pp. 013, 016.
[63] Although Qwest referred to ADSL compatible loops, see Attachment A, Row Nos. 1-3, Qwest had grandparented ADSL by that time and indicated that ADSL may be degraded or not work at all. See *id.* Row No. 4 and next section (d).
[64] TRO ¶249, ¶642, note 465 to ¶140, & note 661 to ¶215.

capable loops and, even when ADSL remains available, Qwest unilaterally announced that "ADSL service may be degraded or may not work at all."[65]

When grandparenting ADSL over the objections of CLECs, Qwest said: "This change is being made consistent with Qwest's implementation of FCC Report and Order and NPPR, FCC 05-150 Adopted: 8/5/05 Released: 9/23/05."[66] Qwest boldly made this assertion, even though the FCC Broadband Order cited by Qwest states (under the heading "Obligations of Incumbent LECs Under Section 251"):

> As noted, the *Wireline Broadband NPRM* sought comment on the relationship between a competitive LEC's rights under section 251 and the Commission's tentative conclusion that wireline broadband Internet access service is an information service with a telecommunications input. Several competitive LECs, ***and one BOC***, argue that regardless of how the Commission classifies wireline broadband Internet access service, including its transmission component, competitive LECs should still be able to purchase UNEs, ***including UNE loops to provide stand-alone DSL telecommunications service***, pursuant to section 251(c)(3) of the Act.[67] We agree.
>
> Section 251(c)(3) and the Commission's rules look at what use a competitive LEC will make of a particular network element when obtaining that element pursuant to section 251(c)(3); the use to which the incumbent LEC puts the facility is not dispositive. In this manner, even if an incumbent LEC is only providing an information service over a facility, we look to see whether the requesting carrier intends to provide a telecommunications service over that facility. Thus, competitive LECs will continue to have the same access to UNEs, including DS0s and DS1s, to which they are otherwise entitled under our rules, regardless of the statutory classification of service the incumbent LECs provide over those facilities. So long as a competitive LEC is offering an "eligible" telecommunications service – *i.e.*, not exclusively long distance or mobile wireless services – it may obtain that element as a UNE. Accordingly, nothing in this Order changes a requesting telecommunications carriers' UNE rights under section 251 and our implementing rules.[68]

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[65] See Attachment J, p. 015.
[66] See Attachment J, p. 001.
[67] "*See* Covad Comments at 84; MCI Comments at 73-76; Letter from Andrew D. Lipman, Richard M. Rindler, & Patrick J. Donovan, Counsel for McLeodUSA, to Chairman Kevin J. Martin, FCC, CC Docket No. 02-33, at 1-2 (filed Aug. 3, 2005) (McLeodUSA Aug. 3, 2005 *Ex Parte* Letter); Letter from Jason Oxman, Senior Vice President, Legal Affairs, CompTel/ALTS, to Marlene H. Dortch, Secretary, FCC, at 2 (filed July 12, 2005) (CompTel/ALTS July 12, 2005 *Ex Parte* Letter); *see also* ***Qwest Apr. 10, 2003 Ex Parte Letter, Attach. at 3 ("CLEC access to UNEs not at risk in this proceeding").*** Broadband Order, note 396 to ¶126 (emphasis added).
[68] FCC Report and Order and NPPR, FCC 05-150 Adopted: 8/5/05 Released: 9/23/05 ["Broadband Order"], ¶¶126-127 (all but one footnote omitted; emphasis added).

It is remarkable that, after Qwest represented to the FCC that "***CLEC access to UNEs not at risk in this proceeding***"[69] to obtain a particular result, Qwest then turned around and used the FCC's order, once obtained, to place at risk access to UNE loops used to provide stand-alone DSL service. Given that Qwest made this statement to the FCC and then cited the Broadband Order in its CMP change request to grandparent ADSL, Qwest was well aware of the FCC's order. As such, Qwest's violation of federal law, and state law requiring access to UNEs, is knowing and intentional.

To the extent Qwest claims any modification to CLEC rights, the proper process would be for Qwest to request amendments to the ICAs pursuant to change of law provisions, and not to unilaterally announce its own implementation of changes in laws via a CMP notice (sent to a group of CLEC representatives that are primarily operational personnel[70]). Regarding Qwest's use of CMP, PAETEC said it in objections in CMP comments:

> Also, as a note, PAETEC finds that Qwest's use of CMP notice(s) as a means to avoid their responsibility to work with CLEC in good faith to resolve issues is an inappropriate use of the CMP process. PAETEC brought issues (customers experiencing interrupted or impaired ADSL/SDSL services), which are directly due to Qwest's Remote DSLAM installation process, to light. This CMP notice does not constitute 'good faith' on the part of Qwest.[71]

The federal rules and TRO/TRRO provisions cited in these Comments remain in place after the Broadband Order.[72]

Qwest used an algorithm for loop assignment purposes for ADSL-compatible loops to calculate whether a loop is likely to perform at the needed specifications for ADSL [see section

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[69] Broadband Order, note 396 to ¶126 (emphasis added).

[70] When re-designing CMP, a CLEC (New Edge) pointed out that CLEC CMP participants are operational business people, not attorneys who could address "regulatory, legal type processes" and changes that "impacts an ICA," and Qwest acknowledged the point and said this has been addressed with language in the CMP Document which states the ICA controls over CMP. See Transcript of 271 CMP Workshop Number 6, Colorado Public Utilities Commission Docket Number 97I-198T (Aug. 22, 2001), pp. 291-292.

[71] See Attachment J, 019.

[72] See, *e.g.*, 47 C.F.R. §51.319(a)(1)(iii)(A) and 47 C.F.R. §51.319(a)(1)(iii)(C) (both quoted above).

(i) below]. When Qwest wrongfully grandparented ADSL compatible loops, however, Qwest ***removed the algorithm*** from its systems for unbundled loops.[73] For its own retail customers of High Speed Internet or "HSI" (and for CLECs ordering Qwest's high priced fully leased commercial resold DSL product), however, Qwest continues to use some algorithm.[74] This is true, even though the law requires nondiscrimination and the Arbitrated ICA specifically states that Qwest "will provision digital Loops in a non-discriminatory manner, ***using the same facilities assignment processes that Qwest uses for itself to provide the requisite service***."[75] Qwest not only removed the algorithm for unbundled loops but also said that, if a CLEC requested that Qwest run the algorithm, Qwest "would have to look at how that would work and how much the ***funding*** would be."[76] Despite Qwest's frequent allegations regarding the costs of system changes, note how quickly and easily Qwest changed its systems when it wanted to remove this capability. Qwest also "delist[ed] the set of NC/NCI codes that point to the old algorithm."[77] Apparently, cost was no object, or it really is not that expensive. Then, after removing this capability for unbundled loops, Qwest had the temerity to suggest that CLECs should pay to restore it. Qwest should not have grandparented ADSL compatible loops at all, so it can hardly expect CLECs to pay for the costs of restoring that service, the algorithm, and the NC/NCI codes, should the Commission find that Qwest must "un-grandparent"[78] it.

In the meantime, Qwest has implemented its CMP change to deny access to working, reliable ADSL compatible loops to CLECs. In some cases, when Qwest unilaterally interprets an ICA to exclude ADSL over conditioned copper loops (*e.g.*, because Qwest has grandparented

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[73] Qwest 1/17/07 CMP Meeting minutes, Attachment J, p. 004.
[74] Qwest 1/17/07 CMP Meeting minutes, Attachment J, p. 008.
[75] Arbitrated ICA, , §9.2.2.3 (emphasis added).
[76] Qwest 1/17/07 CMP Meeting minutes, Attachment J, p. 007 (emphasis added).
[77] Qwest 1/17/07 CMP Meeting minutes, Attachment J, p. 006 (emphasis added).
[78] CMP Adhoc Meeting Minutes, 11/12/08 (Qwest – Bob Mohr), Attachment D, p. 021. [Stating Qwest was looking at "un-granparenting" ADSL, but Qwest did *not* un-grandparent it.]

ADSL), Qwest refuses to process ADSL compatible loop orders. Qwest's technical publication contains a Table 3-14, entitled "Unbundled xDSL NC/NCI Code Combinations." Under the heading for ADSL compatible loops in Table 3-14, Qwest's own technical publication requires the use of the NC Code "LX-R" for ADSL compatible loops.[79] If Qwest unilaterally interprets an ICA to exclude ADSL over conditioned copper loops, however, Qwest enforces its unilateral interpretation by rejecting CLEC orders containing the NC code "LX-R" for ADSL compatible loops.[80] For example, even though the Qwest-Integra ICA in Oregon states that Qwest must provide access to unbundled loops, which includes "two-wire. . . loops that are conditioned to transmit the digital signals needed to provide . . . ***ADSL . . . and DS1-level signals***,"[81] Qwest takes the position that Integra cannot order an ADSL compatible loop under the ICA using an NC code of LX-R.[82] This forces Integra to order using a different NC-NCI code.[83] When DSL service is not working, however, Qwest refuses to remove bridge taps on the grounds that the NC-NCI code used during the ordering process is inappropriate for ADSL, notwithstanding that Qwest refused to allow use of the appropriate NC-NCI code. [See section (j) below.] The Commission should require Qwest to change these policies and comply with the law.

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[79] See http://www.qwest.com/techpub/77384/77384.pdf.

[80] Also, as indicated above, Qwest delisted the set of industry standard NC/NCI codes that point to the algorithm – despite it current insistence, for repair purposes, that use of the appropriate industry standard NC/NCI code is imperative.

[81] Qwest-Integra Oregon ICA, §2.1.

[82] See Feb. 5, 2009 email (Qwest system rejection notice states: "you are not contracted for lxr-"). See Attachment M, p. 10.

[83] As the PAETEC/McLeod example described in Row No. 12 of Attachment A shows, Qwest's direction as to which code to use has been inconsistent over time and among carriers. In fact, Qwest took the position that the NCI code was not used by Qwest at all (*i.e.*, was "informational only"), so there was no reason at the time to distinguish among NCI codes when ordering. See Row Nos. 11-12 of Attachment A. Because Qwest's conduct in this regard has created problems with the codes in the embedded base, Qwest should not be able to force CLECs to place new or change orders to disconnect customers and re-order new service (potentially changing working loops to non-working loops or receiving responses that facilities are not available) simply to change the codes. See Section III(A)(j)(ii).

e. Qwest refuses to repair/restore service to data/digital levels, leaving end user customers adversely impacted.

As discussed above [in Section I(2), Importance of the Issues], Qwest's position that it has no obligation to restore xDSL to a standard that it will continue to work (see Row 5 of Attachment A) creates serious issues for CLECs that need business certainty and for end user customers that need to be able to rely on the service they have ordered. Section 12.4 of the Arbitrated ICA requires Qwest to provide maintenance and repair services, and Qwest is compensated for doing so at Commission-approved rates.[84] Section 12.4.3.5 of the Arbitrated ICA requires that Qwest Maintenance and Repair and routine test parameters and levels will be in compliance with Qwest's technical publications, which must be consistent with industry (Telcordia and/or ANSI) standards. In the recent conversions/commingling docket in Minnesota, Qwest testified about the importance of complying with industry standards.[85] With respect to testing and repair, however, Qwest is not in compliance with industry standards.[86]

For example, for HDSL2, Qwest says that a DS1 level signal is not available and limits testing for repairs to a voice transmission parameter (***1004 Hz***),[87] even though the ANSI standard is a range which is generally tested at ***196 kHz***, as shown below.[88] Qwest's Technical Publication 77384 provides on page 1-1 that an HDSL compatible loop conforms to the industry standard ANSI T1E1, Technical Report Number 28.[89] Regarding routine test parameters and

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[84] In Minnesota, a UNE cost case was completed recently. *See In the Matter of Qwest Corporation's Application for Commission Review of TELRIC Rates Pursuant to 47 U.S.C. § 251*, Docket No. P-421/AM-06-713.

[85] See Attachment I (excerpts from testimony of Rachel Torrence of Qwest).

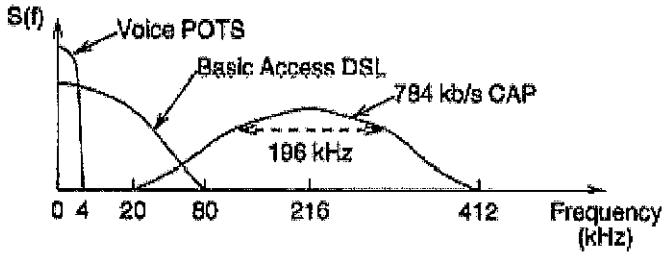
[86] Qwest is also out of compliance with Telcordia standards regarding use of NC-NCI codes for provisioning. See Attachment A, Row 11; section III(A)(2)(i) below.

[87] See Qwest RVP June 5, 2008 email to Integra, Attachment C(3), p. 016 (quoted in Attachment A, Row No. 5).

[88] Qwest is well aware of this information, which Integra presented in CMP, and then included in its communications with Qwest's executives and legal team. See Attachment C(19), pp. 072-074.

[89] ANSI T1E1, Technical Report Number 28 states (with emphasis added) on page 1 that "this document is aimed only at high-bit-rate digital subscriber line (HDSL) systems that transport bi-directional ***digital*** signals at the nominal rate of ***1.544Mb/s***," and, in Section 2.1 on page 2, that a nominal rate of 1.544Mb/s is "***called Digital Signal 1 (DS1)***." This is consistent with the definition of HDSL2 in the Statement of Generally Available Terms ("SGAT") and in the Arbitrated ICA. The definition is quoted in footnote 1 to Attachment K.

levels, see the following chart, from Figure 6 on p. 37 (PDF p. 44) of ***ANSI*** T1E1, Technical Report Number 28 (cited in Qwest's technical publication):



(c) POTS Voice, ISDN DSL & CAP HDSL Spectra

(Amplitudes are not to scale. Shapes are approximations only.)

The ***ANSI*** Standard T1.418 Performance Testing Section states (on p. 86): "This section specifies performance tests for HDSL2 equipment. These out-of-service tests verify the performance of HDSL2 in impaired environments." It proceeds to discuss measuring the insertion loss. On page 89, it indicates that insertion loss should be measured from a 20 kHz to 500 kHz range, which includes a measure at 196 kHz. Note the frequency line on the above Figure that goes from 20 kHz to 412 kHz and the reference above that line to "196 kHz." ANSI Standard T1-417 (cited in §9.2.6.1 of the Arbitrated ICA and in Qwest technical publication 77384, p. 1-1), in footnote 9 on page 24, identifies ANSI T1.418 as the standard "for HDSL2 performance requirements." While Qwest's technical publications cite ANSI standards, Qwest does not construe its technical publications[90] in accordance with these standards.[91]

[90] Section 2.3 of the Arbitrated ICA provides that, in cases of conflict between the technical publications and CLEC's rights or obligations under the ICA, the rates, terms and conditions of the ICA prevail. Even without such ICA language, Qwest's technical publications must comply with the law. For example, Qwest could not legally use CMP to change its technical publications to eliminate CLECs' unbundling rights. Qwest can no more eliminate the line conditioning rules with its technical publication terms than it can eliminate other rights granted under the Act.

[91] "The Qwest Tech Pub 77384 . . . indicate CLEC needs to order the ADSL Capable Loop or a DS1 Capable Loop ***to receive an HDSL Level of Transmission***." Qwest RVP 6/5/08 email, Attachment C(3), p. 016 (emphasis added).

Although the FCC confirmed in 2003 that CLECs are impaired without access to xDSL capable loops,[92] Qwest has elected not to develop xDSL capable loop "products" (*e.g.*, an HDSL2 capable loop). Instead, Qwest requires that CLECs order "non-loaded" loops and authorize conditioning of those loops. Therefore, rather than a "product" distinction, the distinction among the various types of xDSL capable loops (*e.g.*, HDSL2, ADSL, *etc.*) is supposed to be identified ***using industry standard NC/NCI codes***. Because Qwest relies on the NC code but not the NCI code for CLEC orders [see section (j) below], when a CLEC orders an HDSL2 loop using the NC/NCI code for HDSL2, the loop Qwest delivers may have no load coils (per the NC code) but, when tested at 196 kHz consistent with the above ANSI industry standard, it will not pass traffic at a rate of 1.544 Mbps (per the NCI code). In other words, regardless of the NCI code used for a 2-wire non-loaded loop, Qwest will assign the same loop, even when the industry standard dictates a loop with different parameters depending on the NCI code used.[93] This is true, even though a Qwest witness recently testified: "Complying with industry practice is simply part of doing business."[94]

Vendors require use of the industry standard. One vendor – which Qwest itself uses for HDSL – is Adtran. Adtran's publicly available vendor documentation confirms that Adtran uses the 196kHz test for HDSL: "The practice of using insertion loss (***at 196 kHz***) for loop qualification has continued throughout recent history for 2B1Q HDSL. Due to its ease of measurement, insertion loss is commonly used to characterize the loss of a loop and is usually taken at the Nyquist frequency (½ baud rate)."[95]

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[92] TRO ¶642.

[93] See, e.g., Attachment J, p. 013, Qwest CMP Response ("The facility is ***physically the same facility*** as the grandfathered ADSL Compatible UBL. The only difference is the 2-wire Non-Loaded UBL NC/NCI combination does not drive the request to the Qwest DSL Algorithm.") (emphasis added).

[94] See Attachment I, MN conversions/commingling docket, Rebuttal Testimony of Rachel Torrence, p. 7, lines 8-9.

[95] http://www.adtran.com/adtranpx/Doc/0/K45854GQTRJ4D4FIH6AG6PN92D/61221HDSLL1-10C.pdf

Qwest's current policy stands in stark contrast to these industry standards. In the example provided in Integra's CR in CMP (see Attachment D), the HDSL2 service was working fine for Integra's end user customer. Qwest made a Qwest-initiated change to its network which disrupted the customer's HDSL2 service.[96] Integra opened a trouble ticket to restore service, and Qwest repair told Integra that Qwest would test and repair only to voice grade parameters, which meant that the end user customer's HDSL2 service no longer worked (*i.e.*, was permanently disrupted). Since then, Qwest has confirmed in CMP[97] that it will only provide a non-loaded loop (per the NC code) but will not specifically provision HDSL2 (per the NCI code), so that per Qwest at installation HDSL2 service might work, and it might not, and even if it works initially, Qwest will not restore it to that level if it later fails.[98]

In Figure 6(c) above, there is a very small area on the frequency line where the line marked Basic Access DSL intersects with the line going from 20 kHz to 412 kHz. Apparently, it is a narrow situation such as this for which Qwest says a non-loaded loop "might" work, though Qwest will not agree to restore it if a later Qwest network modification takes it out of that area. Figure 6(c) suggests that the likelihood that it "might not" work is greatest. The FCC, the SGATs, and the Arbitrated ICA do not refer to loops that "may or may not" be digital capable. They must be digital capable. Qwest's position that it may restrict testing to ***voice*** transmission parameters is inconsistent with industry standards, as well as 47 CFR §51.319(a)(1)(iii)(C) (quoted above). To the extent that Qwest's technical publications are inconsistent with industry standards and/or the law, they should be revised. Qwest refused CLECs' request to revise its technical publication in CMP (a denial that is subject to dispute resolution in this proceeding).

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[96] As discussed above (Section II, Issues), this is an example that would fall under more than one category, including the network maintenance and modernization arbitration ruling (Issue 9-33; Arbitrated ICA Section 9.1.9). See Section III(B) below.

[97] See, e.g., Attachment D, p. 005.

[98] Attachment C(3), p. 016; C(23), p. 107.

To the extent that Qwest's technical publications are inconsistent with the ICAs, the ICAs and the law control and Qwest must have processes available to CLECs to effectuate those rights.

f. Qwest refuses to remove certain devices, including bridge taps.

As indicated above (in Section III(A)(1), Legal Standards Generally), loop or "line" conditioning is defined as follows:

> Line conditioning is defined as the removal from a copper loop or copper subloop of ***any*** device that ***could*** diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, ***bridge taps***, load coils, low pass filters, and range extenders.[99]

It is important to note that this federal rule contains ***no exception*** to the obligation to remove devices that could diminish xDSL capability for certain types of devices - such as "near-end" bridge taps.[100] The effect of a short bridge tap near the DSLAM (*i.e.*, a near-end bridge tap) "tends to be highly detrimental to a DSL signal."[101] As outlined in Row No. 6 of Attachment A, however, Qwest's policy is to refuse to remove near-end bridge tap, if the bridge tap does not exceed 2.0 kft. and the total bridge tap does not exceed 2.5 kft.[102] There is simply no basis in the law for this unilateral Qwest narrowing of the definition of line conditioning. Although Integra has pointed out the federal definition of line conditioning to Qwest on numerous occasions over time, however, Qwest maintains and enforces its position.

There is no contractual explanation either. For example, in a recent customer-affecting example in Washington, Qwest refused to remove near-end bridge tap even though Integra pointed out that the Qwest-Integra Washington ICA provides that, as there is no definition of line

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[99] 47 C.F.R. §51.319(a)(1)(iii)(A) (emphasis added). See also TRO ¶643, UNE Remand Order, ¶¶172-173 (cited in TRO, note 1925) (all quoted in Row No. 6, Attachment A).

[100] An example of a definition of near-end bridge tap is the following: "A significant factor in lowering service rate is near end bridge tap, i.e., a bridge tap near, e.g., at or within 300 feet of, the DSLAM or modem." http://www.freepatentsonline.com/7076056.html Regardless of the precise definition of near-end, a bridge tap that is near (or far - "far-end" bridge tap) is ***not*** excluded from the federal rule requiring its removal.

[101] http://www.freepatentsonline.com/7076056.html

[102] See, *e.g.*, Attachment L, p. 002; Qwest 10/29/07 email, quoted in Row No. 6 of Attachment A.

conditioning in the ICA, the definition in the federal rules applies.[103] Section 8.2.4.1.2.1 of that ICA provides: "When Integra requests a nonloaded Unbundled Loop and there are none available, Qwest will dispatch a technician to remove load coils and excess bridge taps (i.e. 'deload' and ***condition*** the Loop) in order to make a Loop available. . . . When capable, the loop will support DSL service." Although "excess" is described in the ICA as meaning to "condition" the loop and the ICA provides that condition must have the meaning in the federal rule, Qwest unilaterally defines "excess" or "excessive" (in all states)[104] to mean a bridge tap not in excess of 2.0 kft. and the total bridge tap does not exceed 2.5 kft. If excess, when used to define which bridge taps must be removed, had that meaning, however, the federal rule would state that conditioning is defined to mean removal of a bridge tap in excess of industry standards. It does not say that. If a bridge tap is within the length allowed by industry standards, but it is nonetheless for some reason interfering with DSL service,[105] the federal rule requires its removal. Qwest has no legitimate basis for its position.

Further evidence that Qwest's bridge tap policy is unilateral and not driven by contract language is an example in Oregon. Integra has an ICA with Qwest in Oregon that both specifically states that Qwest must provide access to loops, which include "two-wire . . . loops that are ***conditioned*** to transmit the ***digital*** signals needed to provide ISDN, ***ADSL***, HDSL, and

[103] Qwest-Integra WA ICA, §3.45 ("Terms not otherwise defined here, but defined in the Act or in regulations implementing the Act, shall have the meaning defined here.").

[104] See Attachment L, pp. 002-003. The MN Arbitrated ICA refers to "excess" bridge tap in §9.2.2.4: "Upon CLEC pre-approval or approval of conditioning, and only if conditioning is necessary, Qwest will dispatch a technician to condition the Loop by removing load coils and ***excess Bridged Taps*** to provide CLEC with ***a non-loaded Loop***." When CLECs order a non-loaded loop and authorize conditioning, however, it is Qwest's policy to refuse to remove these bridge taps (*e.g.*, the described near-end bridge taps). See Attachment L, pp. 002-003.

[105] See, e.g., Integra (Kim Isaacs) 11/14/07 email to Qwest (Mary Dobesh): "Qwest's Repair department will often indicate that the amount of bridge tap is causing the service issue on a 2 Wire Non-Loaded Loop but also indicate that it is within Qwest specification." Attachment L, p. 003 & 005. (For a very recent example of Qwest indicating a loop is within specification, though bridge tap is interfering with the customer's xDSL service, see Attachment V.)

DS1-level signals"[106] and also provides that Integra may order a special copper loop "***unfettered*** by any intervening equipment (e.g., filters, load coils, range extenders) and which do ***not*** contain ***any bridged taps***, so that CLEC can use these loops for a variety of services by attaching appropriate terminal equipment at the ends."[107] This is the ICA discussed in section (d) above, for which Qwest has taken the position that Integra cannot use the NC code of LX-R for ADSL compatible loops because Qwest claims Integra is "not contracted" for ADSL.[108] And, although Qwest acknowledges that the "unfettered" language requires Qwest to remove bridge taps, Qwest nonetheless refuses to remove them[109] due to operational barriers it has erected. Qwest has taken the position that it will not remove these bridge taps on repairs unless, at the time of ordering, the loop was ordered with a remark that says "special copper loop."[110] There is no requirement in the ICA to do so. Qwest has no product for special copper loop (though this language has been in the ICA since 2000) and no documented process requiring this added step.[111] Adding a remark to an order drops the order to ***manual*** handling. In contrast, Qwest has

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[106] Qwest-Integra Oregon ICA, §2.1.

[107] Qwest-Integra Oregon ICA, §2.1.1.2.

[108] See Feb. 5, 2009 email (Qwest system rejection notice states: "you are not contracted for lxr-"), Attachment M, p. 10.

[109] See, *e.g.*, Attachment V (containing an Oregon example from ***yesterday*** in which Qwest again refused to remove bridge tap). Qwest claims the loop is "within specification," though there is interfering bridge tap. Knowing the end user customer is currently experiencing trouble, Qwest nonetheless said it considers the issue "closed." *Id.* The Qwest service manager also told Integra's escalations manager that Integra's General Manager/Vice President of Network needed to escalate to Qwest's Regional Vice President any of this "type of request," *id.* – while an end user customer's service is affected – which is directly contrary to the Qwest procedures developed in CMP Re-design and currently reflected in Qwest's PCAT, which states: ***"Escalations can be initiated for any issue, at anytime, and at any escalation point."*** http://www.qwest.com/wholesale/clecs/execover.html (emphasis added); see also CMP Document §12.8.1.

[110] See, *e.g.*, Qwest (attorney Daphne Butler) 10/14/09 email to Integra, Attachment M, p. 16.

[111] Qwest (attorney Daphne Butler) 10/14/09 email to Integra ("the 'Special Copper Loop' is not a defined product in our PCAT and does not conform to any specific product in our PCAT"), Attachment M, p. 16. Integra addressed Qwest's "productization" argument in its CMP escalation (Attachment C(19), pp. 071-072). It is not an adequate response to any of the operational, legal and contractual issues raised by Joint CLECs to argue that Qwest did not choose to develop its "product" that way. Qwest needs to comply with the contracts and the law and ensure its personnel are trained. After all, the applicable FCC rules have been around for about ten years, and the Integra OR ICA has been in place since May of 2000. There has been plenty of time to develop a product, if Qwest desired a product. Integra is relying on our ICA and the law.

admitted that: "Qwest retail does not use a manual process."[112] The law and the contracts prohibit discrimination. Qwest's unilateral decision to require that every one of these Integra xDSL orders drop to manual handling while its retail orders are processed without manual handling is in violation of those laws and contract provisions requiring nondiscrimination. Additionally, for ADSL, Qwest claims that Integra has used a "wrong" NC/NCI code, even though Qwest rejects orders with the appropriate code, as discussed above. The code that Qwest has only recently directed Integra to use, however, is ***not*** the code that its own technical publication identifies for ADSL compatible loops. So, even assuming Integra would issue a new order, the code would still be "wrong" per Qwest's own technical publication. And, the code Qwest has only recently directed Integra to use is ***not*** the same as the one that Qwest had told PAETEC to use [as discussed in sections III(A)(2)(j) and III(B)]. It is a shell game. The reality is that no code is good enough for Qwest right now, because Qwest ignores the NCI code in provisioning (as discussed in section (j)). Qwest should simply remove bridge tap, per the CLEC's authorization of conditioning.

Integra had authorized conditioning in these Oregon examples. Instead of simply removing a near-end bridge tap, however, Qwest said it requires Integra – at the repair stage – to re-order new service for an installed customer to change the NC-NCI code,[113] even though this would subject Integra's customer with the associated delay (*e.g.*, the installation interval of 9 days in Oregon) and risk of service disruption that placing a new order would cause.

Together, these examples and the information in Attachments A and C show that, regardless of what the law or any particular contract says, and no matter how a CLEC orders xDSL loops, Qwest's policy is to refuse to remove bridge tap, including near-end and far-end

[112] See CMP Minutes from 1/21/09 CMP Meeting (Jamal Boudhaouia-Qwest). See Attachment D.
[113] See, *e.g.*, Qwest (attorney Daphne Butler) 10/30/09 email to Integra.

bridge tap, if the bridge tap does not exceed 2.0 kft. and the total bridge tap does not exceed 2.5 kft, even when the bridge tap is clearly interfering with DSL service. While Qwest may attempt to blame its refusal on some action taken by the CLEC or on some allegedly unique contract language, those excuses do not withstand scrutiny. In fact, Qwest has admitted that its policy is universally applicable: "The core tests Qwest performs are the same for both analog and digital signals. The primary difference is checking for loads and bridge tap for the non-loaded loops, i.e., LX-N. ***Qwest will provision to meet core standards, i.e. less than 2500 total bridge tap, with no single bridge tap greater than 2,000 feet.*** If your end-user equipment requires a different facility, ***with less bridge tap***, then ***you may need to order a different product.***"[114] As discussed in section (a) above, however, Qwest cannot force CLECs to order a more expensive, fully leased product instead of the xDSL capable loops to which they are entitled.

The removal of bridge tap should be a particularly easy problem to solve. Qwest simply has to change its policy. Approved conditioning rates are already in place as a result of the recent cost docket.[115] Qwest's own online Product Catalog ("PCAT") already contains a process that states regarding an existing field on the order form: "If this field carries the "Y", all . . . interfering Bridged Tap will be removed . . ."[116] If Qwest implements this language appropriately, the PCAT language would be consistent with the Arbitrated ICA, which states in Section 9.2.2.4: "Upon CLEC pre-approval or approval of conditioning, and only if conditioning is necessary, Qwest will dispatch a technician to condition the Loop by removing load coils and

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[114] Qwest (Mary Dobesh) 10/29/07 email to Integra (emphasis added), Attachment L, p. 008.

[115] In the September 5, 2006 Order Referring Rates to the OAH in the cost docket, the Commission defined the scope of the docket as follows: "The Commission agrees that the collocation rates and nonrecurring element rates (i.e., the elements addressed in the 1735 Cost Docket) and rates for new and restructured UNEs should be reviewed in this docket." Negotiations of the UNE Rate Element Descriptions matrix in the cost docket had started by at least July of 2008. As the documentation in Attachment C shows, Qwest was well aware of this issue over time, and it had every opportunity to address it in the cost docket if it desired any different rate or application of rate for conditioning from that agreed upon in that docket.

[116] See http://www.qwest.com/wholesale/pcat/unloop.html.

excess Bridged Taps to provide CLEC with a non-loaded Loop." In other words, Qwest does not even have its usual claim that processes are not in place. Qwest simply has to give direction to its personnel that "excess" bridge tap as used in the ICA and "interfering" bridge tap as used in the PCAT[117] mean bridge tap that "could diminish" xDSL capability [per 47 C.F.R. §51.319(a)(1)(iii)(A)] instead of its unilateral, narrower definition based on bridge tap length.

For example, in mid-October in Oregon, Qwest refused to remove bridge tap in a customer-affecting situation. After Integra legal contacted Qwest legal, Qwest removed the bridge tap and the Qwest technician added the following note in the Qwest repair system available to CLECs (CEMR): "KATHY, OW164041 WAS OPENED AND WE HAVE TO REMOVE ALL THE BRIDGE TAP PER STAFF ADVOCATE AND OUR LEGAL REP."[118] Unfortunately, Qwest later took the position that it could erect operational barriers [see section (f) above] instead of removing bridge tap again. But, this example shows that Qwest need simply say the word, and bridge taps can be removed.

g. <u>Qwest charges CLECs for repairs, even though the trouble is in Qwest's network (e.g., due to bridge tap).</u>

Generally, maintenance charges do ***not*** apply when the trouble is in Qwest's network (*i.e.*, the trouble is Qwest-caused), and maintenance charges apply (*i.e.*, Qwest charges the CLEC for the repair work) when the trouble is not in the Qwest's network.[119] By unilaterally defining bridge tap in Qwest's network that clearly interferes with DSL service as not excessive [see section (f) above], Qwest not only refuses to restore service via bridge tap removal but also ***charges the CLEC*** for this wholly unsatisfactory result. If Qwest dispatches, tests to its core

[117] In 2004, Qwest made an attempt to change "interfering" to "excessive" in the PCAT. Particularly given Qwest's unilateral unduly narrow interpretation of "excessive," CLECs objected. PROD.03.30.04.F.01521.UBL_PCATs, March 30, 2004 (Qwest Level 1 CMP Notice). Qwest withdrew the change. Unfortunately, Qwest nonetheless also applied an unduly narrow unilateral interpretation of "interfering." See Qwest (Mary Dobesh) 1/21/08 email, Attachment L, Page 002 ("excessive is the same as interfering").

[118] Attachment M, Att. #6, p. 17.

[119] See, e.g., Arbitrated ICA §§9.2.5.2, 9.2.5.3, 12.4.1.5 (all quoted in Row No. 7, Attachment A).

testing standard (a voice transmission parameter, *e.g.*, 1004 Hz)[120] and its core line conditioning standard (*i.e.*, less than 2500 total bridge tap, with no single bridge tap greater than 2,000 feet)[121] and finds that those Qwest standards are met, Qwest codes the trouble ticket to "No Trouble Found" or "NTF" (meaning no trouble found in the Qwest network), "Trouble Isolated to the CLEC" ("IEC"), or "Customer Premise Equipment" or "CPE" (meaning trouble found on the customer's side rather than in the Qwest network), even though the end user customer's xDSL service is not working properly. Because the trouble is coded as not being in the Qwest network, Qwest charges CLEC maintenance of service charges (usually a half hourly rate). When the trouble is a bridge tap (*e.g.*, a near-end bridge tap) which is interfering with service, the trouble should be coded as in the Qwest network. Even though a digital capable nonloaded loop should "provide . . . DS1-level signals,"[122] Qwest has admitted that, after it conducts its voice "core" tests and finds they are met, it automatically closes the ticket to for non-loaded loops to "CPE" - which results in charges to the CLEC:

> Our testers and OSP techs perform tests for the product requested, which is ***an UBL 2Wire Non-Loaded loop***. The ticket was ***closed to CPE by Qwest, because the loop meets ANSI standards for the LX-N product.*** According to Qwest documentation, this product is ***not expected to meet T1 transmission parameters.*** [123]

The interfering bridge tap is in Qwest's network. Therefore, no maintenance of service charge should apply. Qwest should remove the bridge tap and code the trouble to Qwest's network.

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[120] Qwest (Ken Beck) 6/5/08 email to Integra (cited in section (b) above and in Row 2, Attachment A).
[121] Qwest (Mary Dobesh) 10/29/07 email to Integra (quoted in section (f) above), Attachment L, p. 008.
[122] First Report and Order ¶380; see also UNE Remand Order ¶166; TRO ¶ 249.
[123] Qwest (Mary Dobesh) 10/29/07 email to Integra, Attachment L, p. 008.

h. Qwest refuses to proceed with repair, unless a CLEC authorizes charges for testing that is supposed to be optional.

"Optional" testing, as the name suggests, is supposed to be available to CLECs by choice. It is supposed to be an optional alternative to a CLEC conducting its own testing. Generally, before either party reports a trouble condition, the party uses its best efforts to locate or "isolate" trouble.[124] A party is not required to identify a specific location within the other party's network, but attempts to isolate trouble to the other party's network/facilities.[125] In contrast, with "optional testing," a CLEC may forego its role in conducting any testing and providing any test results and instead pay Qwest to conduct testing on its behalf.[126] The charge for this testing was established in the cost docket and is reflected in the MN Cost Docket UNE Elements Description Matrix, Section 9.20.3, which provides:

> Miscellaneous Charges, Additional Labor Other - Optional Testing, per half hour, or fraction thereof. This is a nonrecurring charge applied per half hour: . . . for ***optional*** testing, performed by Qwest on the CLEC's behalf, with CLEC authorization, ***when CLEC chooses not to provide trouble isolation results***, per the CLEC's interconnection agreement. The charge will be the basic rate, unless overtime or premium hours are requested by the CLEC. (Emphasis added.)

When Qwest implemented "optional testing" in CMP, Qwest assured CLECs that it would provide test results to CLEC:

> The CLEC will receive the benefit of this Optional Testing in that the ***test results will be provided to the CLEC*** either verbally or electronically. . . . Once the test is complete, the test ***results will be related back*** to the CLEC. The ***CLEC can then choose*** to amend these test results to its initial request and submit a trouble ticket to Qwest or can then choose to resolve the trouble without Qwest's assistance.[127]

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[124] See, e.g., Arbitrated ICA, §12.4.1.1.
[125] See, e.g., Arbitrated ICA, §12.4.1.1.
[126] See, e.g., Arbitrated ICA, §12.4.1.6: "When CLEC ***elects not to perform trouble isolation*** and CLEC requests Qwest to perform ***optional*** testing, Qwest will charge CLEC the applicable optional testing rate as set forth in Exhibit A" (emphasis added).
[127] Qwest CMP Response CR #PC100101-5, 12/13/01 (emphasis added). See Attachment F.

Qwest, however, does not provide results consistently, if at all, to CLECs. Qwest nonetheless bills CLECs for optional testing charges. If Qwest proceeds to repair the service without relating back the test results and allowing the CLEC to then choose how to proceed, Qwest may also charge CLEC maintenance of service charges that may not apply if CLEC had been given those results and that choice.

Even assuming Qwest would provide results, because Qwest is testing to "core" tests for insertion loss (1004 Hz) and bridge tap [see section (f) above], Qwest's current tests would not reveal the trouble in Qwest's network when the trouble is either that the circuit works at levels for voice but not data or is caused by bridge tap that Qwest refuses to remove. Given that CLECs are paying for testing, Qwest should be conducting the appropriate tests ***for digital services*** before charging CLECs for testing.

Additionally, Qwest should not be charging for optional testing when CLECs provide test results to Qwest, as described in Row No. 8 of Attachment A. On October 7, 2009, Integra provided two Minnesota examples[128] to Qwest in which Integra provided test results to Qwest and in both cases, by Qwest's own cause-coding, the troubles were ***in the Qwest network*** (*i.e.*, Qwest-caused). In both cases, Qwest nonetheless refused to proceed with the repair unless Integra authorized optional testing (with associated charges). Authorization is not genuine if obtained under such circumstances.

Even though Integra provided test results and the troubles were in the Qwest network/facilities in those examples, Qwest later said it imposed optional testing charges because Qwest unilaterally determined the results were not valid because they were not "metallic":

[128] Qwest ticket OE270597 & Circuit ID 3/LXFU/517831/NW; Qwest ticket OE270973 & Circuit ID: 3/LXFU/544385/NW.

> Qwest responds that, by 'metallic' testing, Qwest is referring to loss at ***1004 Hz*** and 40 kHz, Loop Noise, Foreign Voltage, Resistance to Ground, Conductor Loop Resistance. . . . If you order a metallic loop from us, then ***we require metallic testing***. If Integra has ordered a loop, but does not provide test results that show it has isolated the trouble to Qwest's network, i.e., metallic tests, then Integra must authorize optional testing, and Integra need not provide any test results. Where Integra has ordered an unbundled loop, and metallic test results isolate trouble to the loop, then Qwest will repair the loop.[129]

Even though Qwest claimed that the problem is the type of test results provided, when Integra has provided metallic test results, Qwest has still imposed optional testing charges. It seems that, no matter what a CLEC does, Qwest can find some reason to insist upon charging. If Qwest insists upon authorization of charges while a CLEC end user customer is experiencing service problems, Qwest holds the leverage, as the CLEC needs Qwest to repair the service.

In addition to the charge issue, if optional testing is required when it should not be, Qwest nonetheless stops the clock for performance measurement purposes,[130] so Qwest does not count the time toward the four-hour repair commitment time in the Performance Indicator Definitions ("PIDs") for service quality measurement purposes.

i. <u>Qwest fails to assign the best available loop, and instead assigns to voice parameters for CLECs.</u>

Many of the problems described above may not occur at all or would be reduced, if Qwest assigned a better loop to begin with. When assigning a loop to be installed/provisioned, however, Qwest uses the same narrow definition of "core standards"[131] that it uses when asked to remove bridge tap upon repair. [See section (h) above.] If, when assigning a loop and installing service, Qwest removed bridge tap that, although meeting core standards, nonetheless interferes with xDSL service, Qwest would not later have to test and repair for that bridge tap upon repair.

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[129] Qwest (attorney Daphne Butler) 10/16/09 communication to Integra (emphasis added).
[130] E.g., in Qwest Ticket OE270973 (Circuit ID: 3/LXFU/544385/NW), 10/6/09, Qwest states: "IN STOP TIME UNTIL TROUBLE ISOLATION WAS DONE BY TECH."
[131] Qwest (Mary Dobesh) 10/29/07 email, Attachment L, p. 008: "Qwest will ***provision*** to meet core standards, i.e. less than 2500 total bridge tap, with no single bridge tap greater than 2,000 feet." See *id.* pp. 003-004.

It would have already removed it in the provisioning process. After all, when a CLEC authorizes conditioning on its order, Qwest should remove bridge tap and other devices that could diminish xDSL capability.[132] Or, better yet, there may have been a loop better suited to the requested service available at the time that would not have required conditioning or as much conditioning, as discussed in Row No. 9 of Attachment A.

Qwest, however, admits that it does not assign the best available facility for the type of xDSL loop ordered by a CLEC [as indicated by the NC/NCI codes on the order, see section (j) below]. Integra provided Qwest with three scenarios involving three loops of varying make ups, the first of which (Loop 1) was the most likely to meet the specifications for HDSL service. Integra asked Qwest whether it would assign Loop 1 (the best available loop). Integra asked the question as follows, and received the following response from Qwest:

> Integra: "a. Because we know that Loop 1 would most likely meet the ANSI T1E1 technical specifications for HDSL, how would Integra/Eschelon request Loop 1 on our LSR? . . . c. Based on the HDSL NCI codes we provide on our LSR would Qwest automatically assign Loop 1 or Loop 2 because they are more likely to meet the HDSL technical specifications?[133]
>
> Qwest: "No, the assignment system would NOT automatically assign Loop 1 or Loop 2 because they are most likely to meet HDSL technical specifications."[134]

Qwest also admits that, even though Qwest says that CLECs have the "responsibility to inspect the character of the facilities, e.g., gauge, length, etc. and determine that the facility is appropriate for their specific application,"[135] CLECs do not have the means to choose/assign the best available loop. Integra asked the question as follows, and received the following response from Qwest:

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[132] 47 C.F.R. §51.319(a)(1)(iii)(A).
[133] Integra (Kim Isaacs) 11/14/07 email, Attachment L, p. 005 (question repeated on p. 003).
[134] Qwest (Mary Dobesh) 1/21/08 email, Attachment L, p. 003.
[135] CMP 3/18/09 Meeting Minutes (Bob Mohr, Qwest), Attachment D, p. 004.

> Integra: "Qwest's response indicates that the 'CLEC shall determine whether the available loop satisfies their service requirements.' My assumption is that Qwest feels that it is the Integra/Eschelon responsibility to review the available raw loop data at a given address to see if the loop will meet the HDSL technical specifications outlined in ANSI T1E1. If this is the question a few questions arise. . . . "a. Because we know that Loop 1 would most likely meet the ANSI T1E1 technical specifications for HDSL, how would Integra/Eschelon request Loop 1 on our LSR? It has always been my understanding that CLECs can not 'reserve' available loops[136]
>
> Qwest: "Integra/Eschelon cannot specifically request a facility. . . . The CLEC cannot 'reserve' available loops."[137]

Qwest then goes on to explain that, instead of either assigning the best available loop or allowing CLEC to identify and reserve the best available loop, Qwest imposes upon the assignment process its own narrow definition of a qualified loop – *i.e.*, a loop that simply meets one industry standard regarding length (individual bridge tap length or total bridge tap length),[138] regardless of any other factors that may indicate the bridge tap could diminish xDSL capability, such as ***placement*** of the bridge tap [*e.g.*, whether near-end, see section (f) above].

To illustrate the problem, Attachment N to these Comments contains a CLEC order (a Local Service Request or "LSR"), along with Qwest documentation related to the loop Qwest assigned and other loops, which Qwest did not assign.[139] The LSR shows that the CLEC ordered HDSL2 service [which should be apparent from the NC-NCI code, see section (j) below] and requested conditioning (by checking "Y" in the "SCA" field). For the Qwest-assigned loop, the Qwest Raw Loop Data tool shows bridge tap. For the unassigned loops, there are at least two loops for that address which have a better loop make up, as they have no bridge tap. Qwest did not assign the best available loop. Moreover, the Raw Loop Data result for the unassigned loop

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[136] Integra (Kim Isaacs) 11/14/07 email, Attachment L, p. 005 (question repeated on p. 002).
[137] Qwest (Mary Dobesh) 1/21/08 email, Attachment L, p. 002.
[138] Qwest (Mary Dobesh) 1/21/08 email, Attachment L, p. 002-003.
[139] This LSR was selected randomly only for purposes of comparing assigned and unassigned loops for the same address. (It is not one of the examples of non-working service.)

says: "This query will not reserve these facilities." This confirms that, although it is possible to identify the best available loop, Qwest will not allow the CLEC to request/reserve it.

Also attached to these Comments, as Attachment O, is documentation from a vendor used by both Qwest and CLECs – AdTran. This documentation illustrates that whether a loop is likely to perform at the needed specifications for a requested service can be estimated relatively easily. AdTran offers a "DSL Assistant" tool, which is described online as follows:

> ADTRAN's DSL Assistant is a design tool intended for Local Exchange Carrier planning and design groups to calculate insertion loss for various digital subscriber line technologies. This application can be used to graphically build and display elements of the DSL loop.
>
> Version 2 features:
>
> - New! Repeaters/Extenders
> - New! HDSL2 loop attenuation calculations
> - New! On-board registration
> - HDSL, HDSL2, ISDN, IDSL & IDSL DDS
> - ANSI and ETSI CSA standard loops for HDSL, HDSL2 and ISDN
> - Total Reach ISDN, 2-Wire Total Reach DDS
> - 4-Wire DDS with secondary and non-secondary channel rate[140]

In Attachment O, the first example is the raw loop data and the associated AdTran DSL Assistant results for the business address for the Minnesota Commission (which has no bridge tap). The second example (the final page of Attachment O) is a different business address randomly selected to show how the AdTran DSL Assistant results appear when bridge tap is present.

A carrier first obtains the loop makeup data for a particular street address (*i.*e., in this case from the Qwest Raw Loop Data tool). Next, using the DSL Assistant tool, the carrier selects the type of service (*e.g.*, HDSL2) and then enters the raw loop data (*e.g.*, loop length, gauge of copper, *etc.*) for each loop segment for that address, including entering bridge tap where the raw loop data indicates it is present on the loop. Once the carrier hits "submit," the DSL

[140] http://www2.adtran.com/frames/mid_center.html (emphasis omitted).

Assistant tool indicates whether the loop "passes" specifications for the selected service and provides an estimated insertion loss. However, ***because CLECs cannot reserve any particular loop***, CLECs may know that there are suitable loop(s) for the service at a particular address, but CLECs cannot ensure that they receive one of those loops from Qwest. In addition, this tool is fairly manual for CLECs in that they have to pull the Qwest raw loop data and manually enter it into the DSL Assistant tool on a loop-by-loop basis.

Qwest, in contrast, has the raw loop data in its systems and has the capability to automatically apply a formula, or algorithm, to calculate whether a loop is likely to perform at the needed specifications for a requested service. For years, Qwest used just such an algorithm for loop assignment purposes for ADSL compatible loops.[141] This demonstrates that an algorithm is a feasible, readily available tool for Qwest to use to improve its loop assignment process. Moreover, industry use of algorithms is not limited to ADSL. They are used for other xDSL services as well, such as this loop attenuation formula in the ANSI documentation[142] related to HDSL2 and HDSL4:

$$\mathrm{LoopAtten}_{\mathrm{HDSL2}}(\mathrm{H}) = \frac{2}{f_{\mathrm{Baud}}}\left(\int_0^{\frac{f_{\mathrm{Baud}}}{2}} 10\cdot\log_{10}\left(\sum_{n=0}^{1} S(f - nf_{\mathrm{Baud}})\right)df - \int_0^{\frac{f_{\mathrm{Baud}}}{2}} 10\cdot\log_{10}\left(\sum_{n=0}^{1} S(f - nf_{\mathrm{Baud}})\left|H(f - nf_{\mathrm{Baud}})\right|^2\right)df\right)$$

where $f_{Baud} = 517.\overline{3}$ kHz, $\frac{1}{H(f)}$ is the insertion loss of the loop, and $S(f)$ is the nominal transmit PSD (PSD mask – 1 dB – *N*).

Qwest participates in the ANSI committee that published this formula,[143] so it is obviously aware of the development and availability of such formulas for xDSL services in addition to ADSL. If Qwest follows industry standards – requiring use of not only the NC code but also the NCI code

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141 Qwest 1/17/07 CMP Meeting minutes, Attachment J, p. 004-0013. See section (d) above.
142 ANSI T1.418-2002
143 ANSI T1.418-2002, p. iii (identifying Qwest as an ANSI committee member).

for provisioning purposes [see section (j) below] – the NCI code will tell Qwest which algorithm to apply. Whether Qwest uses an algorithm or some other means to identify the best available loop, improvements are needed to its facilities assignment process so that Qwest is assigning facilities for the particular xDSL service ordered, as discussed in the next section.

j. Qwest ignores industry standards for NCI codes in the facilities assignment process, while blaming NCI codes for repair and spectrum management problems.

i. NCI codes – Loop Assignment/Provisioning

Qwest should provide a loop that will actually support the service ordered by the CLEC. Instead, and despite industry[144] and ICA requirements[145] to comply with both the NC code ***and the NCI code***, Qwest chooses to ***provision*** only to the NC code without regard to the NCI code, as described in Attachment A, Row Nos. 10-11. Whereas the "N" in the NC code LX-N indicates for example that the loop is non-loaded, the NCI code specifies which type of xDSL (HDSL, ADSL, *etc.*) the non-loaded loop needs to be capable of carrying. Therefore, when a CLEC receives the loop, it may for example have no load coils (per the NC code) but, when tested to the specification of 196 kHz consistent with the ANSI standard for a service,[146] it will not pass traffic at a rate of 1.544 Mbps (per the NCI code). If Qwest's current processes (including its technical publications) do not allow a CLEC to order a service (*e.g.*, HDSL2) in the manner the service is defined as indicated by the full NC/NCI industry standard codes, then Qwest's processes are out of compliance and need to be brought into compliance. CLECs need

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[144] The Telcordia Common Language NC/NCI Dictionary provides the NCI codes to the industry, such as 02QB9.00A for ADSL, 02QB9.00H for HDSL, 02QB9.00E for HDSL2, etc. There is a separate chart of NC/NCI codes in the Dictionary for DS1 Capable Loops (*e.g.*, NC HC and NCI 04QB9.11 04DU9.BN). Even though Qwest has testified regarding the importance of complying with industry standards (see Attachment I), Qwest does not fully comply with these standards. For example, Qwest does not offer the HDSL2 code (02QB9.00E), forcing CLECs to use the HDSL code (02QB9.00H) for HDSL2. This is true even though the definition of HDSL2 has been in the SGAT since at least 2003 and in Qwest's own ICA negotiations template since at least 2005 (see template Version 1.8, 5/11/2005). For both see Section 4.0 ("Definitions"), under "Digital Subscriber Loop."

[145] See, e.g., Arbitrated ICA, §9.2.2.1.1.

[146] Regarding ***196 kHz***, see section (e) above.

certainty in their business and operational planning, and they need to meet their end user customers' expectations. Qwest needs to provide the particular service requested by CLEC.

To view this technical issue in another context may help in understanding the problem:

> Consider a customer who has a terrible allergy to onions. The customer specifically orders a pizza with no onions. The pizza is delivered. The customer believes that the pizza is the type ordered so eats a slice. The customer only learns there is a mistake when the customer with the onion allergy goes into anaphylactic shock. It turns out the pizza delivery person delivered a pizza with onions. When the customer calls to complain, the pizza place says it met its obligation to the customer because "hey, we delivered a pizza." It is a completely unsatisfactory result. The customer did not receive the product ordered and, as a result, the customer is harmed.

In this analogy, if an NCI code were used, the NCI code would tell the pizza place that the pizza should have no onions, just as in telecommunications the NCI code tells the ILEC which flavor of xDSL (e.g., HDSL2, ADSL, *etc.*) the CLEC requests. Despite this intended use of NCI codes, however, Qwest said in CMP: "For Unbundled Loop LX-N Network Channel (NC) codes, the NCI codes are informational only, as stated in the . . . Technical Publication."[147] This statement is just another way of saying that Qwest does not provision to the full NC/NCI codes but instead only takes the "NC" code into account, so regardless of the NCI code used Qwest assigns the same loop (as discussed above). Although Qwest attributes this position to ("as stated in") Qwest's technical publication, Qwest misquotes its own publication. Qwest's technical publication 77384 states on page 3-6 in Section 3.4.3 that the NCI codes are "informative to Qwest" and adds that the "customer specifies the NCIs to communicate to QWEST the character of the signals the customer is connecting to the network at each end-point of the metallic circuit."[148] Once informed of the customer's specifications, Qwest must take

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[147] Qwest CMP Denial, 3/13/09, Attachment C(15), p. 062.

[148] The NCI codes "communicate to QWEST the character of the signals the customer is connecting to the network at each end-point of the metallic circuit" because – unlike with a DS1 Capable Loop when Qwest provides the equipment on each end – for xDSL capable loops, CLECs provide that equipment at the customer premises and in the central office. Therefore, CLECs use the NCI code to communicate this information to Qwest.

them into account. Specifically, Qwest's publication states on page 3-6 in Section 3.6 (with emphasis added) that an NCI code "tells a Qwest engineer and the circuit design system, of ***specific technical, customer requirements*** at a Network Interface." As required by federal law, state law, the Arbitrated ICA, and industry standards, Qwest cannot ignore these wholesale customer requirements and must comply with them. In other words, Qwest must provide the service in the manner requested by CLEC.

Integra submitted a change request in CMP to, among other things, gain Qwest compliance with proper use of the NCI codes, but Qwest denied both the change request and the later CMP escalation (which several other CLECs joined).[149] Joint CLECs escalate this issue to the Commission and ask the Commission to resolve this dispute and reverse Qwest's CMP denial.

ii. NCI codes – Repair/Spectrum Management

Although Qwest has basically disregarded the NC/NCI codes for loop assignment purposes, Qwest increasingly has taken the position that there should be strict compliance with the NC/NCI codes in repair situations – to the point that it asks a CLEC to re-order service for a long-installed customer before submitting a trouble report. Qwest says it is now paying attention to the codes in the repair phase "to manage spectrum."[150] Generally, spectrum management is a means to coordinate the joint use of the electromagnetic spectrum for advanced services, so as to enable systems to perform their functions without causing or suffering unacceptable interference. There are terms regarding managing spectrum in the Arbitrated ICA[151] and the federal rules,[152] and Qwest should comply with them.

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[149] See Attachment D (CMP materials related to this change request, escalation, and Qwest's denials). See also Attachment K (Summary of Key Events).
[150] CMP Meeting minutes, 2/17/08 (Jamal Boudhaouia, Qwest), Attachment D, p. 017.
[151] Arbitrated ICA §9.2.6.

In CMP, Integra asked Qwest how Qwest obtains the NC/NCI information to manage spectrum.[153] Qwest responded that it "is driven by the service order and that is how they get assigned to the cable."[154] Qwest said that, "going forward," Qwest would look at the NC/NCI codes and the total technical parameters within the NC/NCI codes.[155] Integra asked, when Qwest assigns an HDSL loop up-front using its facilities assignment system (LFACS), whether the NC/NCI codes going forward will be tied to the circuit so that Qwest may manage spectrum to avoid interference.[156] Qwest replied that, when a new Universal Service Ordering Code (USOC) is put in place, the system "will drive the correct NCI codes."[157] Qwest had proposed adding a readily available USOC for HDSL as a solution to the flaws in its facilities assignment process[158] and at one point indicated the USOC would be implemented in a systems release in mid-April 2009.[159] Qwest then attempted to use implementation of the USOC as leverage to obtain agreement to CLECs paying higher charges (by requiring CLECs to forego their right to basic loop installations at Commission-approved rates in the case of every xDSL installation[160]). When the parties could not agree to a resolution on the other issue, Qwest refused to proceed with implementing the USOC as part of the NC-NCI change request. Integra then submitted a separate, narrowly focused change request in CMP to ask Qwest to implement the USOC, without bogging down the USOC implementation with other issues. Qwest denied both change

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[152] See 47 C.F.R. §§51.230, 51.231 & 51.232.
[153] CMP Meeting minutes, 2/17/08, Attachment D, p. 017.
[154] CMP Meeting minutes, 2/17/08 (Jamal Boudhaouia, Qwest), Attachment D, p. 017.
[155] CMP Meeting minutes, 2/17/08 (Jamal Boudhaouia, Qwest), Attachment D, p. 017. Qwest's statement that it would do this "going forward" is an indirect admission that it has not done it to date.
[156] CMP Meeting minutes, 2/17/08, Attachment D, p. 017.
[157] CMP Meeting minutes, 2/17/08 (Jamal Boudhaouia, Qwest), Attachment D, p. 017.
[158] "Qwest found an existing USOC (U2UXX) that is defined today as a HDSL Unbundled Loop. The USOC is not used for any other application and LFACS can assign a Qual Code to validate availability of a facility that meets the HDSL guidelines." CMP Meeting Minutes, 11/12/08 (Bob Mohr, Qwest), Attachment D, p. 020.
[159] CMP Meeting minutes, 2/17/08 (Bob Mohr, Qwest), Attachment D, p. 012.
[160] Integra CMP Comments, 2/4/09, Attachment C(5), pp. 025-032; Escalation No. 45 (joined by other CLECs), Attachment C(19), pp. 13, 16-17. See also Attachment D (as these documents are part of the CR Detail), pp. 007-012, 037-038, 040-041.

requests, and both CLEC escalations of both change requests in CMP.[161] Joint CLECs escalate this issue to the Commission and ask the Commission to resolve this dispute and reverse Qwest's CMP denials. If Qwest were to promptly implement the readily available USOC for HDSL, improvements in assignment of better loops up-front could help reduce or avoid problems in the repair and spectrum management stages. And, valuable learning could be gained as to whether USOC implementation would be a potential solution for loop assignment for other types of xDSL as well.

Even assuming a USOC were implemented or the loop assignment process were improved via other means, those are "going forward" solutions. To date, Qwest has not been taking the NCI codes on the orders into account during the facilities assignment process [as discussed in the previous section III(A)(2)(j)(i)]. Therefore, a situation can arise today when, for valid historical reasons, the NC/NCI code on the order is not the appropriate order for the desired service. Now, however, Qwest is saying it will nonetheless look at that code to manage spectrum. If interference occurs, and a historical NC/NCI code is on the order, Qwest may claim that the CLEC has placed a service on the loop for which the loop was not intended and attempt to have the service disconnected (or refuse to restore it if it needs a repair), even though Qwest's historical treatment of NC/NCI codes in the provisioning phase created the problem.

Regarding the embedded base of customers (customers already in service which may not have the appropriate industry standard NCI/NCI codes on their orders at the time they were submitted), Qwest has caused confusion and misdirection by treating the NCI codes as informational only and has erected operational barriers by misinforming CLECs as to ordering processes (such as telling PAETEC to order ADSL with HDSL NC/NCI codes and use of

[161] See Attachment E (CMP materials related to this change request, escalation, and Qwest's denials). See also Attachment K (Summary of Key Events).

remarks) and rejecting orders (such as rejecting "LX-R" orders as not being in the ICA when ADSL is in the ICA[162]). CLECs should not bear the burden of correcting Qwest's mistakes in this regard. Qwest's proposed "solution" – for CLECs to order new service for already installed customers simply to change the codes – is no solution at all. It introduces a delay (associated with the installation interval before Qwest will submit a trouble ticket) and exposes end user customers to the risk of additional service disruption. An end user customer that is already having trouble with its xDSL service should not have to wait several days before a trouble ticket can be opened, only to have its service disrupted when the new circuit is installed or put on hold altogether because Qwest says no new facility is available (as in some of the PAETEC examples). Qwest needs to bear the burden with respect to NC/NCI codes in the embedded base, given that Qwest has refused to properly abide by the NCI codes for loop assignment purposes to date. When an existing customer needs a repair due to interfering bridge tap (*e.g.*, after a Qwest network change), for example, Qwest may issue an internal service order to direct its repair personnel to remove bridge tap. Qwest could update codes in the records at that time, per direction from the CLEC in the trouble report.

To summarize, the xDSL capable copper loop issues addressed in sections IIIA(2)(a)-(j) of these Comments are important issues, not only for CLECs but also for end user customers in Minnesota. A particular threat to business certainty and therefore to competition is Qwest's position that it has no obligation to restore a customer's previously working xDSL service. When taken together, these issues create a serious, customer-affecting, and anticompetitive situation. Joint CLECs ask the Commission to help remedy these problems.

[162] See Feb. 5, 2009 email (Qwest system rejection notice states: "you are not contracted for lxr-").

B. Network Maintenance and Modernization[163] or Other Changes in UNEs Provisioned to CLECs.

Even if Qwest provides a conditioned loop (initially or after multiple requests) in the loop assignment process [see Section III(A)(2)(i)&(j) above], Qwest may later make changes that adversely affect service to a CLEC's end user customer. For example, CLECs have experienced situations in which Qwest-initiated network changes have disrupted the HDSL2 or other xDSL service the CLEC provides to its customers.[164] As a result, CLECs have had to open trouble tickets to restore service. Upon opening trouble tickets with Qwest for repair of these circuits, Qwest has said that Qwest will test and repair to voice grade parameters, which means that the end user customer's HDSL2 service will no longer work (*i.e.*, will be permanently disrupted). This result is contrary to section 47 C.F.R. §51.319(a)(1)(iii)(C), which prohibits ILECs from restricting their testing to voice grade service, as discussed in Section III(A)(2)(b) & (e) above.

The FCC's unbundling rule provides, in part: "An incumbent LEC shall not engineer the transmission capabilities of its network in a manner, or engage in any policy, practice, or procedure, that *disrupts or degrades access* to the local loop."[165] In adopting this rule, the FCC was not content to simply refer to industry standard; rather the focus of the rule is on the end that such standards are intended to advance – access to the local loop. As a practical matter, if a network maintenance or modernization activity results in a change that causes a CLEC customer to be dissatisfied with the service, then that is a change that would be of concern. As the Washington Commission has observed: "While Qwest should have the discretion to modernize

[163] See Arbitrated ICA §9.1.9; Qwest-Eschelon Arbitration Issue No. 9-33, Attachment G.
[164] See, e.g., example provided by Integra in it CMP CR, Attachment D, p. 001.
[165] 47 C.F.R. § 51.319(a)(8) (emphasis added).

and maintain its own network, it should be apparent that 'modernization' and 'maintenance' efforts should enhance or maintain, not diminish, transmission quality."[166]

Eschelon (*i.e.*, a party to the arbitration) is experiencing this problem, even though Eschelon prevailed on the issue of restoring service, including data service, after Qwest network maintenance and modernization activity in the Minnesota Qwest-Eschelon ICA arbitration (Issue No. 9-33).[167]

Velocity has had similar experiences, involving ADSL, as discussed in its earlier comments.[168]

PAETEC has also had a similar experience with Qwest, which involves ADSL and SDSL capable loops.[169] PAETEC was providing ADSL and SDSL service to end users over many circuits for several years. During that time, PAETEC ordered the circuits used to provide xDSL services using the ordering process specified by Qwest for lines that were to be used to provide xDSL services.[170] In late 2007, PAETEC customers started experiencing repair issues. Many customers that had working ADSL or SDSL service with no issues for several years began experiencing degraded service and, in some instances, total interruption of service. After PAETEC's investigation into the issue, it concluded the problem arose because Qwest had unilaterally modified its network configuration by binding loops together in groups (binder groups) when deploying Remote DSLAMS.[171] Binding different xDSL services together, including ADSL with SDSL, will degrade and/or interrupt the services. Apparently, Qwest had

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[166] WA Arbitrators' Report, WUTC UT-063061, Order No. 16 (aff'd), ¶83. See Attachment G.
[167] Arbitrator's Report, *In the Matter of the Petition of Eschelon Telecom, Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. §252(b)*, MPUC Docket No. P-5340, 421/IC-06-768 ("Minnesota Arbitration"), at ¶¶ 140-142 (Issue 9-33), adopted by the MPUC in its Order Resolving Arbitration Issues (March 30, 2007). Integra has since opted in to the Eschelon ICA.
[168] See Velocity's Reply Comments in the initial KTF docket (7/20/09), p. 1 (first four examples).
[169] See Attachment R, Summary of Key Events
[170] See Attachment P, Business Analysis and Quality Assurance (Confidential).
[171] See Attachment Q, Communications Regarding ADSL & SDSL Troubles, page 1, 4th entry.

ignored spectrum management and bound all loops with the NC code "LX-N" together without regard to the varying types of services, some with ADSL or SDSL, provided over the newly bound circuits. Qwest neither provided notice that it was making changes to its network, nor indicated that changes would impair services provided by Qwest to the CLEC to serve end user customers. Even after months of inquiry, testing, investigation, and discussion between PAETEC and Qwest, Qwest was unwilling to acknowledge responsibility for the issue.[172] Instead, Qwest proclaimed that the newly bound circuits met its voice grade standard, which Qwest said was the only service it was obligated to provide.[173]

After Qwest's delay for more than one and a half years, when PAETEC raised this issue in a Change Management Process ("CMP") meeting during a discussion of Integra's NC-NCI CR, Qwest finally agreed to address the issue.[174] However, after several more months of discussion, Qwest provided notice, via the CMP, that "*...Interference may be present or may develop in the future, Central Office Based ADSL service may be degraded or may not work at all. Qwest can not guarantee the feasibility CO Based ADSL.*"[175] Qwest then noted that this occurrence is due to the existence of a Remote DSL Terminal...," as PAETEC had determined and told Qwest more than a year before.[176]

The manner in which PAETEC initially ordered the circuit, which reflects the process and NC-NCI codes Qwest told PAETEC to use, resulted in the provision of a working circuit suitable for ADSL and SDSL for a period of years. Qwest is now telling PAETEC the "solution" to resolve the issue is for PAETEC to submit a new order for installed customers -- which would introduce risk of service disruption, cause delay during the installation interval, and subject

[172] See Attachment Q.
[173] See Attachment Q.
[174] See Attachment D, p. 018.
[175] See Attachment J, p. 015.
[176] See Attachment J, p.015.

PAETEC to applicable non-recurring charges -- to change the NC-NCI codes for all the existing ADSL and SDSL customers. Yet, Qwest will not even commit to ensuring that, if PAETEC submits a new order, Qwest will 1) assign and provision a circuit that works for ADSL and SDSL; 2) retain the existing facilities and repair the service by removing it from the binder group; and 3) provide the same protections as afforded by the earlier product.

By ignoring its spectrum management obligations and indiscriminately binding circuits carrying diverse xDSL services into the same binder groups when deploying Remote DSLAMs, Qwest knowingly has reconfigured its network in a manner that impairs PAETEC's ability to provide services contemplated by its ICA,[177] state law, the Act and the FCC's rules and regulations. As alleged by KTF and confirmed here by Joint CLECs, Qwest unlawfully makes unilateral changes that adversely affect CLECs and their customers.

C. Advance Notice of Changes in Facilities/Maintenance Activity.[178]

Unannounced or insufficiently noticed Qwest maintenance activity can cause serious service- and resource-affecting problems. As this is a well known fact, the need for advance notice of maintenance activity was recognized early. The Minnesota Statement of Generally Available Terms ("SGAT") has included the following provision since 2003:

> 12.3.10.2 Qwest will work cooperatively with CLEC to develop industry-wide processes to provide as much notice as possible to CLEC of pending maintenance activity. Qwest shall provide notice of potentially CLEC Customer impacting maintenance activity, to the extent Qwest can determine such impact, and negotiate mutually agreeable dates with CLEC in substantially the same time and manner as it does for itself, its End User Customers, its Affiliates, or any other party.

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[177] See Attachment R. US WEST Communications, Inc. and McLeodUSA Telecommunications Services, Inc. Interconnection Agreement for Minnesota, Part A, Scope of Agreement, § C:

> USWC shall not reconfigure, reengineer or otherwise redeploy its network in a manner which would impair McLeod's ability to offer Telecommunications Services in the manner contemplated by this Agreement, the Act or the FCC's Rules and Regulations. USWC agrees that all obligations undertaken pursuant to this Agreement, including, without limitation, performance standards, intervals, and technical requirements are material obligations hereof and that time is of the essence.

[178] See Arbitrated ICA §§9.1.9, 12.4.3.11.1.

Substantially the same language appears in Section 12.4.3.11.1 of the Arbitrated ICA, which was approved more recently by the Commission and which has been adopted or used in negotiations by other CLECs. (*See, e.g.*, in Minnesota, the approved ICAs of Integra, NorthStar Access, LLC, Otter Tail Telecom, LLC, Popp.com, and TDSM – Attachment H.) In fact, the above language appears in Section 12.3.10.2 of Qwest's own negotiations proposal (which Qwest refers to as its negotiations "template").[179]

Nonetheless, Qwest has not worked cooperatively with CLECs to develop processes to provide as much notice as possible to CLECs of pending maintenance activity. For example, in 2004, Eschelon attempted to work with Qwest to implement notification of maintenance activity. In March of 2004, Qwest's service manager indicated that Qwest was in the pre-stage of reviewing, developing, and implementing a pre-notification process for Qwest planned events, such as maintenance. At that time, Qwest said it had a tentative target date of the fourth quarter of 2004. Qwest then indicated that it placed this initiative on hold for IT resources. In March of 2008, Qwest indicated that it would not proceed with the process and since then has not changed its position. Qwest does not provide as much notice as possible to CLECs of pending maintenance activity.

D. Marketing Activity and Disparaging Remarks.[180]

In its role as a wholesale provider to CLECs, Qwest performs activities, such as installing and repairing unbundled loops on a CLEC's behalf. If Qwest makes an error in the course of these activities that impacts a CLEC's end user customer, that customer may attribute fault to the

[179] Qwest Template negotiations agreement, available at http://www.qwest.com/wholesale/downloads/2008/081230/Negotiation_Template_12_29_08.doc.

[180] See Arbitrated ICA §§ 5.16.3, 12.1.5.3, 12.1.5.4.7, 12.1.5.8. Regarding Customer Proprietary Network Information (CPNI), marketing activities, and customer retention/winbacks, see 47.U.S.C. § 222(b); Bright House decision (FCC 08-159 Bright House Networks LLC v. Verizon California Inc.); Order on Reconsideration and Petitions for Forbearance, FCC 99-223, CC Docket No. 96-149; Adopted August 16, 1999; Released September 3, 1999 (CPNI); Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 8061, FCC 98-27, CC Docket No. 96-115, Adopted Feb. 19, 1998; Released Feb. 26, 1998 (CPNI I).

CLEC, rather than Qwest. Indeed, this may occur because the customer does not fully understand the wholesale relationship between its provider (CLEC) and Qwest. Or, Qwest may even tell the end user customer that the error was caused by the CLEC despite the fact that Qwest caused the service impacting error.[181] Qwest may blame the CLEC in an attempt to win the customer away from the CLEC. The Commission has recognized that Qwest's unique role as both a vendor and a competitor of CLECs gives it unique opportunities for such conduct:

> As a provider of monopoly and bottleneck wholesale services, as well as the best-known provider of retail services, Qwest has unparalleled opportunities to manipulate the wholesale service transfer process to its benefit. For this reason, ensuring that calls from other carriers' customers are immediately referred to them and preventing misleading characterizations of other carriers' conduct are critical to providing adequate wholesale service.[182]

Integra has reported multiple separate instances of this nature to Qwest's service management team, some of which are described in Attachment S. Recently, Popp.com experienced a situation in which Qwest reduced the internet bandwidth available to Popp.com's end user customers by installing fiber. The customer reported to Popp.com that a Qwest representative told the customer that Qwest could not correct the bandwidth decrease and that the customer should, therefore, consider a Qwest fiber connection. In other words, Qwest created a problem for a Popp.com end-user customer by a unilateral network change and then inappropriately sought to take marketing advantage of that problem through direct contract with the customer on a repair call to address the problem. In addition, as described in Attachment U, Popp.com has experienced at least two other situations in which Qwest inappropriately used proprietary information as part of marketing to a Popp.com end-user customers.

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[181] This happened in a previous Minnesota case. See orders dated 7/31/03 and 11/12/03 in the docket entitled *In The Matter of a Request by Eschelon Telecom for an Investigation Regarding Customer Conversion by Qwest and Regulatory Procedures*, Minnesota PUC Docket P-421/C-03-616 ("MN 616 Orders") (and citations to the law therein).

[182] MN 616 Order, July 30, 2003, p. 7.

Another example of a Qwest attempt to engage in inappropriate marketing activity occurred with respect to its efforts to implement a process allowing the current local service provider to cancel a pending number port request initiated by the new local service provider. Meeting minutes from Qwest's CMP state as follows:

> Mark Coyne-Qwest said that when we get the responses to comments we will get with our SMEs and legal team. He said that it is a marketing opportunity (3/27/09 Comments to minutes received from Integra and PAETEC to delete the words in CAPS in this paragraph) FOR THE COMPANY WHO IS THE OLSP. Mark said that the volumes may not be large but it is a marketing opportunity.[183]

Although after objection from multiple CLECs and involvement of the North American Numbering Council ("NANC"), Qwest did not implement its change. Qwest said that it was merely deferring the change and not withdrawing it.

The Commission has previously found that its authority, including its authority to regulate service quality, extends to resolving these issues:

> The Commission's general authority to require telephone companies to provide adequate service on just reasonable and reasonable terms is codified at Minn. Stat. § 237.081. That statute authorizes the Commission to conduct an investigation whenever it believes, or whenever any provider of telephone service alleges, that any "practice, act, or omission affecting or relating to the production, transmission, delivery, or furnishing of telephone service or any service in connection with telephone service is in any respect unreasonable, insufficient, or unjustly discriminatory, or that any service is inadequate or cannot be obtained."[184]

The Commission further observed:

> Providing adequate wholesale service includes taking responsibility when the wholesale provider's actions harm customers who could reasonably conclude that a competing carrier was at fault. Without this kind of accountability and transparency, retail competition cannot thrive. Telecommunications is an

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[183] Qwest Wholesale Products & Services, http://www.qwest.com/wholesale/cmp/cr/CR_PC012009-1.html. The parenthetical in the quotation refers to corrections to the CMP minutes made by Integra and PAETEC, per the CMP procedures which provide that Qwest drafts the initial minutes and CLECs then comment on them. In this case, both Integra and PAETEC indicated that Qwest had added a statement to the CMP minutes that was not said at the CMP meeting.

[184] MN 616 Order, July 30, 2003, p. 5.

> essential service, and few customers will transfer their service to a competitive carrier whose service quality appears to be inferior to the incumbent's.[185]

Qwest has engaged in marketing its retail services when it should be acting on CLEC's behalf as it performs UNE installations and repairs (for which CLEC compensates Qwest). The number of total reported instances of this type of conduct by Qwest likely under-estimates the true extent of the problem, because CLECs will generally only know when it occurs if their customers tell them. If the end user customer does not inform the CLEC, the CLEC may never know why the customer switched carriers, when in fact it may have resulted from a Qwest technician making disparaging comments about the CLEC's service or improperly marketing Qwest's own retail services.

E. Other Discrimination.

Qwest acts in a dual role as CLECs' wholesale provider of bottleneck facilities and CLECs' largest competitor in retail markets. If a CLEC's end user customer is harmed, the CLEC's reputation and its ability to compete meaningfully are harmed as well. As indicated in the previous section, the Commission has recognized that Qwest's unique role as both a vendor and a competitor of CLECs gives it unique opportunities for such conduct.[186] In some cases, no suitable facilities are available to serve a customer. In those situations, Qwest sends a notice to the CLEC indicating that, due to a "lack of facilities," the order will be delayed until facilities are available (or ultimately rejected if none become available). To be nondiscriminatory, if there are no facilities for a CLEC to serve the customer, there should be no facilities for Qwest retail to similarly serve the customer. When Qwest delays installation of a CLEC's request due to lack of facilities, and then Qwest retail delivers service to that customer itself, discrimination occurs.

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[185] *Id.*, p. 13.

[186] See *In The Matter of a Request by Eschelon Telecom for an Investigation Regarding Customer Conversion by Qwest and Regulatory Procedures*, Minnesota PUC Docket P-421/C-03-616 ("MN 616 Order"), 7/30/03, p. 7 (quoted above).

The facility that Qwest retail used to serve the customer should have been used to process the CLEC's request. The CLEC and competition suffer as a result of such conduct. Because Qwest has control over provisioning the CLEC's request, Qwest can delay the service in an attempt to win the customer away from the CLEC. That is exactly what happened in the example described here.

Attachment T to these Comments is a chronology of events relating to a request Integra sent to Qwest to install service for Integra's customer. The end user customer was moving from one location to another. Integra submitted the request for four unbundled loops on July 23, 2009 and requested a due date of August 20, 2009. Integra allowed Qwest ample time (almost a month) to process the request and locate facilities to fulfill the request. Qwest initially sent Integra a Qwest facility jeopardy notice (indicating the due date was in jeopardy of being missed) the day after Integra submitted the order. Qwest sent a new firm order confirmation (FOC) the next business day (July 28, 2009), which cleared the Qwest facility jeopardy and confirmed the due date Integra had requested (August 20, 2009). Qwest had the remaining several weeks to fix any defective pairs that Qwest had assigned to the service or assign pairs that worked.[187] Nonetheless, on the day Qwest had said it would deliver the loops (*i.e.*, the due date), Qwest sent Integra a Qwest facility jeopardy notice for one of the loops but contacted Integra and said it could not deliver any of the loops. Qwest did not deliver the loops, and Integra could not provide service to its customer.

Over the next several days, Qwest sent Integra multiple Qwest facility jeopardy notices on some or all of the loops. Integra spoke with its customer on August 27, 2009, and the customer said it was unhappy that its request for service was delayed. The customer said it had

[187] Qwest later said in a response to an Integra request for root cause that the reason Qwest did not deliver the service was because of defective pairs. See Attachment T.

talked with Qwest retail, and Qwest said it could install its service on August 28, 2009. While Integra's request remained on hold because Qwest said no facilities were available (defective pairs), Qwest delivered its own retail service to the customer on August 28, 2009.[188] Integra's customer called Integra on August 31, 2009 and said Qwest had successfully installed service for the customer and the customer was leaving Integra and changing its service to Qwest. Integra's customer also asked Integra to cancel the order it had placed with Qwest because it was preventing Integra's customer from porting the numbers from Integra to Qwest. Integra processed the customer's request to cancel the order with Qwest.

As a result of the events surrounding Integra's request for loops, Integra's business unit was left wondering how this could happen. On September 2, 2009, Integra asked Qwest to perform root cause. Integra asked Qwest to explain Qwest retail could provide service to the customer and why the same facilities could not have been used to fill Integra's order – which Integra had placed almost a month before Qwest retail placed its order. Integra told Qwest that it had checked the tool in Qwest's Interconnect Mediated Access (IMA) Pre-Order/Service Availability/Convert POTS to Unbundled function available in IMA, and determined that the facility Qwest used to provide service to its customer could have been used for Integra's request.[189]

On September 28, 2009, Qwest responded to Integra's request for root cause and said:

> Qwest investigated this issue. There were two different types of technicians with different skill levels that worked the two different types of orders. While they worked them a little differently (because of their skill levels) they did not do anything improper. It was

[188] See Attachment T. Integra based the date of the Qwest retail service installation on comments the customer made to Integra. Even if the date the customer contacted Qwest and the installation date are off by a day or two, the fact is that Qwest was able to process the request, find facilities to install its own service, and clear any defective pairs in a matter of no more than a few short days.

[189] There are some cases when a facility will support one service but not another. In this case Integra confirmed the facility Qwest used to provide the retail service could have been used for the loops Integra ordered.

> coincidental that the one got worked before the other because of all of the defective pair issues.

Qwest's response suggests that Qwest's order also had defective pairs. Qwest, however, sent a technician with a greater skill level to install the Qwest retail service than it did to install Integra's service. Integra compensates Qwest, via Commission-approved rates, for installation and maintenance and repair. Integra receives no discount for less skilled technicians, and it is not acceptable to assign technicians with inferior skills for CLEC installations and repairs.

If it is the case that the Qwest technician encountered defective pairs when it installed the Qwest retail service, that technician had the means or skill level to either fix the defective pairs or find new pairs that worked, on the due date. Even if the Qwest technician that installed Integra's service did not have that skill level, Qwest had a full week from the due date of Integra's order to the date Qwest installed the retail service to dispatch a technician with a higher skill level. It is discriminatory for Qwest to assign technicians with a higher skill level to its own orders (technicians that can clear a defective pair the day of installation), and assign technicians with inferior skills (technicians that cannot clear a defective pair or find a new pair for over two weeks) to CLECs orders.[190] Qwest had ample time to assign appropriate technicians and repair any defective pairs. Instead, Qwest converted its own inferior wholesale installation and repair performance into an inappropriate winback for Qwest retail. This violates state, federal, and contractual anti-discrimination provisions.

IV. CONCLUSION

For all of the reasons stated, the Commission should investigate Qwest's compliance with the Commission's previous orders, state law, and federal law, including whether Qwest's noncompliance is knowing, intentional, and/or willful in violation of Minnesota Statutes

[190] Qwest placed a Qwest facility jeopardy on Integra's request for defective pairs on 8/20/09 and was still on hold for defective pairs when Integra canceled the request on 9/4/09.

Chapter 237. The Commission should require Qwest to comply with state and federal law regarding xDSL-capable copper loops and reverse Qwest's denial of Integra's change requests in CMP; require Qwest to make changes affecting UNEs with the least service disruption and, if service is disrupted, to restore service to previously working or other mutually agreeable levels; require Qwest to provide adequate notice of changes in facilities and maintenance activity; prohibit Qwest from inappropriately marketing its retail service, including via disparaging remarks about its competitors, as part of its wholesale activities, including UNE installation or repair; refer the matter to the Attorney General for penalties as appropriate under Minn. Stat. 237.461; and award such other and further relief as the Commission deems just and proper.

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Respectfully submitted,

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