Decision No. C03-1189

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03B-287T

IN THE MATTER OF PETITION OF QWEST CORPORATION FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. AND TCG-COLORADO PURSUANT TO 47 U.S.C. § 252(b).

INITIAL COMMISSION DECISION

Mailed Date: October 17, 2003
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APPEARANCES:

Mary Rose Hughes, Esq., and Winslow Waxter, Esq., for Qwest Corporation;

Letty Friesen, Esq., and Steven Wiegler, Esq., for AT&T Communications of the Mountain States, Inc. and TCG-Colorado.

I. BY THE COMMISSION

A. Statement of the Case

1. On July 7, 2003, Qwest Corporation (Qwest) filed a Petition for Arbitration of an Interconnection Agreement (the Interconnection Agreement) with AT&T Communications of the Mountain States, Inc. and TCG-Colorado (collectively, AT&T). Qwest requests that we arbitrate unresolved issues in its Interconnection Agreement with AT&T pursuant to § 252(b) of the Telecommunications Act of 1996 (Act), 47 U.S.C. § 252(b). On July 10, 2003, AT&T filed its Response to the Petition for Arbitration.

2. By Minute Entry dated July 16, 2003, we referred the matter to Hearing Commissioner Gregory Sopkin for hearing. Because of the time constraints contained in the Act, and pursuant to the provisions of § 40-6-109(6), C.R.S., we find that due and timely execution of our functions requires that the recommended decision of the Hearing Commissioner be omitted, and that we render an initial decision.

3. The Hearing Commissioner held a scheduling conference on July 24, 2003 between the parties' counsel. Decision No. R03-0818-I memorialized the procedural schedule agreed to by the parties. Among other things, the schedule set deadlines for the submission of prepared testimony, the filing of the Final Joint Disputed Issues Matrix, and established hearing dates of September 29 and 30, 2003.

4. On September 17, 2003, the motion of Qwest to file supplemental testimony of witnesses Philip Linse and Loretta A. Huff was granted. *See* Decision No. R03-1054-I.

5. On September 25, 2003, the motion of Qwest to strike the consideration of certain issues presented by AT&T in the Final Joint Disputed Issues Matrix was granted in part and denied in part. *See* Decision No. R03-1099-I.

6. The hearing commenced as scheduled on September 29, 2003. Initially, the motion of Qwest to admit attorney Mary Rose Hughes, Esq., of Perkins Coie, LLP, Washington, D.C. to practice before the Commission in this docket, was granted.

7. The parties had filed a joint stipulation that several issues be submitted for decision based on the pre-filed testimonies and related exhibits, and the stipulation was approved in Decision No. R03-1099-I. In effect, both parties waived their respective right to conduct cross-examination of witnesses on those issues. In addition, during the hearing the parties agreed to waive cross-examination on additional issues. The issues on which the parties waived cross-examination are: 19, 21, 22, 24, 30, 33, 34, 35, 36 (parts 1 and 3).

8. Oral testimony was presented by Qwest witnesses Paul McDaniel (Issues 3, 5, 17, 18, 36: part 2) and Loretta Huff (Issue 27), and by AT&T witnesses David Talbott (Issues 3, 17, 18, 36: part 2), Douglas Hyatt (Issue 5) and Robert Hayes (Issue 27). Qwest Exhibits 1, 2, 14

through 16, and 23 through 29 and AT&T Exhibits 3 through 13, 17 through 22, and 30 through 33 were marked for identification, offered and admitted into evidence.

9. On October 1, 2003, AT&T filed an errata to the Joint Disputed Issues Matrix, which reflects the oral testimony of David Talbott at the hearing on Issue 17.

10. On October 6, 2003, both parties filed their post-hearing briefs.

II. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISCUSSION

11. Under the Act, parties seeking to implement an interconnection agreement relating to telecommunications services are required to engage in good faith negotiations in an attempt to informally and voluntary resolve interconnection issues. This Commission's authority to arbitrate issues arises when the parties are unable to resolve them on their own.

12. Since late 2002, Qwest and AT&T have been negotiating a new interconnection agreement to replace existing agreements between AT&T and Qwest (approved in Docket No. 96A-345T) and between TCG-Colorado and Qwest (approved in Docket No. 96A-329T). Qwest and AT&T participated in negotiation sessions more than 60 times to discuss the interconnection agreement involved in this proceeding[1] and succeeded in resolving numerous disputed issues. However, many issues remain to be arbitrated by the Commission. These issues are summarized in the Final Joint Disputed Issues Matrix filed with the Commission on September 15, 2003.

13. In arbitrating an interconnection agreement, the Commission seeks to arbitrate an agreement consistent with the provisions of § 251 of the Act. Applying these criteria, the Commission will order the following resolution to the issues in dispute:

[1] A draft of the Interconnection Agreement was attached to the Petition for Arbitration as Exhibit A.

A. Issue 3 – Section 4.0: Definition of Tandem Office Switch

14. The issue here is the appropriate definition to determine when the End Office Switch of a competitive local exchange carrier (CLEC) should be considered a Tandem Office Switch for reciprocal compensation purposes. The language proposed by Qwest to § 4.0 of the Interconnection Agreement requires that the End Office Switch "serve a comparable geographic area as Qwest's Tandem Office Switch." AT&T's language, by contrast, requires that the End Office Switch be "capable of serving" a comparable geographic area as Qwest's Tandem Office Switch.

15. Qwest's maintains that its definition is consistent with and tracks the language for 47 C.F.R. § 51.711(a)(3), the language in Qwest's Colorado SGAT, the Commission's definition of a tandem switch, and past Commission decisions. In the *Local Competition Order*,[2] the Federal Communications Commission (FCC) determined that the costs of transporting and terminating traffic could vary depending on whether tandem switching is involved. In the *Local Competition Order* at ¶1090, the FCC said:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

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

Also, Rule 51.711(a)(3) of the FCC rules[3] provides that:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

Qwest argues that AT&T's "capable of serving" language is inconsistent with the plain language of 47 C.F.R. § 51.711(a)(3). The rule provides that a CLEC's switch will qualify as a tandem switch, "[w]here the switch of a carrier other than an incumbent LEC *serves* a geographic area . . . ," but does not say "*capable of serving* a geographic area . . . ."

16. Qwest alleges that AT&T's position is also inconsistent with a 2001 decision of the Commission.[4] That case involved a complaint proceeding in which e.spire Communications sought to designate its switch as a tandem switch. The Commission determined that whether e.spire's switch qualifies as a tandem "requires a determination to be made as to whether e.spire *provides service* to a comparable geographic area with its switch."[5] Qwest states that the Commission agreed that the CLEC must show that it is actually providing service to customers in a comparable geographic area to receive tandem compensation.

17. Qwest also argues that AT&T's standard removes any incentive for AT&T to actually provide services to customers across a geographic area comparable to the area served by Qwest's tandem. Under AT&T's approach, AT&T could maintain switches with tandem *capabilities* without ever offering services via its switches to customers across a geographic area comparable to the area served by Qwest's tandem switch, while charging Qwest tandem switching rates. Qwest claims that, as a practical matter, all of AT&T's switches would qualify

[3] 47 C.F.R. § 51.711(a)(3).

[4] Decision Denying Exceptions, *American Communications Services of Colorado Springs, Inc. d/b/a e.spire and ACSI Local Switched Services, Inc., d/b/a e.spire and e.spire Communications, Inc., f/k/a American Communications Services, Inc.*, Docket No. 00F-599T, Decision No. C01-514 (Colo. PUC. May 9, 2001).

[5] *Id.* at 8. (emphasis added).

as a tandem under its definition, and had the FCC intended such a result it could have said so (but did not).

18. Also, according to Qwest AT&T's proposal encourages CLECs to acquire and maintain indefinitely in available inventory precious industry numbering resources simply to qualify their switches for compensation at higher rates. Under AT&T's combined positions concerning Issues 3 and 5, Qwest argues, CLECs could obtain NXXs without any intention of actually using the numbers to provide service to customers in the geographic areas to which the NXXs are assigned, yet still receive tandem switching compensation. AT&T's proposed approach allows CLECs to be compensated at a higher tandem interconnection rate for merely terminating calls over short loops that have been transported over much longer distances by interconnected originating local carriers or using the Qwest tandem in routing the call to its final destination. To be considered a tandem switch, Qwest states, AT&T's switch must serve a geographic area comparable to the geographic area served by Qwest's tandem solely by means of AT&T's own switch.

19. There is another reason, Qwest states, that AT&T’s definition should be rejected. Qwest assesses charges for tandem switching and tandem transmission only when Qwest actually routes the terminating call through the tandem switch and carries the call to a specified end office.[6] Approximately 35 percent of all interconnection traffic sent by a CLEC is subject to Qwest tandem switching charges, according to Qwest. By contrast, *all* of the calls that Qwest sends to a CLEC are subject to the higher charge once the CLEC's switch has been classified a tandem. According to Qwest, in May 2003 Qwest sent over 1.8 billion minutes of calls to Colorado CLECs and received approximately 300 million minutes of calls from Colorado

[6] Agreement § 7.3.4.2.1.

CLECs. Therefore, Qwest believes that AT&T's proposal seeks to create a greater imbalance of compensation.

20. AT&T's position is that its switch must be "capable of serving" a comparable geographic area as Qwest's tandem office switch in order for the AT&T switch to be considered a tandem switch for purposes of reciprocal compensation; it need not "actually serve" a comparable geographic area. AT&T states that the FCC's rule recognizes that while new entrants may adopt network architectures that differ from those of incumbents, the new entrants nonetheless are entitled to be compensated for their costs of terminating traffic.[7] Indeed, in order to achieve the same scale economies as incumbents, AT&T argues, CLECs must deploy switches that serve a comparatively broader geographic area, because they lack the concentrated, captive customer base that the incumbents enjoy. AT&T believes that Qwest's proposal would have the effect of penalizing CLECs entering the market, because they would not yet have had sufficient time to build their customer bases to be "comparable" to the size and scope of Qwest's. Indeed, without earning the higher tandem rate that compensates the CLEC for its costs of termination and for deploying an architecture designed to serve an area comparable to the incumbent's, AT&T argues, CLECs would be unable to recoup their costs to terminate Qwest's traffic and would thereby be precluded from entering certain markets altogether.

21. AT&T stresses that the FCC in the *Virginia Arbitration Decision* interpreted this rule to require an inquiry into whether the CLEC's "switch is *capable of serving*

[7] *Local Competition Order* at ¶¶ 1090-1091.

a geographic area that is comparable to the architecture served by the incumbent LEC's tandem switch."[8] The FCC did "not require an examination of the competitor's customer base." Further, in its *Intercarrier Compensation NPRM*, the FCC stated,

> [S]ection 51.711(a)(3) of the Commission's rules requires only that the comparable geographic area test be met before carriers are entitled to the tandem interconnection rate for local call termination. Although there has been some confusion stemming from additional language in the text of the *Local Competition Order* regarding functional equivalency, section 51.711(a)(3) is clear in requiring only a geographic area test. Therefore, we confirm that a carrier demonstrating that its switch serves "a geographic area comparable to that served by the incumbent LEC's tandem switch" is entitled to the tandem interconnection rate to terminate local telecommunications traffic on its network.[9]

22. AT&T asserts that the U.S. Court of Appeals for the Ninth Circuit also addressed the issue by reversing a ruling by the State of Washington Utilities and Transportation Commission to find that AT&T Wireless must be compensated at the tandem rate because its switches serve a comparable geographic area to U S West's tandem switches.[10]

23. AT&T presents evidence in an attempt to persuade the Commission that its switches in Colorado are capable of serving a geographic area comparable to Qwest's tandem switches. However, the Hearing Commissioner granted Qwest's motion to strike the issue of whether AT&T's switches qualify as tandem switches under the definition adopted by the

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[8] *In the Matter of Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc.*, CC Docket Nos. 00-218, 00-249, 00-251, Memorandum Opinion and Order, DA 02-1731, Rel. July 17, 2003 (*FCC Virginia Arbitration Decision*) at ¶ 309. (emphasis added).

[9] In the Matter of Developing a Unified Intercarrier Compensation Regime, CC *Docket No. 01-92, Notice of Proposed Rule Making* (Released April 27, 2001) (*Intercarrier Compensation NPRM*), at ¶ 105. (emphasis added)

[10] *U S West Communications, Inc v. Washington Utilities and Transportation Commission, AT&T Wireless Services, Inc.,* CV-97-05686-BJR, No. 98-36013 (July 3, 2001). The Court cited both the *Local Competition Order* and the May 9, 2001 letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau of the FCC, and Dorothy T. Attwood, Chief, Common Carrier Bureau of the FCC to Charles McKee, Senior Attorney, Sprint PCS in its ruling.

Commission.[11] Therefore, the Commission does not decide in this proceeding whether AT&T's switches so qualify.

24. Qwest's reply addressing the *FCC Virginia Arbitration Decision* and other legal authority is that the Commission is not bound by it and should reject it. Qwest points to a Commission order[12] that was made as part of the 271 proceeding that rejected the *FCC Virginia Arbitration Order*, which states:

> We have been presented with no authority that indicates to us that the Colorado Commission is bound by a Virginia arbitration ruling, even when done by the Wireline Competition Bureau. We are likewise unaware of the record developed in that arbitration, thus have no way to assess whether that ruling employs superior reasoning or analysis than our own. Absent any record or authority before us that compels us to prefer the Virginia arbitration outcome, we will stick to our guns and reaffirm our original construction of 47 C.F.R. § 51.319(c)(2).

Qwest urges the Commission to apply its own policies to determine whether a CLEC switch should be treated as a tandem switch. With respect to the *Intercarrier Compensation NPRM*, Qwest concedes that the FCC clarified its rules that to qualify for tandem compensation a CLEC switch need not perform the same functions as an incumbent tandem, however, the FCC also stated that the CLEC still must serve a comparable geographic area.[13] Qwest notes that the Colorado Commission subsequently clarified during Qwest's 271 proceeding that a CLEC switch need only serve a comparable geographic area and ordered Qwest to remove the SGAT language regarding functionality.[14]

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[11] *See* Decision No. R03-1099-I, Docket 03B-1099-I, page 4.

[12] Decision Denying Motion, *The Colorado Public Utilities Commission's Recommendation To The Federal Communications Commission Regarding Qwest Corporation's Provision Of In-Region, Interlata Services In Colorado*, Docket No. 02M-260T, Decision No. C02-1443 (Colo. PUC. Dec. 27, 2002).

[13] *Intercarrier Compensation NPRM* at ¶105.

[14] *Decision No. R01-0768-I* Docket No. 97I-198T pages 4-5.

25. AT&T responds to Qwest's imbalance of traffic argument by stating that AT&T/TCG exchanges with Qwest are much more balanced; Qwest originated traffic to AT&T and TCG was only 1.9 times the volume of traffic originated by AT&T and TCG.

26. The policy decisions made by this Commission in the past regarding the definition of tandem office switch for the e.spire case and the 271 proceedings influence our decision here. We find that a CLEC switch will be considered a tandem office switch if it serves a comparable geographic area. We reject the AT&T proposal to substitute "capable of serving" for "serves" in the interconnection agreement. AT&T's argument centers on the decision made by the FCC's Wireline Competition Bureau in the *Virginia Arbitration Decision* that a CLECs switch need only be capable of serving a geographic area that is comparable to that served by the incumbent LEC's tandem switch. The Colorado Commission is not bound by the Virginia arbitration ruling. We note that the FCC has not changed the language of Rule 51.711(a)(3); nor has the FCC released any orders that would extend the ruling made in the Virginia arbitration to all carriers.

27. We approve the following language:

> "Tandem Office Switches" - CLEC end office Switch(es) shall be considered Tandem Office Switch(es) for the purpose of determining reciprocal compensation rates to the extent such Switch(es) serves a comparable geographic area as Qwest's Tandem Office Switch. If the Parties have not already agreed that CLEC's switches meet the definition of Tandem Office Switches, a fact based consideration of geography, when approved by the Commission or mutually agreed to by the Parties, should be used to classify any Switch on a prospective basis. In addition, "Tandem Office Switches" are used to connect and switch trunk circuits between and among other End Office Switches. Access tandems typically provide connections for exchange access and toll traffic, and Jointly Provided Switched Access traffic while local tandems provide connections for Exchange Service (EAS/Local) traffic. CLECs may also utilize a Qwest Access Tandem for the exchange of local traffic as set forth in this Agreement.

B. Issue 5 – Section 4.0: Definition of Exchange Service and, if Qwest's definition is adopted, whether access charges should be imputed for Foreign Exchange Service.

28. The definition of "Exchange Service" or "Extended Area Service/Local Traffic" fundamentally affects compensation between carriers, and ultimately whether end use customers are billed for toll charges. Qwest's proposed definition is that Exchange Service means "traffic that is originated and terminated within the same local calling area as determined for Qwest by the Commission." Instead of local calling area being determined by the Commission, AT&T's definition would have it determined by "the calling and called NPA-NXXs," regardless of the actual origination and termination points.[15] AT&T suggests that determining whether calls are local or toll by NPA-NXXs is no different than Qwest's Foreign Exchange (FX) service.

29. As noted above, Qwest's definition provides that Exchange Service traffic is traffic that originates and terminates within the same local calling area, and the Commission determines the boundaries of local calling areas. *See, e.g.,* Local Competition Order ¶ 1035. In contrast, Qwest labels AT&T's proposal as "virtual" NXX ("VNXX") because the NXX is assigned a Vertical and Horizontal coordinate in the *calling party's* local calling area, rather than the *called* party's local calling area. In other words, the "virtual" NXX does not actually provide local exchange service in the local calling area to which it is assigned.

30. Qwest notes that its proposed definition is the same as the definition in its Commission–approved SGAT and complies with Colorado statutes and rules, as well as the Act, whereas AT&T's proposed definition does not. § 40-15-102(3) Colorado Revised Statutes (CRS) defines "basic local exchange service" as "the telecommunications service which provides a local

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[15] "NPA-NXX" refers to the first six numbers of a 10-digit telephone number. For example, in the telephone number 303-555-1234, the Number Plan Area (NPA) or area code is 303, the exchange or central office code is 555, and the NPA-NXX code is 303-555.

dial tone line and local usage necessary to place or receive a call within an exchange area and any other services or features that may be added by the commission under § 40-15-502(2)." Section § 40-15-102(8) CRS defines an "exchange area" as "a geographic area established by the commission, which consists of one or more central offices together with associated facilities which are used in providing basic local exchange service." "Toll service" is defined in § 40-15-102(31) CRS as

> a type of telecommunications service, commonly known as long distance, that is provided on an intrastate basis between LATAs and within LATAs that is:
>
> (a) Not included as part of basic local exchange service;
>
> (b) Provided between local calling areas; and
>
> (c) Billed to the customer separately from basic local exchange service.

Qwest maintains that its proposed definition of "Exchange Service" is consistent with all of these definitions because it is based on the geographic exchange areas established by this Commission for basic local exchange service. Also, Qwest believes that its definition is consistent with Commission Rules 4 *Code of Colorado Regulations* (CCR) 723-2-2.21 (defining "exchange area" as "a geographical area established by the Commission, which consists of one or more central offices together with associated facilities which are used in providing basic local exchange service…"); 4 CCR 723-2-2.22 (defining "exchange" as "the entire telecommunications plant and facilities used in providing telecommunication service to customers located in a geographic area defined by tariff. An exchange may contain more than one central office switch location or wire center"); and 4 CCR 723-2-2.33 (defining "local calling area" as "the geographic area approved by the Commission as a community of interest in which

customers may make calls without payment of a toll charge. The local calling area may include exchange areas in addition to the serving exchange area").[16]

31. Qwest also contends that its definition is consistent with previous Commission decisions. Specifically, in an arbitration between Level 3 Communications (Level 3) and CenturyTel of Eagle, Inc. (CenturyTel), the Commission determined that Level 3 was not seeking "interconnection" within the meaning of § 251(c) of the Act because Level 3 was seeking to serve Internet Service Provider (ISP) customers that were not located in the local calling areas served by CenturyTel.[17] The Commission determined that "calls by CenturyTel's customers to Level 3's ISP customers would originate and terminate in different calling areas, and, therefore, would be interexchange calls."[18] The Commission stated that because Level 3 did not propose to provide either "exchange service" or "exchange access," it was not seeking interconnection within the meaning of § 251(c) of the Act.[19]

32. Qwest asserts that AT&T's proposed language would allow AT&T to convert calls that should be and currently are treated as toll calls into local calls solely based upon the assignment of the NPA-NXX. For example, under AT&T's definition, a call that originates in Denver and terminates in Durango would be considered a "local" call or a "basic local exchange call" so long as the NPA-NXXs matched those assigned to a local calling area, even though the called and calling parties are not physically located in the same exchange and are located 230 miles from each other. AT&T proposes its definition for both its own customers as well as

[16] Qwest notes that, in contrast to these definitions, the Commission defines "toll service" as "the furnishing of telecommunications service between stations of different customers in different exchange areas or local calling areas as defined by the Commission …". *See* Rule 4 CCR 723-2-2.49.

[17] *See* Decision Denying Exceptions, *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(B) of the Telecommunications Act of 1996 with CenturyTel of Eagle, Inc. Regarding Rates, Terms, and Conditions for Interconnection*, Docket No. 02B-408T, Decision No. C03-0117, at ¶ 36 (Colo. PUC Jan. 17, 2003).

[18] *Id.*

[19] *Id.*

Qwest retail customers. AT&T also seeks to charge Qwest reciprocal compensation for calls that otherwise are treated as toll calls for which Qwest receives retail intraLATA toll or wholesale switched access charges.

33. Qwest alleges that AT&T's definition also is inconsistent with the Telecommunications Act of 1934. The Act defines "exchange access," "telephone exchange service" and "telephone toll service" as follows:

> The term "exchange access" means the offering of access to *telephone exchange services* or facilities for the purpose of the origination or termination of telephone toll services.
>
> * * *
>
> The term "telephone exchange service" means (A) service *within a telephone exchange,* or within a connected system of telephone exchanges *within the same exchange area* operated to furnish to subscribers intercommunicating service of the character *ordinarily furnished by a single exchange,* or (B) *comparable service* provided through a system of switches, transmission equipment, or other facilities (or a combination thereof) by which a subscriber can originate and terminate a telecommunications service.[20]
>
> * * *
>
> The term "telephone toll service" means telephone service *between stations in different exchange areas* for which there is made *a separate charge* not included in contracts with subscribers for exchange services.[21]

Under the Act, Qwest argues, telephone exchange service is a service provided to subscribers that enables a particular subscriber to originate and terminate calls within a single exchange; telephone toll service, in contrast, applies when a customer places a call to end users located beyond the calling area covered by Qwest's basic local exchange service tariff. Qwest also cites the FCC's *Local Competition Order* for the proposition that "state commissions have the authority to determine what geographic areas should be considered 'local areas' for the purpose of applying reciprocal compensation obligations under § 251(b)(5) …. Traffic originating or

[20] 47 U.S.C. § 153(47) (emphasis added).

[21] 47 U.S.C. § 153(48) (emphasis added).

terminating outside of the applicable local area would be subject to interstate and intrastate access charges."[22]

34. Qwest claims that, in addition to depriving it of toll revenues, in a VNXX arrangement Qwest is further obligated to pay AT&T reciprocal compensation for terminating a call from a Qwest customer to an AT&T VNXX customer in a distant exchange. Qwest describes the issue as follows: In a typical VNXX arrangement, a CLEC's switch is located in a centralized, metropolitan area. The CLEC then offers its end user (typically a business customer) located in the metropolitan area a telephone number (from the "virtual" NXX) that appears to be located in a distant local calling area. Callers from the distant local calling area can dial the called party's telephone number, and it will appear to the calling party as a "local" call. Although this call would, under AT&T's language, be rated as a "local" call, Qwest must transport the call from the rural area to the metropolitan area (where the Qwest tandem is located) and hand the call off to AT&T who terminates the call to the called party (or, in the case of Internet-bound traffic, relays the call to an ISP), who is located in the metropolitan area (since this may be the extent of the CLEC network). In this example, Qwest (i) receives no toll revenue from any party, (ii) incurs the cost of transporting this inter-exchange call, (iii) sends the call to AT&T, and, rather than receiving the appropriate switched access charges for the transport of this interexchange call, is billed for reciprocal compensation by AT&T on the basis that the call is a "local" call; and (iv) bills the call to Qwest at the higher tandem interconnection rate.[23] Qwest also alleges that AT&T's proposed definition has impacts beyond § 7 of the Agreement and may

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[22] *Local Competition Order* at ¶ 1035 (emphasis added).

[23] At the hearing, AT&T witness Douglas Hyatt denied that Qwest would incur the cost of transporting the call (part ii) from the Point of Interconnection (POI) onwards, but did admit to the other three parts of this example. Hearing Transcript (September 29, 2003) at page 78.

affect other products under the Agreement, such as enhanced extended links (EELs), and would discriminate against other carriers.

35. AT&T's position is that the determination of the nature and compensation of a call should be based on the NPA-NXX of the originating and terminating telephone numbers, not the physical location of the users. AT&T maintains that NPA-NXX codes have been and continue to be used by the industry to rate and bill calls, and there is presently no viable alternative to the current system and no public policy reason to change that arrangement now.

36. AT&T cites the *Virginia Arbitration Decision*, in which Verizon asserted that calls to Virtual FX customers should be rated based on their geographical end points and not on the NPA-NXX codes. The FCC rejected Verizon's language that would rate calls according to their customers' physical locations. The Bureau stated:

> We agree with the petitioners that Verizon has offered no viable alternative to the current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes. We therefore accept the petitioners' proposed language and reject Verizon's language that would rate calls according to their geographical end points. Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide. The parties all agree that rating calls by their geographical starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time.[24]

The Bureau added:

> Most importantly, Verizon concedes that currently there is no way to determine the physical end points of a communication, and offers no specific contract proposal to make that determination.[25]

37. AT&T likens virtual NXX to Qwest's FX service, and argues that AT&T should be permitted to provide an FX-like service. AT&T states that Qwest offers its FX service as

[24] *FCC Virginia Arbitration Decision,* at ¶ 301.

[25] *Id*. at ¶ 302.

private line transport service (not an access service and not a toll service) in its Tariff.[26] Thus, when an Qwest customer dials a number assigned to the customer's own rate center and Qwest routes that call to a Qwest FX customer who is physically located in a different rate center, Qwest treats the call as a local call, not as a toll call. That is, the Qwest end user that originated the call pays Qwest's local charges for that call. Qwest also offers its Market Expansion Line (MEL) service, which AT&T contends provides Qwest's customers with the same functionality as FX service.[27] At the hearing, AT&T introduced exhibits 5-7 seeking to demonstrate that Qwest offers various services which have the purpose of allowing Qwest customers to avoid toll charges.

38. AT&T contends that its FX-like or VNXX arrangement is not a toll service and is not subject to access charges that apply to toll services. AT&T's VNXX service is comprised of a single switch (a single wire center) and the local loop. In AT&T's network, dial tone is provided by the customer's native switch, not a foreign switch. Since AT&T's switch serves a much broader geographic area than do Qwest's individual local switches, AT&T is able to terminate traffic to customers within different Qwest rate centers at comparable cost. Hence, from the perspective of AT&T's network, there is no difference in function or cost to terminate a call in one rate center versus another, and thus AT&T can offer this service option at no additional charge to the customer as part of its local service offering.

39. AT&T also contends that Qwest's costs to deliver a call to a particular AT&T NPA-NXX code do not vary depending on whether the call is destined to a customer physically located in the legacy Qwest rate center associated with the NPA-NXX code or to a customer

[26] Qwest Private Line Transport Services Tariff, State of Colorado, Section 5.2.6.

[27] Qwest Exchange and Network Services Tariff, State of Colorado, Section 5.4.4.

physically located in a foreign rate center. The cost to Qwest is exactly the same, because Qwest delivers all traffic bound to the same AT&T NPA-NXX code to the same AT&T Point of Interconnection (POI) where traffic is exchanged with Qwest's network. In other words, AT&T specifies a single POI for an NPA-NXX code, regardless of the physical location of the AT&T terminating customer. Since the POI to which Qwest delivers traffic is the same, Qwest's network costs to deliver traffic to that POI are necessarily the same. Where there are any additional costs between AT&T's switch and the customer to complete such traffic, such costs are borne by AT&T. AT&T concludes that this issue is not about costs but, instead, loss of revenue, and Qwest is attempting to recover competitive losses it is suffering due to competition from AT&T and other CLECs.

40. AT&T also asserts that NPA-NXX rating is the established industry-wide compensation mechanism. Carriers rate calls by comparing the originating and terminating NPA-NXX codes. By comparing the originating and terminating NPA-NXX codes, a carrier is able to identify a call as local or intraLATA toll or interLATA toll and to bill its customers and other carriers accordingly. AT&T contends that there is no other workable method in existence at this time. Such a change would involve changing the routing, rating, and billing for a number of different services including Foreign Exchange Service, Foreign Central Office Service, Answer Line Service, Centrex and PBX Off Premise Extensions, Call Forwarding, Remote Call Forwarding and calls between private networks and the public switched network. Changing to a system based on the geographic location of the customers, communicating that information to every interconnecting local service provider and inter-exchange carrier, and merging that data with the current industry billing processes would require an enormous developmental effort on an industry-wide basis that would take years to complete.

41. Qwest disagrees with AT&T that Qwest's definition would require massive changes to the existing system. Qwest states that its definition fits squarely within the Commission's longstanding definitions of local exchange service, is consistent with its tariff,[28] and with how toll and local calls are rated today. Moreover, Qwest argues, the industry has also historically and routinely assigned NXXs to specific rate centers which serve customers physically located within the geographic boundaries of the rate center. For example, the Central Office Code Assignment Guidelines state: "It is assumed from a wireline perspective that CO codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer's premise physically located in the same rate center that the CO codes/blocks are assigned. Exceptions exist, for example tariffed services such as foreign exchange service."[29] Also, Qwest argues that AT&T's proposed definition is inconsistent with number portability requirements. Only service provider portability and location portability within a rate center are supported at this time, and the VNXX proposal would have numbers ported to a *different* rate center. In addition, 47 C.F.R. § 52.26(a) states that local number portability administration must comply with the recommendations of the North American Numbering Council (NANC), and NANC's LNP Architecture Task Force Report provides that "location portability is technically

[28] Qwest claims that its definition is also consistent with *AT&T's* tariff. *See* AT&T's Local Exchange Services Tariff, Section 2.10 (defining "Exchange Area" as "A geographical area served by a Rate Center. The Company concurs with the Incumbent Local Exchange Carriers' exchange areas and exchange area maps that are on file"); (defining "Local Exchange Service" as "A service which permits calling to stations in the Customer's Local Service Area); (defining "Local Service Area" as "the region, comprised of one or more complete Exchange Area(s), within which a Customer can call another station at the rates and charges as specified in this Tariff"). Also, Section 3.1 of AT&T's Local Exchange Services Tariff provides that AT&T "offers Local Exchange Service within Colorado and concurs in the exchange areas and exchange maps filed by U S WEST Communications, Inc. [the predecessor of Qwest] in its Exchange and Network Services Tariff, Colorado PUC No. 15, in effect as of March 2, 1998."

[29] Central Office Code (NXX) Assignment Guidelines, INC 95-0407-008 at § 2.14 (ATIS Aug. 15, 2003).

limited to rate center/rate district boundaries of the incumbent LEC due to rating/routing concerns."[30]

42. Qwest also disagrees with the suggestion that it should be financially indifferent to the VNXX proposal. Qwest argues that AT&T is attempting to shift the costs AT&T and its customers should assume for providing service onto Qwest and its customers. Qwest suggests that VNXX violates the principle of cost-causation: applying costs to the carrier or subscriber that causes them. In addition, Qwest argues that VNXX discourages efficient network usage: When NXXs are assigned to specific rate centers in accordance with industry practice and routed in accordance with those practices, if the traffic volume exchanged between the parties in an exchange (Exchange A) reaches a certain level, both Qwest and the CLEC will have the incentive to establish additional points of interconnection in Exchange A to avoid the costs of hauling traffic to another, distant exchange (Exchange B). However, Qwest argues, in the VNXX situation, a CLEC will never have an incentive to establish a point of interconnection in Exchange A, no matter what the traffic level, because Qwest would be doing all the hauling from A to B, for which the CLEC would pay nothing.

43. According to Qwest, AT&T's VNXX service is not comparable to Qwest's tariffed FX service.[31] Unlike the AT&T VNXX customer, the Qwest FX customer pays a premium for the privilege of establishing a local number in a distant calling area and for having Qwest transport calls over a private line facility (for which the FX customer pays) between the distant

[30] North American Numbering Council, Architecture and Administrative Plan for Local Number Portability, NANC-LNP Architecture Task Force, § 7.3 (Apr. 25, 1997).

[31] Newton's Telecom Dictionary (17th ed.) defines FX service as: "FX. Provides local telephone service from a central office which is outside (foreign to) the subscriber's exchange area. In its simplest form, a user picks up the phone in one city and receives a dial tone in the foreign city. He will also receive calls dialed to the phone in the foreign city. This means that people located in the foreign city can place a local call to get the user. The airlines use a lot of foreign exchange service. Many times, the seven digit local phone number for the airline you just called will be answered in another city, hundreds of miles away."

calling areas. While the calling party avoids having to pay a toll charge for calling the number associated with an FX line, the *called* party absorbs that cost. Under AT&T's proposed definition, however, Qwest would receive no compensation from AT&T to carry the call to a distant AT&T customer; instead, Qwest would have to pay AT&T reciprocal compensation at the tandem interconnection rate for transporting the terminating call over a short distance. Further, a FX call is returned to the originating local calling area by the terminating carrier. In a VNXX call, however, the terminating call is not transported to the originating local calling area. Qwest asserts that neither the Act nor any FCC rules encourage or endorse AT&T's proposal to shift its costs of serving its customers onto Qwest, and many other state commissions have declined to adopt "virtual" NXX proposals espoused by CLECs in arbitrations.

44. During the hearing, AT&T witness Douglas Hyatt admitted that AT&T can offer its customers foreign exchange service in the same way as Qwest – by leasing or buying a dedicated line to provide a local presence and then offering it to its customers for a flat recurring fee. Further, AT&T admitted that it currently offers virtual NXX service to its customers at no additional charge above the basic local exchange rate.[32]

45. If the Commission agrees with Qwest that NPA-NXXs should not be used to determine whether calls are local traffic, AT&T asserts that voice-FX service (including Qwest’s) is subject to access charges. AT&T argues that, under the FCC’s *ISP Remand Order*[33], *all* telecommunications traffic is subject to reciprocal compensation unless the traffic falls within the exemptions established in § 251(g) of the Act. The FCC declined to use the local/non-local distinction to determine whether reciprocal compensation applies. AT&T asserts that voice-FX-

[32] Hearing Transcript (September 29, 2003) at pages 80-81.

[33] *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, 116 FCC Rcd 9161 (2001) (*ISP Remand Order*).

like traffic does not fall under the § 251(g) carve out, for two reasons. First, this traffic is not exchange access traffic. Second, regulators may not add new types of traffic to the § 251(g) carve out because Congress intended the carve out to apply only to certain types of traffic that pre-existed the Act. Accordingly, voice-FX traffic is subject to the reciprocal compensation provisions of § 251(b)(5).

46. AT&T's notes that FX-like traffic consists of two categories of traffic: non-ISP and ISP-bound traffic. However, whether or not such traffic is "local" is not determinative of whether reciprocal compensation applies. In its *ISP Remand Order*, the FCC reaffirmed that traffic delivered to an ISP is predominantly interstate access traffic subject to FCC jurisdiction under § 201 of the Telecommunications Act of 1996, and established a cost recovery mechanism for the exchange of such traffic. Thus, concludes AT&T, ISP-bound traffic, including ISP-bound FX-like traffic, is subject to the FCC's intercarrier compensation mechanism and not state commission jurisdiction. On the other hand, intrastate voice FX-like traffic is subject to the jurisdiction of the state commissions and the reciprocal compensation rates they establish for the exchange of such traffic.

47. While AT&T's proposed definition is consistent with current industry practice for rating and routing of calls, Qwest's language is consistent with current federal and state laws defining local calling areas and local exchange service. AT&T's definition would ignore the historical assumptions regarding the relationship between NPA-NXXs and the geographic rate centers to which they are assigned. AT&T's definition would negate the requirement of "community of interest" in establishing local calling areas found in our rules at 4 CCR 723-2-17.3. In addition, AT&T's definition would allow calls that would normally be toll or

interexchange to be rated and routed as local calls to the detriment of the incumbent provider and its end use customers.

48. AT&T admitted on cross-examination that a call carried from Colorado to New York could be considered a local call under AT&T's definition as long as the NPA-NXXs "matched".[34] This practice would not only impermissibly allow the expansion of local calling areas, but also defy the Central Office Code Assignment Guidelines and the Numbering Resource Utilization/Forecast requirements.[35]

49. We recently upheld an ALJ decision on exceptions, where he found in a past arbitration proceeding between CenturyTel and Level 3 that the service Level 3 intended to offer in CenturyTel's exchanges was not a local service.[36] That service, VNXX, is the same service AT&T seeks to offer under its proposed definition of exchange service in this arbitration. AT&T claims that its VNXX service is offered to compete against Qwest's FX service. However, for traditional FX service, the customer must pay for the cost of the transport facilities between local calling areas. Those costs are often substantial. Customers subscribe to FX primarily to allow others to call them without toll charges, *i.e*., the called party pays. This traditional FX service has attributes of local service because it brings a local presence (on the part of a customer) to a remote location; but the primary purpose of FX is as a toll substitute. Qwest's witness, Mr. McDaniel indicated this to be true on cross-examination.[37]

50. We note the FCC in the *ISP Remand Order* states:

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[34] Hearing Transcript (September 29, 2003) at page 75.

[35] The NRUF is used by the FCC and state commissions to determine utilization of telephone numbers by rate center. Carriers must meet certain utilization percentages by rate center before they are assigned additional numbering resources.

[36] *See* Decision No. R02-1125 at page 7 and Decision No. C03-0067.

[37] Hearing Transcript (September 29, 2003) at page 24.

> Local calls set up communication between two parties that reside in the same local calling area. Prior to the introduction of local competition, that call would never leave the network of an incumbent LEC. As other carriers were permitted to enter the local market, a call might cross two or more carriers' networks simply because the two parties to the communication subscribed to two different local carriers. The two parties intending to communicate, however, remained squarely in the same local calling area.[38]

51. We are not persuaded by the *FCC Virginia Arbitration Decision* that ordered the inclusion of the CLEC definition in that agreement. We find the Wireline Competition Bureau's reasoning flawed when it states, "[a]dditionally, we note that state commissions, through their numbering authority, can correct abuses of NPA-NXX allocations."[39] In Colorado, we have always dealt with our numbering resource issues proactively and as a result have delayed the need for new area codes for years. We see no reason now to be reactive to a situation and allow for abuses to occur rather than prevent them from occurring in the first instance.

52. We find, therefore, that *any* service, including, but not limited to, Qwest's FX service and AT&T's VNXX service, regardless of what the service is called, that does not meet our approved definition of exchange service is an interexchange toll service. The calling party and called party must both be physically located in the same local calling area for the call to be a local call for reciprocal compensation purposes. Calls originating from and terminating to customers that are physically located in different local calling areas are interexchange.

53. We will not make a decision, at this point in time, regarding the appropriate access imputation method for these FX and FX-like services. This policy decision would best be handled in a separate proceeding.

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[38] *ISP Remand Order* at ¶ 63.

[39] FCC Virginia Arbitration Decision at ¶ 303.

54. We approve the following language for the definition of Exchange Service:

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

C. Issue 15 – Section 7.3.1(b): Reciprocal Compensation – Cost of Interconnection Transport and Termination when Private Line is Used for Interconnection Traffic; and

Issue 16 - Section 7.3.1.1.2: Reciprocal Compensation – Inclusion of Relative Use Factor in the Rate for Private Line Transport Service

55. Issues 15 and 16 relate to the cost of interconnection transport and termination when Private Line Transport Service (PLTS) is used for interconnection. Issue 15 involves AT&T's objection to a sentence in Qwest's proposed language by which Qwest excludes PLTS from the cost-sharing otherwise associated with flat-rated transport underlying a two-way local trunk group. Issue 16 involves the application of a relative use factor in the rate for Private Line Transport Service.

56. In the (b) paragraph of § 7.3.1 (Issue 15), AT&T and Qwest have generally agreed that when a party to the interconnection agreement provides a two-way trunk group that is supported by dedicated transport, the parties agree to share the transport cost associated with such span based on their relative use. The exception is when AT&T has a PLTS facility in place that is purchased from a Qwest tariff, and that facility is used by AT&T for commingled two-way flat-rated transport. Qwest does not believe it should share the cost of the private line facility in this circumstance, whereas AT&T believes Qwest should.

57. More specifically, AT&T objects to a sentence in the Qwest proposal by which Qwest seeks to exclude private line transport from the preceding sentence that establishes a cost-sharing rule for all two-way flat-rated transport. AT&T concedes that the Qwest sentence

standing alone is true: "When a CLEC elects to employ a portion of a Qwest tariffed private line transport systems to support a local trunk group, the local transport is added at no additional cost to the CLEC." This is consistent with agreed-to language in § 7.3.1.1.2 (Issue 16). However, by placing the sentence in this paragraph, Qwest is asserting that it will not share the cost of this facility when Qwest sends its originating traffic over such facility.

58. This is the same issue identified in Issue 16. AT&T seeks to add the following underscored language to § 7.3.1.1.2: "If CLEC chooses to use an existing facility purchased as Private Line Transport Service from the state or FCC Access Tariffs, the rates from those Tariffs will apply<u>, as will a relative use factor as described in 7.3.1.1.3.1 or 7.3.2.2.1, as applicable</u>." AT&T asserts that Qwest should share the cost of its private line facility whenever it uses this facility for its originating traffic, because AT&T is paying the full price for the private line facility, and Qwest is in effect making AT&T pay to transport Qwest originating traffic. According to AT&T, Qwest's position that it may send traffic over this facility without sharing the cost or paying any compensation to AT&T is contrary to 47 C.F.R. § 51.703(b): "A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network"; and 47 C.F.R. Section 51.709(b): "[T]he rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network." Further, in its *Local Competition Order* the FCC reaffirmed the fundamental rule that each party bears financial responsibility for the costs of transporting its own traffic.

59. According to AT&T, Qwest's position that AT&T incurs no extra costs by using PLTS ignores the fact that its originating traffic uses part of the capacity of the private line

facility AT&T has purchased from Qwest and therefore, this capacity is not available for AT&T to use for its intended purpose. Thus, AT&T will have to replace this capacity by leasing more facilities from Qwest or a third party or by building the facilities itself.

60. Qwest objects to AT&T seeking to charge Qwest when it uses spare capacity on its private line circuits for local interconnection, because AT&T incurs no additional costs to charge Qwest. AT&T PLTS rates remain the same whether AT&T chooses to use spare capacity for interconnection or not. Each carrier provides necessary switching and transport of an originating local call to the POI at no charge to the other carrier. Because Qwest assesses no additional charge when the AT&T elects the two-way PLTS option, AT&T has no cost to share.

61. Further, argues Qwest, it is inappropriate for AT&T to attempt to move TELRIC-based Qwest traffic to spare capacity on AT&T's tariffed PLTS and then charge Qwest transport. By ordering two-way trunks and putting Qwest traffic onto unused capacity of a Qwest-provided PLTS, AT&T does not move the POI to the Qwest end of the PLTS and thereby somehow establish that Qwest owes it compensation for use of the facility. Also, Qwest alleges that AT&T seeks to reduce its interexchange carrier access costs by requiring Qwest to pay when AT&T decides that the carriers will use the PLTS facility to also carry long distance traffic that is not subject to reciprocal compensation.

62. According to Qwest, use of a Qwest PLTS circuit for transport underlying a two-way local trunk group is an option, not a requirement of AT&T. At AT&T's request, Qwest has agreed that AT&T may use any spare capacity it has on PLTS to deliver traffic, thus avoiding any concomitant payment to Qwest. AT&T is under no obligation to choose this configuration for

any of its trunking. Thus, Qwest states that its language provides AT&T an additional trunking option beneficial to AT&T.

63. With respect to Issue 16, Qwest notes that this Commission approved the language that Qwest is offering in Issue 16 of this arbitration, which is also the SGAT language for 7.3.1.1.2. The Commission concluded: "Qwest's SGAT language § 7.3.1.1.2 complies with 47 U.S.C. § 271(c)(2)(B)(xiii). Qwest's offering of interconnection at TELRIC prices through 'entrance facilities' is enough in itself to satisfy the § 271 requirements. … Qwest is not required by any provision of the Act to allow the use of excess capacity on an existing private line facility as an interconnection trunk at TELRIC prices."[40] Qwest argues that this decision resolved Issue 15 also, because the Commission held that, "[i]f CLEC chooses to use an existing facility purchased as Private Line Transport Service from the state or FCC Access Tariffs, the rates from those Tariffs will apply." The effect of that section, Qwest asserts, is to cause private line (non-TELRIC-based) rates (Qwest's access Tariff) to apply when a CLEC uses spare capacity on facilities previously purchased under a private line tariff, for local interconnection usage.

64. AT&T's proposed language is, according to Qwest, an attempt by AT&T to "ratchet" (reduce) its tariffed private line charges by applying relative use to private line. Qwest argues that FCC PLTS tariffs do not permit the reduction of interstate tariffed services when used for local interconnection. PLTS is purchased out of a federal tariff, Tariff F.C.C. No. 1. Qwest asserts that the Commission cannot apply AT&T's proposed language in 7.3.1 (b), or 7.3.1.1.2 to *federally-tariffed* PLTS because this would amount to a state commission changing FCC-tariffed

[40] Decision No. R01-651-I, Docket No 97I-198T (Issue 13-3: Commingling of special access circuits with interconnection facilities and ratcheting of rates).

rates. Neither AT&T nor this Commission can modify the terms of a federal tariff, Qwest contends.

65. AT&T disagrees that its position is somehow an attempt by AT&T to reduce its interexchange carrier access costs. AT&T illustrates: If AT&T leases a DS-3 level special access facility from Qwest and decides to use a portion of such facility for its long distance and a portion of the facility for its local traffic, AT&T pays fully for both functions. If one of the 28 DS-1 channels on the DS-3 facility is used to carry Qwest's trunk requirements, then Qwest would not bill AT&T for 1/28 of the cost of the DS-3 facility. AT&T would still pay Qwest the pro rata billing for 27/28s of the DS-3 facility that AT&T can use. Thus, argues AT&T, it has not escaped payment for anything.

66. AT&T also disagrees that the Commission is federally preempted from adopting AT&T's language. AT&T notes that the Commission is empowered by § 252(b)(4)(C) of the Act to "resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required to implement subsection (c)…" Further, in § 252(c)(1), the Commission is charged with "ensur[ing] that such resolution and conditions meet the requirements of § 251, including the regulations prescribed by the [FCC] pursuant to § 251." Also, if it adopts AT&T's language, AT&T maintains that the Commission will not be changing the rates in Qwest's federal tariff; rather, it will be determining how the Parties will share the cost associated with such facilities based on their relative use as an interconnection facility.

67. Generally, we agree that costs of interconnection facilities should be shared by the users and that the fairest way to share those costs is by calculating a relative use factor. Here, however, even though there is no requirement for PLTS facilities leased for long distance traffic

to be used as interconnection facilities, Qwest allows spare capacity in such leased facilities to also be used for local traffic. Because Qwest does not charge an additional amount to AT&T when AT&T chooses to use its spare capacity in leased PLTS facilities for local traffic, we agree with Qwest that there is no cost to share associated with these facilities, and the normal cost sharing for interconnection facilities should not apply. Further, we find that local traffic carried on spare capacity on leased PLTS facilities should not be accounted for in calculating a relative use factor.

68. We approve the following language for 7.1.3 (b):

> If flat-rated transport is necessary to support two-way trunking of Exchange Service, then the cost of the flat-rated transport is shared by Qwest and CLEC based on directional relative use. When a CLEC elects to employ a portion of a Qwest Tariffed private line transport system to support a local trunk group, the local transport is added at no additional cost to the CLEC. A relative use factor emulates the costs Carriers would otherwise face if one-way trunking had been employed. In general, the terminating Party charges the originating Party for switching and common transport (if any) starting from the terminating Carrier's end of the flat-rated transport to the terminating end office.

69. We approve the following language for 7.3.1.1.2:

> If CLEC chooses to use an existing facility purchased as Private Line Transport Service from the state or FCC Access Tariffs, the rates from those Tariffs will apply. Such a facility is not an Interconnection Entrance Facility. Therefore, Qwest is not entitled to an Interconnection Entrance Facility charge when CLEC elects to place Interconnection trunking onto the spare capacity of an existing Private Line Transport Service circuit.

D. Issue 17 – Sections 7.3.1.1.3.1 and 7.3.2.2.1: Reduction of Direct Trunked Transport Rate Element When 2-Way Trunking is Established for Reciprocal Compensation and Exclusion/Inclusion of ISP-Bound Traffic

70. There are many sub-issues here. First, in §§ 7.3.1.1.3.1 and 7.3.2.2.1, the parties have generally agreed to share the cost of two-way trunk groups that are supported by dedicated transport. However, these provisions by their terms refer only to Entrance Facilities (EF) and

Direct Trunked Transport (DTT). AT&T asserts that there is other two-way flat-rated transport that may come by another name for which AT&T and Qwest will share the cost. For example, if AT&T purchases two-way UNE dedicated transport from Qwest, the parties will share the cost of this facility.[41] AT&T added parenthetical language to §§ 7.3.1.1.3.1 and 7.3.2.2.1 to make clear that they are not limited to EF and DTT: "(or other comparable facility providing equivalent functionality)." AT&T asserts that its proposal is consistent with the agreed-to language in § 7.3.1(b) (not including the disputed sentence) that refers generically to flat-rated transport and states that the parties will share the cost when it is used to support two-way trunking.[42]

71. Qwest maintains that AT&T's "comparable facility" language is vague. Either carrier may provide the transport necessary to create the interconnection between the carriers. The provider of the transport apportions cost when two-way trunking is supported. Qwest notes that it pays at the same rate it would have charged if Qwest had provided the same transport. AT&T's language suggests that Qwest might pay at the rate associated with a CLEC's "comparable facility providing equivalent functionality," however, Qwest asserts, to do so would make Qwest subject to asymmetric compensation when compensation should be symmetric per 47 C.F.R. 51.711.

72. The second sub-issue involves truing-up the relative use factor (initially set at 50 percent) based on actual minutes of use. Qwest seeks to limit the true-up period to one quarter; AT&T's language trues-up all quarters governed by the initial relative use factor. AT&T argues

[41] During the hearing, private line dedicated transport was the only example AT&T witness David Talbott gave as another two-way flat rated facility for which the parties would share the costs. Hearing Transcript (September 29, 2003) at page 228.

[42] AT&T also asserts that, if the Commission adopts AT&T's proposed language in § 7.3.1(b) in Issue 15 and AT&T's proposed language in § 7.3.1.1.2 in Issue 16, then the Commission should be consistent with those decisions and also adopt AT&T's proposed language in §§ 7.3.1.1.3.1 and 7.3.2.2.1.

that its language recognizes that the parties may actually use the initial relative use factor for more than one quarter for any number of reasons, and thus a true-up for all quarters is fair to both parties. Qwest responds that its proposed language is consistent with Qwest's Colorado SGAT. Furthermore, Qwest states that it generally opposes true-ups of rates, and this Commission has not ordered true-ups of rates. Also, applying a true-up to the first quarter only also encourages the parties to address any adjustment to the relative use factor early.

73. The third sub-issue arises because AT&T deletes the last sentence of §§ 7.3.1.1.3.1 and 7.3.2.2.1 in Qwest's proposal, namely: "ISP-bound traffic delivered to Enhanced Service Providers is Interstate in nature." Qwest asserts that, by recommending deletion of the last sentence of these sections, AT&T seeks to have ISP-bound traffic transported as if it were local in nature, but it is not.

74. The last disputed sub-issue is whether ISP-bound traffic should be included in the computation of cost sharing for these facilities. AT&T seeks to include ISP-bound traffic in such computation; Qwest seeks to exclude it (by adding the language "non-ISP-bound traffic," which AT&T proposes be deleted). AT&T alleges that there is no legal basis to exclude it, because 47 C.F.R. § 51.709(b) allows recovery for all traffic: "The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods." Neither 47 C.F.R. § 51.703(b) nor 47 C.F.R. § 51.709(b) contain exceptions allowing a carrier to exclude Internet related (ISP-bound) traffic from its obligations

to be financially responsible for traffic originating on its network, AT&T argues.[43] AT&T states that the language of this rule does not exclude "ISP-bound" traffic, and there is nothing in the *ISP Remand Order* that supports the result sought by Qwest.

75. AT&T believes that Qwest seeks to require the terminating carrier to bear the cost of carrying a certain class of Qwest's originating traffic, specifically ISP-bound traffic. AT&T provides an example: Assume AT&T leases a dedicated transport facility from Qwest and the facility supports a two-way trunk group between a Qwest switch and an AT&T switch. Assume further that the facility has monthly cost of $500 and Qwest sends AT&T 60,000 minutes per month and AT&T sends Qwest 20,000 minutes per month. Based on AT&T's relative use of 25 percent, Qwest would bill AT&T $125 per month for its relative use of the facility. Now, assume that 20,000 of the minutes that Qwest is sending to AT&T are Internet related traffic and, under Qwest's proposed language, are excluded from the relative use calculation. AT&T's relative use is now 33 percent and Qwest would bill AT&T $167 per month for its relative use of the facility.[44] Therefore, AT&T concludes, under Qwest's proposal, even though it is sending AT&T the same amount of originating traffic to terminate, Qwest is paying less than its proportionate share of the transport facility.

76. AT&T also notes that the FCC developed an intercarrier compensation mechanism that provides for two payment options for ISP-bound traffic. An ILEC may offer to exchange traffic subject to § 251(b)(5) and ISP-bound traffic at rate caps established for certain periods – i.e. $.0015 per minute of use (MOU) from June 13, 2001 to December 13, 2001;

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[43] AT&T also points to the FCC's pronouncements in ¶ 52 of its *Local Competition Order* and ¶52 in its *FCC Virginia Arbitration Decision*, discussed in Issue 16.

[44] At the hearing, Qwest witness Paul McDaniel admitted that the AT&T example is accurate. Hearing Transcript (September 29, 2003) at page 216.

$.0010 per MOU from December 14, 2001 to June 13, 2003; and $.0007 per MOU from June 14, 2003 until the Commission issues a further order on intercarrier compensation. If an ILEC chooses not to exchange traffic subject to § 251(b)(5) and ISP-bound traffic under the FCC's rate cap mechanism, then the FCC requires that the carriers exchange ISP-bound traffic at the state adopted reciprocal compensation rate. Neither option permits ILECs to assess access charges for the exchange of ISP-bound traffic, AT&T asserts.

77. Qwest responds that its language is consistent with the language in Qwest's Colorado SGAT and §§ 251(a)(1), 251(c)(2) 252(d)(1) of the Act. Qwest argues that the Act requires the Commission to set rates for interconnection and network element charges that are "just and reasonable" and based on "the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element." By including Internet traffic in the calculation of relative use, Qwest argues, AT&T's proposal would deny Qwest any recovery of its costs in violation of this critical requirement of the Act. Further, AT&T improperly deletes Qwest SGAT language that acknowledges important differences between local § 251(b)(5) traffic and ISP-bound traffic. Qwest states that the *ISP Remand Order* and subsequent FCC 271 Orders the FCC ruled that Internet traffic is not subject to the reciprocal compensation obligations imposed by § 251(b)(5) of the Act,[45] and thus the rules AT&T relies upon are inapplicable.

[45] *Citing* Memorandum Opinion and Order, *Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. for Authorization To Provide In-Region, InterLATA Services in New Jersey*, WC Dkt. No. 02-67, 17 FCC Rcd 12275 ¶ 160 (2002); Memorandum Opinion and Order, *Joint Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Dkt. No. 02-35, 17 FCC Rcd 9018 ¶ 272 (2002); Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Dkt. No. 01-138, 16 FCC Rcd 17419 ¶ 119 (2001); Memorandum Opinion and Order, *Application of Verizon New York, Inc., Verizon Long Distance for Authorization to Provide In-Region, InterLATA Services in Connecticut*, CC Dkt. No. 01-100, 16 FCC Rcd 14147 ¶ 67 (2001).

78. Both parties cite to a D.C. Circuit Court opinion, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). AT&T concludes that the opinion means that ISP-bound traffic is "telecommunications" as set forth in 47 C.F.R. § 51.701(b) and is subject to 47 C.F.R. § 51.703(b), *i.e.*, subject to reciprocal compensation. Qwest disagrees, stating that the court was explicit that it did *not* make this determination:

> Having found that § 251(g) does not provide a basis for the [FCC's] action, we make no further determinations. For example, as in Bell Atlantic, we do not decide whether handling calls to ISPs constitutes "telephone exchange service" or "exchange access" (as those terms are defined in the Act, 47 U.S.C. *§§* 153(16), 153(47)) or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of "telecommunications" covered by *§* 251(b)(5). Nor do we decide whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to § 251(b)(5) . . . . Indeed, these are only samples of the issues we do not decide, which are in fact all issues other than whether *§* 251(g) provided the authority claimed by the Commission for not applying *§* 251(b)(5).[46] (emphasis added)

79. Qwest also asserts that AT&T's proposal is inconsistent with this Commission's decision in a prior arbitration concerning Qwest and Level 3, where this Commission determined that Internet-bound traffic should not be included in relative use calculations. Qwest states that the policies that led this Commission to adopt bill-and-keep for Internet-bound traffic,[47] and led the FCC to phase out the payment of intercarrier compensation for Internet traffic,[48] requires the exclusion of Internet traffic from the relative-use calculation. Here, Qwest argues, AT&T's position is even more objectionable than the Level 3 position the Commission has already

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[46] *Id.* at ¶ 434.

[47] The Colorado Commission discussed bill and keep compensation for Internet-bound traffic in the Sprint, ICG, and Level 3 arbitrations. *See* Docket No. 00B-011T, Decision No. C00-685, (Colo. P.U.C. June 23, 2000); Docket No. 00B-011T, Decision No. C00-479 (Colo. P.U.C. May 5, 2000); Docket No. 00B-011T, Decision No. C00-1071 (Colo. P.U.C. Sept. 27, 2000); Docket. No. 00B-011T, Decision No. C00-858 (Colo. P.U.C. Aug. 7, 2000); Docket No. 00B-601T, Decision No. C01-477 (Colo. P.U.C. Sept. 27, 2000) (*Level 3 RRR Decision*); Docket. No. 00B-601T, Decision No. C01-312 (Colo. P.U.C. Mar. 16, 2001) (*Level 3 Initial Decision*).

[48] In the *ISP Remand Order*, the FCC found that the payment of reciprocal compensation for Internet traffic under the Act causes uneconomic subsidies and improperly creates incentives for CLECs to specialize in serving ISPs to the exclusion of other customers. *ISP Remand Order* at ¶¶ 67-76.

rejected, because here AT&T also proposes to redefine the scope and nature of local exchange service. Specifically, Qwest claims that, were Qwest required to transport Internet-bound traffic for AT&T under AT&T's proposal, Qwest would be required to supply any number of dedicated trunks from any Qwest tandem to any street address (over any distance) that the CLEC might name.

80. We are not persuaded by AT&T's arguments to allow language on comparable facilities in these sections. As stated in footnote 42, AT&T itself ties this decision to the decisions on Issues 15 and 16. Because we did not accept AT&T's proposals for those Issues, it follows that we will not accept AT&T's language on comparable facilities on this issue. We also agree with Qwest that this language, if included, would have the effect of allowing asymmetric compensation contrary to 47 CFR § 51.711.

81. We will, however, allow for the deletion of the Qwest-specific transport reference of "LIS" trunks. It is conceivable that AT&T might provide the transport trunks or Qwest might have a different transport offering, in which case the "LIS" terminology would not be appropriate.

82. On the second sub-issue, we likewise are not persuaded by AT&T's argument. AT&T presents no reason for the longer true-up period except for the statement that a true-up for all quarters is more fair to the parties. As a practical matter, this Commission does not normally allow for the true-up of rates either for retail or wholesale services without good cause. We agree with Qwest that a shorter true-up period will persuade the parties to calculate actual usage on the EF and DTT facilities sooner rather than later.

83. On the last sub-issue, the inclusion or exclusion of ISP-bound traffic from the relative use calculation, we do not believe anything has changed legally since our decision in the Qwest/Level 3 arbitration, and the circumstances for these parties are no different than in that prior case. The relative use factor is used to determine how much a carrier must pay for a transport facility. This factor is applied to the Exhibit A rates to determine what the parties pay. The FCC has made it clear that ISP-bound traffic is no longer subject to reciprocal compensation under § 251(b)(5), but the FCC has not made a determination on how ISP-bound traffic should be treated in apportioning the costs of interconnection facilities. Therefore, we believe this decision rests with the states.

84. In Decision No. C01-0312, we stated:

> The logic underlying our decision on reciprocal compensation for Internet bound traffic dictates a similar result here. When connecting to an ISP served by a CLEC, the ILEC end-user acts primarily as the customer of the ISP, not as the customer of the ILEC. The end-user should pay the ISP; the ISP should charge the cost-causing end-user. The ISP should compensate both the ILEC (Qwest) and the CLEC (Level 3) for costs incurred in originating and transporting the ISP-bound call.

We find that transport trunks at issue in these sections as defined in the Agreement are used for the reciprocal exchange of Exchange Service (EAS/Local) traffic. ISP-bound traffic is neither reciprocal nor local and, therefore, should not be included in these factors.

85. AT&T states in its testimony that Qwest serves ISPs as well and "presumably such traffic flows to AT&T's network over interconnection trunks." This exclusion of ISP-bound traffic is not limited to AT&T or its interconnection trunks. Qwest's ISP-bound traffic should not be included in the relative use calculations either.

86. Tied to this decision is our decision to allow the inclusion of Qwest's language in §§ 7.3.1.1.3.1 and 7.3.2.2.1: "ISP-bound traffic is interstate in nature." This Commission has

previously made this finding in various arbitration and § 271 proceedings.[49] While the language might not be necessary to include in a contractual sense, it is a true statement and might add some clarity to the parties' responsibilities.

87. We approve the following language for §§ 7.3.1.1.3.1, 7.3.2.2 and 7.3.2.2.1:

> 7.3.1.1.3.1 The provider of the two-way Entrance Facility (EF) will initially share the cost of the two-way EF by assuming an initial relative use factor of fifty percent (50%) for a minimum of one quarter. The nominal charge to the other Party for the use of the Entrance Facility (EF), as described in Exhibit A, shall be reduced by this initial relative use factor. Payments by the other Party will be according to this initial relative use factor for a minimum of one quarter. The initial relative use factor will continue for both bill reduction and payments until the Parties agree to a new factor, based upon actual minutes of use data for non-ISP-bound traffic to substantiate a change in that factor. If either Party demonstrates with non-ISP-bound traffic data that actual minutes of use during the first quarter justify a relative use factor other than fifty percent (50%), the Parties will retroactively true up first quarter charges. Once negotiation of a new factor is finalized, the bill reductions and payments will apply going forward, for a minimum of one quarter. ISP-bound traffic delivered to Enhanced Service Providers is interstate in nature.
>
> 7.3.2.2 If the Parties elect to establish two-way trunks for reciprocal exchange of Exchange Service (EAS/Local) traffic, the cost of the facilities shall be shared among the Parties by reducing the two-way DTT rate element charges as follows:
>
> 7.3.2.2.1 The provider of the-two-way DTT facility will initially share the cost of the two-way DTT facility by assuming an initial relative use factor of fifty percent (50%) for a minimum of one quarter. The nominal charge to the other Party for the use of the DTT facility, as described in Exhibit A, shall be reduced by this initial relative use factor. Payments by the other Party will be according to this initial relative use factor for a minimum of one quarter. The initial relative use factor will continue for both bill reduction and payments until the Parties agree to a new factor, based upon actual minutes of use data for non ISP-bound traffic to substantiate a change in that factor. If either Party demonstrates with non ISP-bound traffic data that actual minutes of use during the first quarter justify a relative use factor other than fifty percent (50%), the Parties will retroactively true up first quarter charges. Once negotiation of new factor is finalized, the bill reductions and payments will apply going forward, for a minimum of one quarter. ISP-bound traffic is interstate in nature.

[49] *See* footnote 47, supra.

E. Issue 18 – Section 7.3.4.1.2: Reciprocal Compensation and Calculation of Tandem Transmission Rate

88. When AT&T's switch meets the definition of a tandem switch under 47 C.F.R. § 51.711(a)(3), the Parties agree that AT&T is entitled to charge and receive the call termination and tandem switching transport rate elements. In addition to those charges, AT&T seeks to charge the tandem transmission rate for nine (9) miles of common transport. AT&T asserts that charging for all three rate elements are symmetrical to the charges Qwest assesses when a Qwest tandem switch is used as part of the transport and termination of an AT&T originated call, and AT&T is entitled to charge a symmetrical rate pursuant to 47 C.F.R. § 51.711. Since Qwest's Tandem Transmission rate is mileage sensitive, the argument goes, then AT&T should charge Qwest a Tandem Transmission rate based on the average mileage contained in Qwest's billing to AT&T, or as otherwise agreed by the Parties.

89. Qwest concedes that C.F.R. § 51.711(a) requires symmetrical reciprocal compensation rates, but states that the rule does not require payment of an assumed transport rate as well. Qwest admits that its tandem transmission rates in Colorado are mileage sensitive, but does not agree that AT&T's proposal is symmetrical. Qwest contends that its proposal is to pay AT&T a transport rate that is symmetrical to and mirrors the Qwest transport rate, and that AT&T's interpretation of Rule 711(a) actually *creates* asymmetry. Qwest explains: The only time Qwest applies an assumed nine mile charge for tandem transmission is for *transiting* calls. A transited call is neither originated nor terminated by Qwest and, accordingly, is not subject to reciprocal compensation under § 251(b)(5). AT&T seeks to apply the assumed mileage rating to *non*-transited calls. When Qwest terminates local calls, Qwest applies an actual airline mileage. Therefore, where Qwest's tandem and Qwest's end office are in the same building, Qwest rates tandem transmission at zero-mileage. However, under AT&T's proposal, where its tandem and

end office are in the same building, AT&T should "assume" it provides nine miles of transport and charge Qwest accordingly.

90. Qwest concludes that AT&T's interpretation would allow not only that all Qwest calls be subject to two switching charges plus a fixed rate for tandem transmission, but also a distance-sensitive charge when there is no actual common transport mileage involved in terminating the call. Qwest argues that this is not symmetrical, and improperly inflates the per minute of use call termination rate where AT&T's switches qualify as tandem.

91. AT&T responds that, while it could have proposed to bill Qwest the actual average mileage that Qwest bills to AT&T, this requires calculation of the average mileage each month. The better approach, argues AT&T, is to include a specified number of miles in the interconnection agreement and to bill Qwest accordingly, because it simplifies the billing and bill verification processes for both Qwest and AT&T. Further, AT&T chose nine miles because that is the mileage Qwest currently assumes for tandem transmission for transiting calls and thus the assumption "seemed reasonable."

92. We conclude that AT&T must provide a similar service in order to receive reciprocal compensation. The parties' disagreement concerns whether AT&T should be reciprocally compensated for tandem transmission service if its switch meets the tandem office switch definition. This record establishes that the network architecture used by AT&T does not provide any tandem transmission service. AT&T proposes to use Qwest data to determine the amount of mileage that would be used to calculate the distance sensitive tandem transmission rate because it does not have and will not have its own data. We reject AT&T's proposal.

93. We approve the following language for § 7.3.4.1.2:

For purposes of call termination, CLEC Switch(es) shall be treated as End Office Switch(es) unless CLEC's Switch(es) meet the definition of a Tandem Switch in this Agreement in the Definitions Section. When a CLEC Switch meets the definition, the per minute of use call termination is equal to the sum of (1) the Termination rate as described in Exhibit A of this Agreement and (2) the Tandem Switched Transport rate.

F. Issue 19 – Sections 7.3.6.1 & 7.3.6.2.1: ISP-Bound Traffic, UNE-P Minutes and the 3:1 Ratio of Terminating to Originating Traffic

94. The two issues here are: (1) the appropriate intercarrier compensation rate for ISP-bound traffic, and (2) whether unbundled network element platform (UNE-P) minutes should be included in the 3:1 ratio that applies when determining whether traffic should be compensated at the ISP rate, or the local voice rate.

95. Qwest notes that Commission has established a zero rate for traffic bound for Internet service providers. Qwest amended its SGAT to explicitly include the zero rate for Internet-bound traffic in Exhibit A, and the Commission approved that rate and SGAT amendment.[50] Also, in three Colorado arbitration dockets decided in 2000 and 2001,[51] the Commission determined that reciprocal compensation would not be paid on ISP-bound traffic. The Commission also determined that ISP-bound traffic was primarily interstate in nature. Since the Commission has set the recurring rate for ISP-bound traffic at zero ($0.00), Qwest's proposed language in § 7.3.6.1 is: "ISP-bound traffic exchanged between Qwest and CLEC will be billed at the Commission ordered rate of zero (0)."

96. Further, notes Qwest, the *ISP Remand Order* established an interim regime whereby the rate for ISP-bound traffic would eventually be reduced to zero. However, because its interim phase-down represented a *cap*, the FCC did not displace those state commission

[50] *See* Docket No. 03M-078T, Decision No. C03-0464 at ¶ 6 (May 5, 2003) (*Ninth Revised SGAT Order*).
[51] *See* footnote 47, supra.

decisions that established rates *below* the FCC's cap.[52] Paragraph 80 of the *ISP Remand Order* states:

> We also clarify that, because the rates set forth above are *caps* on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps we adopt here or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic). The rate caps are designed to provide a transition toward bill and keep or such other cost recovery mechanism that the Commission may adopt to minimize uneconomic incentive, and no such transition is necessary for carriers already exchanging traffic at rates below the caps. Moreover, those state commissions have concluded that, at least in their states, LECs receive adequate compensation from their own end-users for the transport and termination of ISP-bound traffic and need not rely on intercarrier compensation.[53]

Footnote 152 of the *ISP Remand Order* further states:

> Thus, if a state has ordered all LECs to exchange ISP-bound traffic on a bill and keep basis, or if a state has ordered bill and keep for ISP-bound traffic in a particular arbitration, those LECs subject to the state order would continue to exchange ISP-bound traffic on a bill and keep basis.[54]

97. AT&T responds that, from this footnote, it is clear that bill and keep (zero rate) applies to ISP-bound traffic in only two instances: (1) if the state commission had ordered all LECs to exchange ISP-bound traffic under a bill and keep arrangement prior to the *ISP Remand Order*, then such a bill and keep arrangement would apply to all LECs on a going forward basis; or (2) if the state commission had ordered bill and keep in a particular arbitration(s) prior to the *ISP Remand Order*, then bill and keep would apply to the particular LEC(s) that was (were) the subject(s) of the particular arbitration(s). AT&T asserts that the FCC was clear that the transitional rates it was establishing going forward were rate caps and thus they would have no effect to the extent the states had *previously* adopted rates below the caps. Since the Colorado Commission had not ruled that a zero rate for reciprocal compensation for ISP-bound traffic

[52] *ISP Remand Order* at ¶ 80.

[53] *Id.* (emphasis in original) (footnotes omitted).

[54] *Id.* at ¶ 80 n. 152.

applied to AT&T prior to the FCC's issuance of the *ISP Remand Order*, AT&T argues that the Commission cannot do so now. As authority, AT&T cites paragraph 82 of the *ISP Remand Order*: "Because we now exercise our authority under § 201 to determine the appropriate compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue." Therefore, argues AT&T, as explained in Issue 17, and based on the *ISP Remand Order*, ISP-bound traffic should be compensated at $.0007/mou until the FCC makes a further determination.

98. With respect to the second sub-issue, AT&T's position is that AT&T's UNE-P originating minutes of use should be included in the 3:1 ratio that applies when determining whether traffic is to be compensated at the ISP rate versus the local voice rate. AT&T avers that its position is supported by the FCC's conclusion in the Virginia Arbitration. In that decision, the FCC stated: "The ISP Intercarrier Compensation Order does not distinguish between UNE-platform traffic and originating interconnection trunk traffic in its application of the 3:1 ratio. We conclude, therefore, that both categories of traffic should be included in this calculation."[55]

99. AT&T asserts that there is no difference between a CLEC's UNE-P and facility-based traffic for compensation purposes and both should be included. When a CLEC leases UNE-P from Qwest, the CLEC is leasing loops, switches, and transport in order to provide telecommunication services. Thus, AT&T argues, the CLEC uses UNE-P to emulate a facility-based carrier. The CLEC pays compensation to Qwest for terminating either type of traffic and similarly the CLEC is entitled to collect compensation when it terminates calls to its customers served by its switches or by UNE-P.

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[55] *FCC Virginia Arbitration Decision* at ¶ 267.

100. Qwest responds: Qwest does not measure or bill CLECs for unbundled terminating switching related to the UNE-P platform. Reciprocal compensation applies to the exchange of Exchange Service (local) traffic between the CLEC's network and Qwest's network. In the case of UNE-P, many calls are carried solely on Qwest-provided transport and not between the CLEC's network and Qwest's network. Calls that do not traverse an interconnection trunk should not impact the 3:1 presumption or reciprocal compensation. The 3:1 ratio allows carriers to sort Internet-bound traffic from 251(b)(5) "voice" traffic on an individual trunk group. Including this traffic in the 3:1 ratio would artificially inflate the amount of actual local exchange voice traffic exchanged between the parties' physical networks, Qwest contends.

101. More important, Qwest argues, a CLEC who provides service via UNE-P does not face unbundled local switching charges for terminating local calls.[56] Section 9.11.5.3 of the proposed Agreement ensures that AT&T faces no cost to terminate local calls on a UNE-P station, and so AT&T has no cost to recover via reciprocal compensation. Because AT&T is not paying termination costs to Qwest for UNE-P traffic, asserts Qwest, AT&T should not receive "credit" through the inclusion of UNE-P minutes in the 3:1 ratio as if it did.

102. Qwest also claims that the inclusion of UNE-P minutes of use distorts the correct billing of reciprocal compensation by failing to recognize the cost basis underpinning cost based rates. Since the Commission has previously determined that costs associated with terminating voice traffic should be recovered from the originating carrier of the local exchange call, the costs associated with terminating ISP traffic should be recovered from the ISP provider and not through reciprocal compensation.

[56] *See* Agreement at § 9.11.5.3.

103. In addition, Qwest notes that § 7.3.6.2.1 states that either carrier may rebut the 3:1 presumption by demonstrating the factual ratio to the Commission. Qwest intends to rebut the 3:1 presumption in the immediate future in order to help ensure that when this new interconnection agreement takes effect there is no delay in Qwest's ability to exercise its right to use actual minutes of use instead of the 3:1 presumption. Qwest claims to have an accurate means of identifying Internet-bound traffic.

104. Qwest urges the Commission not to follow an order in an unrelated arbitration in Virginia, and instead follow its policies coupled with the facts presented in this case to evaluate the appropriateness of including UNE-P minutes of use in the 3:1 presumption ratio.

105. The arguments presented by AT&T on the rate at which ISP-bound traffic is exchanged are insufficient to convince us that we should alter our position from previous decisions mandating a bill and keep mechanism, or zero rate, for the exchange of ISP-bound traffic. We find AT&T's legal interpretation of the *ISP Remand Order* flawed. The FCC's interim compensation regime sets *caps* with the goal of eliminating arbitrage altogether by moving to bill and keep. The FCC made clear that state commissions are not pre-empted from setting reciprocal compensation below those caps. AT&T's argument that the FCC's rate caps only apply to carriers for whom states previously adopted rates below the caps, but not to any carriers going forward, is neither supported by FCC language or logic. Rather ¶ 80 or the *ISP Remand Order* states that the FCC is transitioning to bill and keep to minimize uneconomic incentives. Adopting AT&T's interpretation of the *ISP Remand Order* would be directly contrary to that minimization.

106. It has been this Commission's position, in several cases, that the disallowance of reciprocal compensation for ISP-bound traffic best comports with § 251(2)(2)(D) of the Act

which requires that interconnection be on rates, terms and conditions that are just, reasonable and nondiscriminatory. By eliminating an unintended arbitrage opportunity, this outcome encourages the efficient entry of competitors into the residential market. Thus, the outcome is pro-competitive and anti-subsidy. ISP users pay for what they use; competitors can serve them accordingly; and non-ISP-users do not have to pay for services they do not use.

107. On the second sub-issue, we agree with Qwest that UNE-P traffic should not be included in the calculation of terminating to originating minutes of use for the 3:1 presumptive ratio. This ratio was set by the FCC in its *ISP Remand Order* for carriers that are unable to identify ISP-bound traffic. The FCC stated that this ratio could be used in place of actual usage data, but could be rebutted by any carrier to a state commission. Any traffic delivered to a carrier that exceeds the 3:1 ratio of terminating to originating minutes is subject to the compensation for ISP-bound traffic (ordered above to be zero), and any traffic exchanged at less than the 3:1 ratio is subject to normal reciprocal compensation rates.

108. As such, the 3:1 ratio is used to determine what rates are charged to transport and terminate traffic – a cost issue. AT&T incurs no costs for the termination of UNE-P traffic, pursuant to § 9.11.5.3 of the Agreement. AT&T admits this to be the case, but states that Qwest can begin charging for termination as soon as it is able to provide usage data. We do not agree with AT&T's statement that cost is not relevant. We also are not convinced that we must conform our decision to that of the Wireline Competition Bureau in the *Virginia Arbitration Decision*. We note that Verizon, in that proceeding, agreed to include the originating UNE-platform traffic.

Without knowing the rates, terms of the negotiation, and other relevant facts concerning that arbitration, we are not persuaded by that decision here.[57]

109. We agree with AT&T that the parenthetical contained in § 7.3.6.2.1 - "(CLEC to Qwest)" - should be deleted. The *ISP Remand Order* makes no distinction between CLEC to ILEC traffic and ILEC to CLEC traffic. If, for some reason, the ILEC to CLEC traffic exceeds the 3:1 ratio, Qwest would have to demonstrate that it is not ISP-bound traffic in order to receive reciprocal compensation.

110. We approve the following language for §§ 7.3.6.1 and 7.3.6.2.1:

> 7.3.6.1 Qwest elects to exchange ISP-bound traffic at the FCC ordered rates pursuant to the FCC's Order on Remand and Report and Order (Intercarrier Compensation for ISP-bound Traffic) CC Docket 01-131 (FCC ISP Order), effective June 14, 2001. ISP bound traffic exchanged between Qwest and CLEC will be billed at the Commission ordered rate of zero (0).
>
> 7.3.6.2.1 Identification of ISP-bound traffic: The Parties will presume traffic delivered to a Party that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic. Either Party may rebut this presumption by demonstrating the factual ratio to the state Commission.

G. Issue 21 – Section 7.3.8 (Billing for traffic that does not carry CPN):

1) **Should the threshold for traffic without CPN be 90% or 95%?**
2) **If the originating party passes CPN on less than the threshold amount, should those calls passed without CPN be billed as intraLATA switched access or based on a percentage local usage (PLU)? and**
3) **Is the transit provider responsible for no-CPN traffic originated by third parties?**

111. No-CPN Threshold: 47 CFR § 64.1601(a) generally requires that "common carriers using Signaling System 7 and offering or subscribing to any service based on Signaling Systems 7 functionality are required to transmit the calling party number (CPN) associated with an interstate call to interconnecting carriers." However, subsection (b) of this rule allows

[57] See page 9 of this decision.

subscribers to block their CPN. In addition, subsection (d) sets forth circumstances where a carrier is not required to pass CPN. AT&T's position is that each party should pass the calling party number (CPN) on no less than 90% of the traffic passed to the other party; Qwest argues for a 95% threshold. AT&T states that it simply seeks a little larger range that allows for the types of situations that could occur and would affect the percentage of traffic passed without CPN.

112. Qwest notes that, in the aggregate, Qwest and other Colorado carriers currently exchange 5% or less "No CPN" traffic (it claims Qwest and AT&T are around 2%). Qwest alleges that AT&T apparently has a plan to introduce services that further preclude the consistent forwarding of caller identification information, but argues that this is inappropriate justification for raising the no-CPN tolerance threshold. Qwest asserts that allowing elevated levels of this traffic type would create higher occurrences of billing disputes between carriers, and incent the wrong behavior.

113. Qwest claims that no-CPN calls are a problem for the industry. Qwest cites recent press reports that have carried allegations by both Verizon and SBC that some carriers "strip off" CPN in order to avoid paying access charges. Qwest notes that AT&T itself alleged in a pending bankruptcy proceeding that a company was disguising toll calls as local in order to avoid access charges and to collect reciprocal compensation,[58] and, recently, AT&T filed suit alleging improper routing of calls to avoid access charges and to collect reciprocal compensation.[59]

[58] *See* Latour, Almare, et al., *MCI, Hoping to Exit Bankruptcy, Faces New Investigation of Fraud*, Wall St. J., July 28, 2003, A1; Labuton, Stephen, *AT&T to Offer New Allegation in MCI Inquiry*, N.Y. Times, July 28, 2003, A1.

[59] *See* Latour, Almare, et al., *MCI Questions Rivals' Call Practices*, Wall St. J., Sept. 3, 2003, A3.

114. Billing of No-CPN Calls: AT&T proposes that a percentage local usage (PLU) factor be used for the traffic that does not contain CPN. The factor is established based on all the traffic that has CPN. So, for example, if the traffic that has CPN is 80 percent local and 20 percent toll, the traffic that has no CPN would be billed 80 percent local and 20 percent toll. According to AT&T, there is no basis to presume that all traffic without CPN is switched access traffic. Further, rather than expend the resources to substantiate every call that does not contain the CPN, the parties should use the factoring approach proposed by AT&T. AT&T agrees CPN should be passed whenever possible where SS7 exists and, it argues, its proposal reflects that. Also, Qwest notes that this issue was addressed by the FCC in the Virginia Arbitration Proceeding,[60] and it held that the parties use PLU factors to jurisdictionalize the traffic below 90 percent.

115. Under Qwest's proposal, the no-CPN traffic will be billed at switched access rates (unless one can "substantiate technical restrictions"). Qwest objects to AT&T's PLU formula as an administratively complex apportioning of what should be a relatively small amount of traffic. Further, argues Qwest, AT&T's language could entice an opt-in carrier to extract CPN from toll calls and only provide CPN on calls which are local. AT&T's proposed formula would then dictate that a local rate should be applied to all traffic. It would incent exactly the wrong behavior, Qwest maintains.

116. AT&T responds that, since it is Qwest's desire to bill all CPN-less traffic as switched access, this assumes that AT&T receives all of its traffic with CPN. This is not the case, notes AT&T, as traffic is delivered to the AT&T network in a variety of ways, some of which cannot carry CPN. As a primary example, AT&T and Qwest have no control over the lack

[60] *FCC Virginia Arbitration Decision*, Issue IV-11, Usage Measurement, at ¶¶ 186-191.

of CPN when business customers use older customer premise equipment (CPE); other examples include outbound nodal customers that connect to AT&T's network via Multi-Frequency signaling; Primary Rate Interface (PRI) customers who often do not pass CPN information to AT&T; and traffic that originates from LECs who do not utilize SS7. Therefore, asserts AT&T, the Commission should not require the originating carrier to pay access charges on all of the calls passed without CPN.

117. Transit Provider Responsibility For No-CPN Traffic: AT&T has proposed the following additional language expressly addressing the obligation of the transit provider:

> The transit provider will be accountable for transit traffic without CPN unless the transit provider provides information to the terminating Party each month that identifies the carriers that originated the no-CPN traffic, and the no-CPN traffic originated by each carrier. If the transit provider does not provide such information, the no-CPN traffic will be treated consistent with this section and as though the traffic was originated by the transit provider.

118. Qwest objects to AT&T's proposal as against existing law. Qwest notes that transiting is neither origination nor termination of a call. Since transport of transit traffic between an originating carrier and a terminating carrier is not the provision of local exchange service, it is not subject to § 251(c) of the Act. Thus, according to Qwest, a terminating carrier cannot, by law, charge a transit carrier for call termination; it must look to the party that originated the call for compensation.

119. Qwest also argues that AT&T can connect with other carriers directly and address with those carriers how to deal with no-CPN calls that they may originate. If AT&T chooses to exchange traffic with other carriers through Qwest transit services rather than via direct trunking to other carriers, Qwest argues, then AT&T should also assume the business risk of no-CPN. Further, Qwest asserts that AT&T should not be permitted to simply bill Qwest for this traffic

because this would punish Qwest, regardless of whether Qwest or another carrier failed to provide the caller identification information AT&T seeks.

120. AT&T responds that the suggestion that every carrier should have to interconnect to every carrier directly is an absurd notion that is utterly inconsistent with the way in which carriers pass traffic amongst themselves today. Furthermore, under the § 251(a)(1) of the Act, Qwest has a duty to provide transit service.

121. Qwest replies that, when AT&T is on the *sending end* of a call, AT&T proposes that the threshold of no-CPN traffic be increased to 10 percent. Yet, when *receiving* no-CPN traffic, AT&T proposes language in the second paragraph of § 7.3.8 that recognizes the potential for lost access charges associated with no-CPN traffic and seeks to hold Qwest, as the transit provider, liable for the traffic of other CLECs. Qwest notes that if other CLECs in Colorado "opt-in" to AT&T's Agreement, AT&T's approach would result in CLECs sending up to 10 percent of their traffic to Qwest without CPN with impunity, and, when that traffic transits Qwest's network for termination to AT&T, AT&T would look to Qwest for compensation for the same traffic.

122. We are persuaded by Qwest's argument to allow a 95 percent standard for the amount of no-CPN traffic exchanged between the parties. As stated above, Qwest indicates that the actual amount of traffic with no-CPN is around two percent. AT&T does not provide sufficient information for us to conclude that this standard should be lowered to 90 percent. Most of the equipment that AT&T named that is not able to send CPN information, is present in the networks today, *e.g.,* payphones, older CPE and PBXs. Therefore, we do not see the current two percent increasing drastically.

123. However, to mitigate any unwarranted over-charging of a carrier for no-CPN calls, we will not allow Qwest to charge switched access rates on these calls above the 95 percent standard as it proposes. Rather, we agree with AT&T's proposal to use a PLU to determine whether no-CPN traffic should be charged at access rates or reciprocal compensation. Qwest's proposal seems to be an extreme and inaccurate answer. It is not likely that 100 percent of the no-CPN traffic is access traffic. AT&T's proposal is more accurate and should not be administratively burdensome since the parties are familiar with PLU calculations from other traffic studies.

124. Finally, we do not agree that the transiting carrier is responsible for the payment for traffic it does not originate. There is no legal or policy basis for this proposal. This is a billing and collection issue to be decided between the originating and the terminating providers. We also agree with Qwest's statement that AT&T does not have to connect with other carriers through Qwest's network. It is free to connect directly and address with those carriers how no-CPN calls will be handled.

125. We approve the following language for § 7.3.8:

7.3.8 Signaling Parameters:

Qwest and CLEC are required to provide each other the proper signaling information (e.g., originating Calling Party Number (CPN) and destination call party number, etc.) per 47 CFR 64.1601 to enable each Party to issue bills in a complete and timely fashion. All CCS signaling parameters will be provided including CPN, Originating Line Information Parameter (OLIP)), on calls to 8XX telephone numbers, calling party category, Charge Number, etc. All privacy indicators will be honored. Where SS7 connections exist, each Party shall pass Calling Party Number (CPN) information, where available, on each EAS/Local and IntraLATA toll call carried over Interconnection trunks. All EAS/Local and IntraLATA Toll calls exchanged without CPN information will be billed as either EAS/Local Traffic or IntraLATA Toll Traffic in direct proportion to the minutes of use (MOU) of calls exchanged with CPN information for the preceding quarter,

utilizing a PLU factor determined in accordance with Section 7.3.9 of this Agreement.

Traffic sent to the other Party on its Interconnection trunks without CPN (valid originating information) will be handled in the following manner. The transit provider will be responsible for only its portion of this traffic, which will not exceed more than five percent (5%) of the total Exchange Service (EAS/Local) and Exchange Access (IntraLATA Toll) traffic delivered to the other Party. The Switch owner will provide to the other Party, upon request, information to demonstrate that Party's portion of no-CPN traffic does not exceed five percent (5%) of the total traffic delivered. The Parties will coordinate and exchange data as necessary to determine the cause of the CPN failure and to assist its correction.

H. Issue 22 – Section 8.2.1.31: Abandonment

126. Qwest's proposed language states that "if Qwest finds in the course of business, evidence to substantiate that any equipment or property of CLEC has been abandoned or left unclaimed in or at any Premises . . .," then Qwest shall provide notice to the CLEC and the CLEC has 30 days to remove the equipment or provide a written dispute resolution request. After the 30 days and assuming inaction on the CLEC's part, ownership of the equipment is transferred to Qwest, Qwest can dispose of the property as it sees fit, and Qwest may charge the CLEC for storage and disposal costs.

127. AT&T asserts that the Qwest proposal provides no objective criteria that Qwest would use in determining there is "evidence" of abandonment. As a result, the determination is left to Qwest's sole discretion, which, AT&T states, is not appropriate. AT&T's proposed language requires objective criteria, including that the CLEC has failed to pay undisputed monthly recurring charges to Qwest for at least three consecutive months before a determination of abandonment may be made. In addition, in the event of abandonment, if Qwest sells AT&T's equipment and the costs of sale are less than the sale proceeds, AT&T's language requires that Qwest refund AT&T the difference. Further, if Qwest appropriates the equipment for its own use or use by others, AT&T's position is that Qwest should seek no expense recovery from AT&T.

AT&T's proposed language requires that Qwest mitigate its damages in these situations. Another element of the AT&T proposal is to expressly state that at a certain point, Qwest must stop charging recurring charges associated with an abandoned collocation site. Qwest's language does not address this issue and leaves the potential for Qwest to continue assessing this charge even after abandonment has taken place, which AT&T states would be inappropriate.

128. Qwest states that the stakes are much higher for it than AT&T. In Qwest's experience with abandoned equipment, the equipment has no or virtually no value. There is no "market" for the equipment and, in fact, Qwest incurs costs related to its removal, asserts Qwest. Qwest alleges that it does not "profit" from selling abandoned equipment. If the equipment retains any value, that value is offset by the cost Qwest incurs to remove the equipment.

129. Qwest testifies that, since December 2001, CLECs have abandoned equipment in over 450 sites in Qwest's 14-state region. In one instance, a CLEC walked away from 165 collocation sites. Qwest received notice via the discovery of liens against over 25 of Qwest's central offices where the CLEC had been collocated. Upon investigation, Qwest discovered that the CLEC in question had gone out of business. Qwest was required to search for the CLEC's creditors to determine if they had right to the equipment the CLEC left at its collocations. The equipment had no salvage value. This process took more than 18 months, and the CLEC had a past due bill in the hundreds of thousands of dollars. In addition, Qwest estimates that costs for removal of the equipment are in the hundreds of thousands of dollars. As a result of this

laborious and expensive process, and others described in its testimony,[61] Qwest urges a more streamlined process to addressed abandoned collocations.

130. Qwest argues that AT&T's proposed language restricts Qwest's ability to quickly and efficiently dispose of abandoned equipment by imposing a mandatory three month period of non-payment before Qwest can proceed with an abandonment notice. Further, AT&T's language imposes mandatory requirements regardless of the unique circumstances of a particular abandonment or other valid indicia of abandonment besides non-payment. Qwest objects to AT&T's language that, after waiting 90 days for nonpayment, the CLEC is still entitled to invoke the dispute resolution process if it disputes Qwest's notice of abandonment. Qwest states that AT&T's language serves only to needlessly extend the timeframe for when a dispute regarding abandonment can be resolved.

131. Qwest's asserts that its proposed abandonment language and process affords abandoning CLECs every opportunity to protect their interests in the event they dispute that they have abandoned the site. Referring disputes regarding whether a CLEC has actually abandoned its site and equipment to the dispute resolution process at the outset is more appropriate, Qwest states, because it allows for flexible and quick resolution of a claim of abandonment.

132. Qwest also objects to AT&T's proposed restriction on its ability to dispose of abandoned equipment and the proposed duty of Qwest to "mitigate" its damages by imposing unnecessary extensions of the 30 day abandonment notice period. Thirty days is more than sufficient time for the CLEC to remove any equipment it may want, Qwest maintains. Also, in an abandonment situation, the notice of abandonment is not the first notice the CLEC has

[61] Qwest claims that, in Colorado, Qwest experienced a total of 105 abandoned collocations and incurred estimated costs of over $300,000 from four situations described in its testimony.

received regarding its collocation space, Qwest states. The typical abandonment involves CLECs that are going or have gone out of business, not a viable CLEC that pays its collocation fees on a timely basis.[62] An abandoning CLEC typically has defaulted on its collocation payments to Qwest. Thus, Qwest's processes provide for issuance of a notice of nonpayment for the collocation space after 30 days. That notice is typically followed after 60 days of non-payment with a collections notice. Therefore, in the normal abandonment situations, Qwest asserts, the CLEC has received notice from Qwest that there are collocation problems that must be addressed.

133. Further, Qwest argues that AT&T's demand that Qwest "mitigate" its damages serves only to raise disputes between the parties over what constitutes "reasonable efforts" and "mitigation." To the extent a CLEC believes Qwest has not properly "mitigated" its expenses, that dispute should be addressed in the dispute resolution process, according to Qwest. Qwest also maintains that AT&T's demands for an accounting are unnecessary and cumbersome.

134. Qwest alleges that AT&T admitted in Minnesota that it is unaware of any situation where AT&T has abandoned a collocation site in a Qwest office. AT&T admits that, as a multi-national corporation employing GAAP related systematic accounting of its assets, it does not plan to "abandon" equipment at the Qwest premises.

135. Qwest states that it requires a remedy that holds Qwest harmless and permits Qwest to dispose of abandoned equipment. Cumbersome and costly abandonment procedures such as AT&T's are inappropriate, argues Qwest, where the CLEC has intentionally abandoned the collocation site and equipment and the CLEC or its former owners refuse to incur the

[62] Qwest witness Philip Linse testified that he is not aware of any situation in which Qwest has "declared" an active and paying CLEC to have "abandoned" its equipment so as to reclaim the CLEC's collocation space.

expense and burden of clearing the site of the equipment or making appropriate arrangements for the equipment's disposal. Because the equipment CLECs abandon has virtually no market value, streamlining the disposal of unwanted equipment more appropriately addresses the circumstances of an abandonment, Qwest asserts.

136. Finally, Qwest claims that AT&T’s own language regarding collocation in AT&T’s central offices is less cumbersome than Qwest’s proposed language. Section 7.1.3.5.31 of AT&T's proposed contract with ILECs addresses a process analogous to decommissioning. It provides that after termination of a Space License, Qwest must remove its equipment within 30 days. If it fails to do so, AT&T may, upon 10 days notice, remove the equipment and restore the site at Qwest's sole risk and expense. Under § 7.1.3.5.33, AT&T states that if Qwest owes it money under the license, any equipment left at the site will be taken free of any interest or lien by Qwest or treated as abandoned. If no monies are owed by Qwest, AT&T removes the equipment and ships it to Qwest's last known address at Qwest's risk and expense. Qwest alleges that AT&T's own language does not require it to "reasonably mitigate" its expenses, does not provide that all outstanding bills are nullified if AT&T "appropriates" the equipment for its own use, and does not require a detailed accounting.

137. AT&T altered its position after direct testimony was filed. Michael Hydock in his Answer Testimony states that AT&T worked with Qwest’s proposal and added/substituted provisions to include that 1) Qwest can make the determination that property has been abandoned but must use objective criteria, 2) Qwest’s notice regarding abandonment must

contain certain information, 3) Qwest must attempt to mitigate its damages, and 4) an accounting is only required if a CLEC requests it.[63]

138. Qwest witness Philip Linse in his Supplemental Testimony objects to AT&T's revised proposal as either (1) already encompassed in Qwest's proposed language; (2) unnecessary; (3) unreasonable; or (4) confusing so as to ensure that the parties will have disputes. Qwest opposes: the "objective criteria" of whether a CLEC has abandoned its equipment, Qwest must wait for 90 consecutive days of nonpayment of "undisputed" collocation payments; the additional 30-day extension of the notice period if the CLEC has not completed removal of equipment; AT&T's attempt to dictate process through contract language by specifying the content of the abandonment notification[64]; and the mandate that Qwest must make "reasonable efforts" to "mitigate" its damages or expenses as well as its language requiring an "accounting" if the CLEC requests one. Qwest also objects to AT&T's language that if a CLEC has commenced removal of its equipment, but does not complete removal within 30 days, Qwest must grant the CLEC an additional 30 days to complete removal. Qwest expects that a CLEC or the bankruptcy trustee may remove some valuable equipment from the collocation site and leave the valueless and difficult to remove equipment. If a CLEC removes some equipment and leaves the remainder, then under AT&T's language Qwest must grant the CLEC an additional 30 days to remove the remaining equipment.

139. Each party has proposed its own language for this issue. A comparison of the proposed language indicates to us that the parties agree on several provisions. We have identified the provisions that the parties disagree upon: 1) AT&T specifies use of

[63] AT&T's proposed language is found in Michael Hydock's Answer Testimony at pages 1-2.

[64] Qwest asserts that the content of the notice could be better addressed in an appropriate forum (like CMP) and then made publicly available in the PCAT so that it is consistent for and available to all carriers.

nondiscriminatory objective criteria, one of which is three consecutive months of failure to pay undisputed monthly recurring charges before Qwest can make a determination of abandonment; 2) AT&T specifies a list of items to be included in the written notice; 3) Qwest specifies that if CLEC fails to remove abandoned equipment, it shall be deemed and construed to have been transferred, deeded and assigned by CLEC to Qwest; 4) AT&T specifies that, if CLEC has commenced removal of equipment prior to the end of 30 days, Qwest shall allow CLEC up to 30 additional days to complete removal; 5) AT&T specifies that Qwest shall cease charging CLEC recurring charges when the time period to remove equipment has elapsed; 6) Qwest specifies that it shall not have an obligation to account for information associated with its removal of abandoned equipment — while AT&T specifies that Qwest should provide, upon request by CLEC, an accounting and CLEC should pay for the preparation of accounting; and 7) Qwest specifies a "hold harmless" release statement.

140. For the provisions agreed upon by the parties we have selected one of the parties language over the other that we consider best addresses that provision. Regarding the provisions that the parties do not agree on (listed above), we conclude that the language should include items 2, 3, 5, and AT&T's language for 6. The language should not include items 1, 4, and 7. We note the words "all of" shall be inserted in front of the words "CLECs equipment" in the sentences addressing transfer of ownership and ceasing of nonrecurring charges.

141. We find it reasonable to expect Qwest to track expenses since we are requiring CLECs to reimburse Qwest for those expenses. Our intent, by including the provision requiring an "accounting of expenses" by Qwest, is for Qwest to track expenses associated with removal and disposition of equipment, including amounts received from sale of equipment, in a manner similar to how Qwest would track expenses and salvage associated with removal and disposition

of its own equipment. We do expect Qwest to offset equipment removal and disposition expenses with any amount it receives from the sale of such equipment. However, we have no expectation for Qwest to refund any amount to the CLEC if the sale amount exceeds expense because we agree with Qwest that the language should state that abandoned equipment not removed in the allotted time by a CLEC shall be "construed to have been transferred, deeded, and assigned by CLEC to Qwest."

142. We approve the following language for §§ 8.2.1.31, 8.2.1.31.1, and 8.2.1.31.2:

> 8.2.1.31 If Qwest finds, in the course of business, evidence to substantiate that any equipment or property of CLEC has been abandoned or left unclaimed in or at any Collocation Premises, Qwest shall provide a written notice to CLEC which shall at a minimum include (i) the identification of the affected Collocation Premises, (ii) the bases for Qwest's determination of abandonment, (iii) a point of contact at Qwest regarding the claimed abandonment and (iv) notice that CLEC has thirty (30) Days from the date of such notice to remove its equipment or property.
>
> 8.2.1.31.1 If CLEC responds in writing within thirty (30) Days that it disputes Qwest's determination of abandonment, the parties may resolve the dispute through negotiation or Dispute Resolution pursuant to Section 5.18, initiated no later than the end of such thirty (30) Day notice period.
>
> 8.2.1.31.2 If CLEC responds in writing to such notice agreeing with such abandonment or fails to respond to such notice, CLEC's equipment shall be deemed abandoned and CLEC shall have until the end of such thirty (30) Day notice period to remove its equipment or property from the Collocation Premises. If CLEC fails to remove all of its equipment or property by the end of such thirty (30) Day period, such equipment or property shall conclusively be deemed and construed to have been transferred, deeded, and assigned by CLEC to Qwest and Qwest may appropriate, sell, store, and/or otherwise dispose of such equipment. Once the time period for removal of all of CLEC's equipment or property has elapsed, Qwest shall cease charging CLEC any recurring charges associated with the Collocation Premise where such abandoned equipment or property was located. CLEC shall reimburse Qwest for all reasonable expenses incurred in connection with the storage or disposition of such equipment or property, provided that Qwest makes reasonable efforts to mitigate such expenses. If Qwest receives value for such abandoned equipment or property, Qwest shall use such value to offset expenses it incurs in appropriating, selling, storing or otherwise disposing of such equipment or property. Qwest shall not be obligated to provide CLEC with an accounting of expenses Qwest seeks to recover from

CLEC, unless CLEC requests in writing such an accounting and agrees to bear the reasonable expenses incurred by Qwest in preparing the same.

Notwithstanding the provisions of this section, where CLEC has submitted a Decommissioning Application, the terms for Collocation Decommissioning, Section 8.2.1.22, contained in this Agreement shall apply.

I. Issue 24 – Sections 9.19 and 19.2: Qwest's obligation to construct facilities for Unbundled Network Elements (UNEs)

143. AT&T states that it and Qwest have negotiated at length the provisions in the interconnection agreement dealing with construction of UNEs including §§ 9.19 and 19.2. The only area of dispute are the words "for itself" in both sections. AT&T would require Qwest to construct facilities for CLECs when they subscribe to UNEs if Qwest would construct facilities for itself or an end use customer under the same or substantially similar circumstances. Qwest relies on the SGAT language for its §§ 9.19 and 19.2 proposals.

144. AT&T notes that, under 47 USC § 251(c)(3) and 47 CFR § 51.307, Qwest must provide "nondiscriminatory access to network elements on an unbundled basis." If Qwest is permitted to do certain activities for itself, but not for CLECs, there is the potential for discrimination. AT&T cites 47 CFR § 51.313, which states:

> Where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements *to itself*. (emphasis added).[65]

AT&T asserts that the Colorado SGAT language for this issue (proposed by Qwest in this arbitration) already requires Qwest to assess whether to build for AT&T in the same manner

[65] AT&T also cites *In the Matter of the Application of BellSouth Corporation et al. for Provision of In-Region, InterLATA Services in Louisiana,* Memorandum Opinion and Order, CC Docket No. 98-121 (rel. October 13, 1998) at ¶185 ("In order to provide nondiscriminatory access to unbundled loops, the BOCs must be able to deliver unbundled loops, of the same quality as the loops that the BOC uses to provide service to its own customers…").

Qwest makes this assessment "for itself." AT&T surmises that Qwest must then object to the retail parity standard ("build for itself *or an End User Customer*" (emphasis added)) included in AT&T's language. AT&T concludes that, since Qwest never objected to this standard in negotiations and the requirement is fully consistent with the requirements of the Act, AT&T's language should be adopted.

145. Qwest responds that, under the Act, FCC orders, and relevant case law from the Eighth Circuit, incumbent LECs are not required to construct UNEs on behalf of CLECs under the expansive terms AT&T proposes. Qwest cites *Iowa Utilities Board v. FCC, which states*:

> We also agree with the petitioners' view that subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network, -- not to a yet unbuilt superior one.[66]

Qwest states that the FCC has also refused to impose on ILECs an obligation to construct new facilities for the provision of unbundled transport.[67] Further, the FCC has held that ILECs do not have an obligation to build a transport network for CLECs:

> In the *Local Competition First Report and Order,* the Commission *limited an incumbent LEC's transport unbundling obligation to existing facilities*, and did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use. Although we conclude that an incumbent LEC's unbundling obligation extends throughout its ubiquitous transport network, including ring transport architectures, we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use.[68]

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[66] *Iowa Utilities Board v. Federal Communications Commission.* 120 F.3d 753, 813 (8th Cir. 1997) (emphasis added).

[67] *See Local Competition Order*, 11 FCC Rcd at 15722 at ¶ 451 ("[W]e expressly limit the provision of unbundled interoffice facilities to *existing* incumbent LEC facilities.") (emphasis in original).

[68] *UNE Remand Order*, 15 FCC Rcd at 3843 at ¶ 324. (emphasis added).

146. Qwest also notes that its construction language is identical to the Colorado Commission-approved construction language in Qwest's Colorado SGAT. Qwest states that this issue was discussed at length during the 271 workshops with the end result being the ordered language that Qwest is proposing here.

147. AT&T proposes that language be added to § 19.2 requiring that, after Qwest completes any construction project, Qwest restore all premises, including those of end use customers, to their condition prior to the commencement of construction. AT&T asserts that it is reasonable to expect that one who performs construction work will restore the premises where the work was performed. Qwest has assured AT&T that Qwest does restore premises after construction. As such, AT&T professes to not understand why Qwest objects to this language. AT&T states that this objection is of great concern because, if Qwest fails to restore premises after construction, this will significantly impact end use customers.

148. Qwest states that there is no basis for adding the language proposed by AT&T since Qwest follows the same restoration practices for both wholesale and retail customers. Qwest points out that AT&T, in response to a Minnesota Department of Commerce information request, acknowledged that it could not identify any instances in which Qwest had failed to restore all premises following completion of a construction project.

149. Qwest's obligation to build UNEs for CLECs was previously address by this Commission in Decision Nos. R01-0846, R01-1141 and R01-1253. In these decisions, we found that Qwest had no affirmative obligation to build CLEC facilities in all instances. AT&T makes no new argument here. Qwest has no obligation to build facilities for CLECs because of its

POLR or ETC designations for end use customers. We also note the FCC recently reaffirmed this position in its *Triennial Review Order*.[69]

150. We do not believe that AT&T's language on applicable service intervals or on restoration of premises is necessary. AT&T has made no demonstration that it is experiencing problems with Qwest missing intervals or not restoring premises after construction. If problems should arise in the future, the exclusion of this language by no means disallows AT&T's filing of a complaint allowed for in the Performance Assurance Plan or a complaint before the Commission for discriminatory treatment.

151. We approve the following language for §§ 9.19 and 19.2:

> 9.19 Construction Charges
>
> Qwest will assess whether to build for CLEC in the same manner that it assesses whether to build for itself. Qwest will conduct an individual financial assessment of any request that requires construction of network capacity, facilities, or space for access to or use of UNEs. When Qwest constructs to fulfill CLEC's request for UNEs, Qwest will bid this construction on a case-by-case basis. Qwest will charge for the construction through nonrecurring charges and a term agreement for the remaining recurring charge, as described in the Construction Charges Section. When CLEC orders the same or substantially similar service available to Qwest End User Customers, nothing in this Section shall be interpreted to authorize Qwest to charge CLEC for special construction where such charges are not provided for in a Tariff or where such charges would not be applied to a Qwest End User Customer. If Qwest agrees to construct a network element that satisfies the description of a UNE contained in this agreement, that network element shall be deemed a UNE.
>
> 19.2 All necessary construction will be undertaken at the discretion of Qwest, consistent with budgetary responsibilities, consideration for the impact on the general body of End Users and without discrimination among the various Carriers.

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[69] Report and Order and Order of Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Dkt. Nos. 01-338, 96-98, 98-147, FCC 03-36 (rel. Aug. 21, 2003) (*Triennial Review Order)* at ¶¶ 635-636.

J. Issue 27 – Section 21.1.1.1.1: CABS Compliant Billing

152. According to Qwest, AT&T and Qwest have substantially narrowed their differences regarding this issue. Through the Change Management Process (CMP), Qwest has committed to making all of the changes sought by AT&T and has provided targeted implementation dates for each Change Request (CR) in accordance with the CMP process.[70] AT&T currently receives Carrier Access Billing System (CABS)-formatted bills for UNE-P POTS and loops. Qwest has implemented the first two changes on AT&T's list. Therefore, the remaining dispute involves the targeted implementation dates for eight CRs concerning changes to the CABS-formatted bills.

153. Qwest states that CMP was designed to allow CLECs to learn about and anticipate the impacts a change may have on their operations, and to voice concerns and request changes to mitigate adverse impacts associated with a change. Through CMP, CLECs can voice their concerns and work toward an equitable solution that better meets the larger community's needs. Qwest notes that AT&T actively participated in designing the CMP and accepted it as the mechanism for changing systems that affect multiple CLECs. The CMP process provides an established forum and existing procedures designed to ensure that the needs of the broader CLEC community are addressed. In fact, Qwest asserts, the CMP process *requires* Qwest to address changes such as those requested by AT&T through the CMP process. It would be inappropriate to impose contractual obligations on Qwest that may be inconsistent with the progression of these issues pursuant to the defined CMP process, argues Qwest.

[70] Although the CMP contemplates that Qwest may deny CLEC CRs for certain reasons, none of the CRs at issue have been denied.

154. Qwest also argues that AT&T's position regarding CABS-formatted bills is not consistent with the views of the vast majority of CLECs that do business with Qwest,[71] which do not receive CABS-formatted bills.[72] Therefore, AT&T's contract is not the appropriate forum for resolving these issues; rather, Qwest asserts, CMP is the appropriate forum because it provides adequate opportunity for other CLECs to participate in the process. Moreover, Qwest notes that its Wholesale Change Management Document mandates that "[a] CLEC or Qwest seeking to change an existing OSS Interface, to establish a new OSS Interface, or to retire an existing OSS Interface *must* submit a Change Request (CR)."[73] Accordingly, concludes Qwest, these issues are properly addressed in the CMP forum.

155. Qwest indicates that the conversion to CABS billing has been technologically difficult. According to Qwest, the systems development effort required to produce CABS-formatted bills for UNE products was complex because of the significant differences between the structure of the existing bill formats (paper, ASCII, and EDI) and the structure of the CABS format. The existing formats are hierarchical in nature, organized by summary and sub-account; the CABS format is organized by record type and charge type. In those instances where AT&T seeks to add an element that is not currently available in any format and that is not captured as part of Qwest's existing process or system flow, Qwest states that it simply cannot provide the information until the development work is complete. This is true of the changes listed in the following subparts of AT&T's proposed § 21.1.1.1.1: (iv) date through which adjustment applies, (v) date from which adjustment applies, (vi) reference audit number provided by AT&T,

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[71] Qwest proffered that recent data reflects that seven CLECs receive CABS-formatted bills, 13 CLECs receive EDI-formatted bills, and 78 receive ASCII-formatted bills across the Qwest 14-state territory.

[72] However, Qwest notes that Rhythms submitted CR 5328167, "Request that loop orders be billed on CABS bill", on January 28, 2001, through the CMP process. This CR was closed on March 20, 2003.

[73] Qwest Wholesale Change Management Process Document, at page 24 (emphasis added).

(vii) recurring/non-recurring charge indicator, and (viii) service established dates. Further, Qwest alleges, the implementation of these enhancements is contingent upon a re-architecture of Qwest's overall billing system platform. Qwest is currently implementing a significant project to re-architect the three regional CRIS systems' invoicing sub-system to support a more common bill format across its three regions. Qwest states that the targeted implementation dates for AT&T's CRs were established given the architectural dependencies of many of AT&T's requested changes on this new invoicing sub-system.

156. Finally, Qwest claims that it has a strong history of implementing CRs by the date on which it committed to do so: Of the 63 CRs deployed between August 1, 2002 and August 1, 2003, 60 were implemented on or before the date on which Qwest committed to make the change. Of the three remaining CRs, one was implemented within a week of the date on which Qwest committed to make the change and the other two were implemented within two months of that date.

157. AT&T responds that, with respect to billing, the Ordering and Billing Forum (OBF) of Alliance for Telecommunications Industry Solutions (ATIS) is the national group that addresses industry billing needs and concerns. Once a matter has been established as a guideline by the OBF, extensive review and industry input has occurred. It is then the responsibility of the OBF membership to implement those guidelines. If any LECs fall out of synchronization with the OBF guidelines, it becomes increasingly difficult to keep up with industry progress.

158. AT&T claims that, without billing standards to drive economies of scale and reduced operating costs for potential local entrants, fewer companies would be enticed to compete in the local market using unbundled services, limiting the local service provider choices

available to consumers. By receiving CABS formatted billing electronically, AT&T would have the data available in the proper format and medium to assure that AT&T's customers are billed correctly for the services the customers ordered and are using. AT&T could electronically compare the details of its inventory/provisioning systems to the details on the Qwest wholesale bill and identify in detail potential billing discrepancies. In addition, AT&T states that it needs this type of billing in order to manage its expenses, because it is not able to verify the billing received from Qwest with any degree of accuracy. AT&T avers that the lack of mechanized data also restricts Qwest's ability to respond to the limited claims AT&T is capable of filing given the paper validation environment.

159. AT&T states that its proposed § 21.1.1.1.1 language enumerates the areas where AT&T has experienced the most significant problems with Qwest's CABS billing. AT&T maintains that each of these items represent a fundamental flaw with Qwest's attempt to render a CABS formatted invoice. Although CABS-compliant billing is fundamental to rendering a proper invoice, AT&T asserts that it has been forced to submit each of these items to Qwest as a CR in the CMP. While Qwest recently identified dates for the completion of these CRs, AT&T stresses that the dates are not assured and are too far in the future. While these CRs remain open, Qwest argues that it is impossible to rely on Qwest's electronic invoice for payment or auditing purposes.

160. While Qwest apparently offers ASCII, EDI or CABS formats, AT&T notes that its payables and receivables processes rely on Industry CABS/Billing Output Specifications (BOS) Guidelines established by the OBF. CABS guidelines were developed to bring uniformity to access billing in the post divestiture environment, and is an industry accepted and supported media for billing of access and interconnection charges. Provisions for billing UNEs were first

included in CABS Version 31, which was implemented 3/1/1999. The CABS guidelines provide a uniform method for billing UNE charges. Compliance with CABS guidelines means AT&T receives the same billing elements, values and record layouts from all bill providers. Therefore, concludes AT&T, no special, company-specific programming is needed. ASCII and EDI formats are not supported by OBF, and as such are not utilized by AT&T's payables and receivables processes.

161. Finally, AT&T notes that the problems laid out in § 21.1.1.1.1 are more fundamental in nature than those one would expect to see on a differences list from a supplier, *e.g.,* Qwest's failure to process bill data and Customer Service Records (CSRs) on the same date; (ii) Qwest's failure to perform all standard CABS BOS edits on the UNE bills; (iii) Qwest's failure to populate the adjustment thru date with the date through which the adjustment applies; (v) Qwest's failure to populate recurring/non-recurring charge indicator with a value of "1" for monthly recurring access charges and a value of "2" for non-recurring charges; and (viii) Qwest's failure to populate service established dates with the date on which service was established.[74] In short, AT&T states that the progress is unacceptably slow and uncertain, given Qwest's unwillingness to commit to correcting all of the deficiencies AT&T has identified. AT&T is not willing to rely on the CMP process, because nothing happens if Qwest misses the implementation date or reneges on its commitment to become CABS complaint.

162. Qwest disagrees that AT&T's CABS billing system is currently unusable. Qwest notes that AT&T has submitted disputes based on the CABS bill, other CLECs have migrated to the CABS billing format, AT&T has closed two CMP CRs indicating that the basic requirements

[74] Qwest claims that the CRs that it has already implemented – 21.1.1.1.1(i) and (ii) – are the issues that AT&T itself claimed (in the Minnesota arbitration) were most critical to its ability to electronically process Qwest's CABS bills.

have been met, and AT&T opened a new CR in July 2003 asking that line splitting be added to the CABS-formatted bill.

163. Through Loretta Huff's Direct Testimony, Qwest provided a chart indicating the scheduled completion dates of the ten CR's at issue. AT&T through the Answer Testimony of Robert Hayes altered its proposal and, among other things, included AT&T's preferred completion dates. The following chart shows Qwest's and AT&T's preferred completion dates:

CR No./AT&T proposed § 21.1.1.1.1 subpart	**Title**	**Targeted Implementation Date**
SCR110802-01IG	CLLI Summarization; provide usage summarized at the end office instead of detailed at TN level	Qwest: 12/15/03; (AT&T agrees)
SCR110802-02IG/ 21.1.1.1.1(iv) & (v)	Adjustments – provide from and thru dates	June 2004
SCR012103-01/ 21.1.1.1.1(i)	Process bill data and CSRs on the same day	deployed July 21, 2003
SCR012103-02/ 21.1.1.1.1(ii)	Perform all standard CABS BOS edits on the UNE bills.	deployed July 21, 2003
SCR012103-03 (Escalated)/ 21.1.1.1.1(iii)	Populate activity date with the date of the activity associated with the charges	Qwest: 12/04; AT&T: 6/04
SCR012103-04 (Escalated)/ 21.1.1.1.1(vi)	Populate audit number with the reference number provided by AT&T	Qwest: 6/04; AT&T: 12/03
SCR012103-05 (Escalated)/ 21.1.1.1.1(viii)	Populate service established dates with the date on which service was established	Qwest: 12/04; AT&T: 6/04
SCR012103-06 (Escalated)/ 21.1.1.1.1(ix)	Separate taxes and surcharges and populate on the appropriate records per the CABS guidelines.	Qwest: 9/04; (AT&T agrees)

CR No./AT&T proposed § 21.1.1.1.1 subpart	Title	Targeted Implementation Date
SCR012103-07 (Escalated)/ 21.1.1.1.1(x)	Establish and use more descriptive local use phrase codes for UNE charges and adjustments	Qwest: 6/04; AT&T: 12/03
SCR012103-08 (Escalated)/ 21.1.1.1.1(vii)	Populate recurring/non-recurring charge indicator with a value of "1" for monthly recurring access charges and a value of "2" for non-recurring charges.	Qwest: 6/04; (AT&T agrees)

164. AT&T notes that the Qwest CMP is and remains subject to the decisions of regulatory bodies such as the Commission and these decisions may result in obligations under interconnection agreements.[75] They may result in orders that Qwest perform certain systems changes by a date certain, which is what AT&T requests from the Commission. Specifically, in addition to the expedited dates described in the chart above, AT&T proposes the following language:

> In the event that Qwest fails to properly implement the corrections to any of the foregoing deficiencies by any of the dates specified, CLEC may withhold payment of all charges reflected on affected CABS bills rendered by Qwest after any such date. Withheld amounts shall not be subject to escrow requirements or late payment charges, and shall not otherwise be treated as a failure to pay under the terms of this Agreement. Once such deficiencies are corrected and confirmed in a CABS bill received by CLEC, CLEC shall pay all amounts withheld in connection with such deficiencies. In addition, anytime Qwest fails to meet the dates specified above, Qwest must demonstrate to the Commission why it has

[75] AT&T states that the Qwest CMP Document acknowledges that obligations under interconnection agreements take precedence over anything that occurs in the CMP ("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, the Qwest CMP Document (under "Regulatory Change") expressly acknowledges that Qwest and the CLECs who participate in the CMP must accommodate the determinations of regulatory authorities that affect activities in the CMP: ("Regulatory Changes are defined as follows: A Regulatory Change is mandated by regulatory or legal entities, such as the Federal Communications Commission (FCC), a state commission/authority, or state and federal courts. Regulatory changes are not voluntary but are requisite to comply with newly passed legislation, regulatory requirements, or court rulings. Either the CLEC or Qwest may originate the Change Request").

failed to meet such dates and the Commission may consider such other remedies as may be appropriate.

AT&T indicates that such a harsh remedy is necessary because, under the CABS billing format, AT&T cannot validate fractional (charges due for only part of the month) charges, cannot identify and verify certain credits/debits associated with a specific claim, cannot match charges on the bill posted to a billing processing date to an actual activity date, cannot track a specific adjustment to a claim, cannot distinguish between monthly recurring and non-recurring charges, and cannot distinguish specific taxes and surcharges.

165. Qwest witness Loretta Huff in her Supplemental Testimony opposes AT&T's revised proposal, stating that accelerating some of the targeted implementation dates by six months appears to be arbitrary and based entirely on AT&T's desire for speed, without consideration of the technical complexity of the changes being sought. Simply moving the dates does not change the amount or complexity of the necessary work to be completed, Qwest argues, and rushing the implementation increases the probability of errors in the systems. Qwest asserts that, if it cannot meet the arbitrarily accelerated dates, AT&T's proposal could allow AT&T to withhold payments for an entire year. Qwest also objects that AT&T's proposed language is too vague, because it is not clear whether AT&T's ability to withhold payment is dependent on the implementation date of the requested changes, or on some other date because it allows AT&T to withhold payments if Qwest fails to "properly implement" changes. Also, the proposal fails to identify how and by whom a determination is made that Qwest failed to "properly" implement changes.

166. Ms. Huff also reiterates that AT&T accepted CMP as the agreed method for addressing changes to Qwest's systems, products, and processes, as defined in Qwest's Wholesale Change Management Process Document. Qwest alleges that, at the meeting to finalize and

present the CMP Document to all the CLECs for approval, AT&T presented eight of the eighteen sections of the Document, and AT&T voted "yes" at the final meeting to accept the CMP design.

167. Ms. Huff also testified during the hearing that AT&T could commence dispute resolution as part of the CMP process if AT&T believes Qwest's implementation dates are unreasonable, or even file a complaint with the Commission.[76] AT&T witness Robert Hayes testified that to date AT&T has not commenced dispute resolution in the CMP.[77]

168. The language proposed by both parties on this Issue will have little effect on the actual outcome or implementation of these requested changes, since they are already being addressed through the CMP. AT&T is apparently concerned that the CMP has no "teeth" if Qwest misses an implementation date and, therefore, this Commission should hold Qwest responsible for AT&T's accelerated dates through this Agreement. We agree with Qwest that the CMP is the appropriate forum for addressing the remaining change requests. We do not belittle AT&T's need for these changes, nor do we question their importance from a billing dispute perspective. However, AT&T has made no showing that it is technically possible for Qwest to implement these remaining changes any sooner than the dates Qwest set with the CMP community as identified above. Our concern in allowing AT&T's accelerated dates is that even if implemented, the shorter timeframes could cause more errors and render the bills useless anyway. As always, AT&T has the opportunity to pursue dispute resolution as outlined in § 15.0 of the Wholesale Change Management Process Document should Qwest fail to meet its proposed implementation dates, or should AT&T be able to demonstrate how those dates can technically be moved up.

169. We approve the following language for § 21.1.1.1.1:

[76] Hearing Transcript (September 29, 2003) at page 134.
[77] Hearing Transcript (September 29, 2003) at page 153.

> 21.1.1.1.1 Subject to Qwest's Change Management Process (CMP), Qwest will work with CLEC to address the following CABS format billing items: (i) to process bill data and CSRs on the same date; (ii) to perform all standard CABS BOS edits on the UNE bills; (iii) to populate activity date with the date of the activity associated with the charges; (iv) to populate the adjustment thru date with the date through which the adjustment applies; (v) to populate adjustment from the date with the date from which the adjustment applies; (vi) to populate an audit number with the reference number provided by AT&T, which reference number is included in the transaction; (vii) to populate recurring/non-recurring charge indicator with a value of "1" for monthly recurring access charges and a value of "2" for non-recurring charges; (viii) to populate service established dates with the date on which service was established; (ix) to separate taxes and surcharges and populate on the appropriate records per the CABS guidelines; (x) to establish and use more descriptive local use phrase codes for UNE charges and adjustments.

K. Issue 30 – Sections 21.1.2.3.1 and 21.2.3.2: Billing for Traffic without CIC Codes

170. AT&T seeks a mutual obligation to provide (i) Operating Company Numbers (OCNs) on local/intraMTA/intraLATA toll calls that are handled within the local exchange carriers' (LEC) networks and that don't involve an Interexchange Carrier (IXC), and (ii) Carrier Identification Codes (CIC) on calls that do involve IXCs. If either party fails to provide this information within the billing record, then AT&T's language would make the party that has failed to include the CIC or OCN identifier responsible to the terminating carrier for intercarrier compensation charges that the terminating carrier would otherwise bill to the originating carrier or IXC if the OCN or CIC had been provided.

171. AT&T notes that the CIC code identifies the interexchange carrier and the OCN identifies the local/intraMTA/intraLATA toll local exchange carrier so that the terminating carrier knows to whom it should bill terminating charges. According to AT&T, when IXC calls come to AT&T through a Qwest tandem, Qwest knows from whom it is receiving the calls and must provide the CIC to AT&T within the billing record or else AT&T will not know the identity of the IXC it should bill. Qwest's failure to provide CICs will result in AT&T's inability to bill

access charges to the proper carrier. Since Qwest receives the call in the first place (over a dedicated trunk group with a "hard-coded" CIC), AT&T asserts that Qwest should be responsible to provide the information to AT&T. If Qwest won't provide this information, then AT&T argues that it should be able to charge Qwest for the access revenue AT&T is unable to bill to the appropriate carrier due to Qwest's failure to provide the CIC.[78]

172. Similarly, argues AT&T, Qwest should provide AT&T with the OCN on other call types, because Qwest is directly interconnected with the originating carrier and is therefore able to obtain or derive the OCN by virtue of the dedicated connections. AT&T states that, without the provided information, AT&T must currently manually examine each call record with the missing OCN and plot the originating NPA-NXX against local routing numbers from the local number portability databases to identify the originating company, and AT&T is expending funds to automate this process. Since AT&T generally pays Qwest for billing records that are supposed to include the CIC or OCN, AT&T argues the information should be contained in those records. If not, Qwest should bear responsibility for this omission.

173. Qwest responds that it follows industry guidelines for the signaling, routing and billing of its traffic. All carriers/providers have access to these guidelines. Qwest, serving as a transit carrier, has no requirement or desire to accept the financial responsibility of other providers. According to Qwest, AT&T may use the originating caller NPA-NXX to determine the OCN. Further, AT&T should negotiate terms for signaling, routing, and billing with any originating carrier/provider.

[78] AT&T avers that, in the case of AT&T using UNE-P to provision service, Qwest is the only party with access to the records and information required to provide the CIC or to research the trunk records of the call. AT&T states that it is essentially paying Qwest for this signaling-related data stream so that it can bill its end users and the IXCs that are terminating long distance traffic to the AT&T end users.

174. Qwest notes that signaling information that Qwest receives, where Qwest is a transiting carrier, is passed along to networks receiving the traffic. Qwest does not "withhold" information that would permit AT&T to bill the originating carrier. Qwest relays transit traffic with whatever signaling information Qwest is provided by the originating carrier. The most accurate way for AT&T to receive the information it is seeking is from the *originating* carrier of the switch originating the traffic, according to Qwest. Because no Qwest customer is involved when Qwest transits traffic, Qwest argues it would be manifestly unfair for Qwest to become involved in disputes over compensation between AT&T and third-party carriers, or for Qwest to bear any losses as a result of such disputes or failures by AT&T and third-party carriers to create direct trunking or billing agreements.

175. Qwest asserts that, as a practical matter, AT&T's proposal would disproportionately favor AT&T, because the language would operate to make Qwest liable to AT&T without any real reciprocity. Qwest alleges that AT&T has conceded in other proceedings that traffic exchanged between the parties is not balanced, since Qwest delivers far more transit traffic to AT&T than AT&T delivers to Qwest.

176. Qwest states that nothing in the Act requires Qwest to provide a transiting service. AT&T makes a business decision to use Qwest transit services to exchange traffic with other carriers; AT&T has a duty to establish reciprocal compensation arrangements with the carriers with whom it exchanges traffic. AT&T's language encourages carriers to avoid this duty by making the transit provider the guarantor of payment from other companies, argues Qwest.

177. Qwest also asserts that CICs are not required in the signaling, routing or billing of local traffic. CICs are assigned to carriers by North American Numbering Plan Administration

(NANPA) for equal access routing. CICs are routing codes used by carriers to route traffic from subscribers' Primary Interexchange Carrier (PIC) to the carrier's network.

178. Likewise, according to Qwest, OCNs are not required in the signaling, routing, or billing of local traffic. OCNs are administrative numbers assigned by National Exchange Carrier Association (NECA) and Telcordia Routing Administration. OCNs are a method of identifying numbering resource code holders and related information.

179. Qwest avers that AT&T's proposal is not supported by law. Transiting is neither origination nor termination of a call. Since transport of <u>transit</u> traffic between an originating carrier and a terminating carrier is not the provision of local exchange service, it is not subject to § 251(c) of the Act. Further, states Qwest, § 252(d)(2)(i) of the Act precludes the terminating carrier from seeking payment from the transit carrier. Qwest concludes that, contrary to AT&T's language, a terminating carrier cannot, by law, charge a transit carrier for call termination.[79]

180. Finally, Qwest states that, if requested by AT&T, Qwest would consider developing a system to collect billing information on behalf of AT&T. Qwest admits that it may be able to find out, through the application of as-yet-nonexistent processes, some, but not all,[80] of the information AT&T seeks, but states that it would require system enhancements to conduct the forensic analysis required to discover such information, and recurring costs to provide AT&T with its monthly billing information. But, according to Qwest, AT&T has previously stated it is unwilling to pay for this service.

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[79] Qwest cites the *FCC Virginia Arbitration Decision*, which rejected WorldCom's proposal to require Verizon to serve as a billing agent or intermediary between WorldCom and third-party carriers with which it exchanges traffic transiting Verizon's network. *See FCC Virginia Arbitration Decision*, at ¶¶ 107, 114, 119.

[80] Qwest states that, for traffic that is transited twice, where for example, an originating company hands a call off to an initial transit carrier which, in turn, hands the call off to Qwest as second transit carrier, which then hands the call off to AT&T for termination, Qwest is *not* "directly interconnected" with the originating carrier. In this situation, Qwest claims that there is no process that Qwest could develop to derive the information AT&T seeks.

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

182. We approve Qwest's proposal for this issue, which is that proposed §§ 21.1.2.3.1 or 21.2.3.2 not be adopted.

L. Issue 33 – Section 21.2.4: Alternatively Billed Calls

183. For purposes of this arbitration, "alternatively-billed calls" are calls that are billed as collect calls or billed to a third number. Qwest's disagreement with AT&T regarding alternatively billed calls is limited to UNEs and Resale. Because the existing processes such as the Centralized Message Distribution System (CMDS) process are not workable for UNEs and resale, Qwest has proposed that alternatively billed calls in these cases be billed directly to AT&T. Qwest explains that CMDS is frequently used to exchange alternately billed call usage records between Bell companies in order to facilitate billing of the calls. Some independent companies and CLECs participate in CMDS through a sponsor relationship with a CMDS host company to enable exchange of call records with these companies as well. The company that physically provided the call sends a rated usage record to CMDS, which forwards the record on to the LEC that owns the NPA-NXX code assignment for the billing number. This is accomplished using an industry prefix database, for example the Local Exchange Routing Guide (LERG), which details what local exchange company owns each prefix (or thousands block, in

the case of Number Pooling) in the North American Numbering Plan. For example, the LERG would indicate that 303-896 is a Qwest prefix. If an intraLATA call is carried by Verizon, but bills to a number with a Colorado 303-896 prefix, Verizon does not have a direct way to bill the Qwest customer. Instead, Verizon would send a usage record to CMDS, which would in turn forward that call on to Qwest, as the code owner for the 303-896 prefix. Under the CMDS arrangement, the earning company who actually carried the call can be compensated for their toll charges and the billing company is compensated a small billing fee ($.05 per call) to compensate it for the system, collection and bad debt costs associated with billing the call to its end user. This same process occurs whether the billed-to telephone number is served by Qwest, or is provided via resale or unbundling by a CLEC. This is because there is no industry database for other parties (in this example, Verizon) to determine that a particular line within that 303-896 prefix might be an unbundled line provided to AT&T. Hence, in this example, the charge for the call would be passed to Qwest, even though the billing customer is not a Qwest customer.

184. Currently, for alternatively billed calls for AT&T's UNE-P or resale customers, Qwest passes the call information on the Daily Usage File (DUF) to AT&T to allow AT&T to bill its end-use customer. Qwest then bills AT&T for the call on its interconnection bill. Qwest provides its resale discount where applicable to compensate AT&T with the margin between the resale rate and the retail rate for the call. For calls originated by other companies and passed to Qwest via CMDS, Qwest also passes information regarding those calls on the DUF and agrees to pay AT&T $.03 per call.

185. Qwest proposes to continue to pass the usage records for UNE and resale customers to AT&T using the DUF, as it has for more than five years. Qwest notes that this proposal is consistent with the agreements AT&T and Qwest have reached in the undisputed

portions of the Agreement,[81] and with general industry practice. Also, according to Qwest its proposal is consistent with general industry practice for AT&T to bear the risk that its own UNE or resale customers may not pay for the alternatively-billed calls they agreed to pay.

186. Qwest claims that, if it cannot pass such call information to AT&T on the DUF, Qwest would be faced with processing the call, attempting to recognize that it is billed to a CLEC line, and rejecting the call back to CMDS as unbillable. Qwest would not be compensated for this processing. The originating company would then be left to figure out how to get the call billed or, more likely, forced to write the call off as unbillable. Qwest states that its proposal does not preclude AT&T from entering into agreements with any other provider, but simply provides for the manner in which alternatively-billed calls for AT&T's UNE or resale customers will be handled if no such agreement exists. Qwest concludes that its proposal is more efficient, more timely, and less costly for all parties.[82]

187. AT&T objects to the proposal to require AT&T as a resale or UNE-P customer to be responsible for alternately billed calls. AT&T argues that a billing and collection agreement that makes AT&T Qwest's agent for billing end users for retail services provide by Qwest, or other carriers, is not required by the Act. As a result, AT&T does not believe it is appropriate to include this obligation in the interconnection agreement.

188. AT&T states that, under the Qwest proposal, AT&T would be required to automatically compensate Qwest for the charges payable to a third party who has completed

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[81] Qwest states that its proposal is consistent with § 12.2.5.2.3 in the Operational Support System section of the agreement, which specifies that the Daily Usage File is the mechanism for passing usage information for alternatively billed calls.

[82] Qwest claims that using DUF typically results in delivery of usage records within two days of call completion, whereas the CMDS standard is to deliver usage records within five days. The DUF also involves no third party processing fees, as opposed to the per record fee charged by CMDS, and is required even in the absence of alternately-billed calls.

these ABS calls. AT&T will then be required to collect those charges from its resale/UNE-P based customer. As a result, Qwest's proposal shifts to AT&T all the costs and risks of billing and collection for a service AT&T did not even provide. AT&T alleges that, in these cases, the customer might dispute the bill and not agree to pay those charges to AT&T. AT&T, as the *local* service provider, has little recourse other than to enter into a dispute with the customer over the bill to collect for services it did not provide.

189. With respect to Qwest's status quo argument, AT&T states that it viewed the current arrangement as language without any impact because AT&T, until recently, rarely incurred any expense of third party billing arrangement with Qwest due to AT&T's lack of entry into the local market. However, as AT&T anticipates its volume will increase in the future, the need for a formalized and equitable billing arrangement increases.

190. AT&T states that, if the Parties are willing to enter into billing and collection arrangements for handling end user needs, those terms are properly the subject of a separate business agreement between the parties, which AT&T is prepared to negotiate.

191. Qwest responds that alternatively billed calls for UNE and resale customers must be handled as part of the interconnection agreement (as opposed to a separate agreement) because, for CLEC UNE and resale customers the billing information is routed to Qwest, even though these are CLEC customers, not Qwest customers. Second, Qwest's proposed language in § 21.2.4 is consistent with other provisions of the interconnection agreement which are not in dispute, including §§ 6.1.1, 12.2.5.2.1, and 12.2.5.2.3.

192. With respect to AT&T's risk-shifting argument, Qwest responds that there is no risk-shifting because alternatively billed calls provide a service to customers by allowing them to

receive collect calls or to charge calls to their home phone when they are away. Second, Qwest states that the Qwest proposal provides a mechanism whereby AT&T is compensated for its billing and collections efforts through the application of the wholesale discount or a sharing of the CMDS fee. Third, Qwest notes that it makes available, at no charge, a call blocking service that CLECs are able to order on their unbundled and resold lines which can be used to limit the risk from problem customers; thus, if AT&T believes that the risk of an uncollectible bill is so great as to outweigh the desire to provide the service to its customers, then AT&T can block this service for a particular customer thereby eliminating the risk of an uncollectible bill.

193. AT&T notes in response that Qwest has already agreed that AT&T and Qwest should have a separate billing and collection agreement for calls that terminate to an AT&T customer serviced by an AT&T switch. AT&T argues that there is nothing inherently different between facilities-based customers and UNE-P customers in terms of the billing and collection processes and work that AT&T needs to perform if that subscriber uses the services of another carrier for some type of call, such as a collect call. AT&T also states that Qwest's proposal unilaterally seeks to require certain terms and conditions for these calls that have not been negotiated between the parties and are not desired by AT&T. AT&T seeks to have all arrangements with Qwest for billing and collection dealt with in the context of a separate agreement that defines the flows, terms, conditions, allocation of risk and remuneration for all alternatively billed calls, no matter what method AT&T uses to provision the customer. AT&T notes that it received better terms than Qwest proposes in a separately negotiated contract with SBC, and argues that Qwest should not be allowed to leverage this arbitration to avoid such a negotiation or to force its one-sided terms on AT&T.

194. We are persuaded by AT&T that billing for alternatively billed calls is better dealt with through a separate agreement. We note that AT&T has entered into a separate agreement for alternatively billed calls with SBC Communications Inc.[83] This separate agreement is much more elaborate than Qwest's proposed interconnection agreement language.

195. We approve the following language for § 21.2.4 as follows:

> This Agreement does not contain an arrangement by which the parties compensate one another for alternatively billed calls. To the extent the Parties are willing to enter into an arrangement concerning the processing, billing, and collection of these calls through CMDS, the intra-region IntraLATA equivalent, or some other arrangement, the terms for any arrangement, including compensation arrangements, would be the subject of a separate agreement.

196. In its Statement of Position, Qwest requests that if the Commission decides in favor of AT&T that the Commission order the parties to continue to abide by the existing process until a separate agreement is reached. We grant Qwest's request.

M. Issue 34 – Section 21.8: Qwest billing for Local Primary Interexchange Carrier (LPIC) service

197. Qwest may be the toll provider of end users who have AT&T as their local provider.[84] Qwest proposes that, if AT&T elects to offer Qwest as an LPIC, then Qwest will bill AT&T for its intraLATA toll at the retail rate and apply the wholesale discount. Qwest claims that this discount compensates AT&T for billing and collection at a substantially higher rate than most billing and collection agreements allow. Qwest notes that its proposal is the status quo for resale services; however, for UNE-P, the industry has not offered a solution. Qwest argues that its proposal is appropriate because Qwest does not require AT&T to offer Qwest as an LPIC choice to its new local retail subscriber.

[83] *See* Michael Hydock Answer Testimony at Exhibit A.

[84] Qwest notes that, when Qwest's interexchange affiliate is AT&T's subscriber's choice for PIC and LPIC, this arrangement is not an issue.

198. Qwest explains that when Qwest's long distance affiliate becomes a facility-based provider of intraLATA and interLATA toll service in Colorado, the affiliate may provide the intraLATA toll service to other CLECs' local exchange customers. At that time, the end user's Primary Interexchange Carrier (PIC) may change and Qwest's long distance affiliate will bill the end user. When retail local customers move from Qwest to an alternative local service provider, the new local service provider makes every effort to sell a package of services that includes intraLATA toll service. Qwest encourages the end user to obtain its intraLATA toll from its new local carrier, because Qwest would incur high billing costs if it were to provide intraLATA toll service only. As a result, Qwest cannot provide a competitively priced intraLATA toll only service. Qwest states that, for these reasons, very few retail customers retain Qwest as an LPIC when they move to a new local carrier. In fact, Qwest alleges that only about two percent of UNE-P lines in Colorado had Qwest as an LPIC. Qwest concludes that it is unreasonably burdensome to request Qwest to establish a billing system that addresses only a very few intraLATA toll calls. In this scenario, Qwest states, AT&T is in the best position to minimize the costs for the end user.

199. Qwest also states that its approach provides AT&T the opportunity to earn a reasonable profit for end user billing of these intraLATA toll calls. Qwest believes that AT&T is legally authorized to represent to its end user that it carries these calls or that it is reselling Qwest's intraLATA toll service in these unusual circumstances. Qwest states that § 6.1.1 of the Agreement specifically permits the resale of intraLATA toll, and that Qwest's language is consistent with CABS industry guidelines. Qwest also alleges that, although AT&T would propose forcing Qwest to develop mechanisms to bill the end user, it offers no contractual mechanism to provide Qwest the information necessary to do so. In addition, since Qwest has no

pre-existing relationship with the customer regarding these intraLATA toll calls, under AT&T's proposal Qwest would be powerless to directly recover the costs of the service it provided in good faith to CLEC customers. Finally, Qwest states that this circumstance will be reduced or eliminated at the point in time when Qwest's long distance affiliate is fully operational because Qwest's long distance affiliate will bill AT&T's end user for toll separately.

200. AT&T objects to Qwest’s proposal that it bill AT&T for all toll calls made by end users (who choose Qwest as their LPIC), and then for AT&T to go to these end user customer and collect the charges Qwest assessed. This is unreasonable, AT&T contends, because AT&T will not have a contractual relationship with these end users for toll services. As a result, AT&T will have no right under any legal authority to send these customers bills for toll services provided by Qwest. If these end users decide not to pay AT&T for the toll services they received from Qwest, AT&T will have no legal recourse against these customers. AT&T objects to Qwest’s attempt to force the risk of collection onto AT&T. If Qwest is providing toll service, it needs to establish its own direct relationship with its toll customers, including a billing relationship. AT&T should not be in the middle, argues AT&T.

201. AT&T states that it is disingenuous and misleading for Qwest to state that AT&T "offers no contractual mechanism to provide Qwest the information necessary" to bill its end users. AT&T alleges that Qwest in negotiations never requested "current billing name and address information" for AT&T local end users who are Qwest toll customers. This is information that AT&T states it is prepared to provide to Qwest for a fee. However, alleges AT&T, Qwest doesn’t want this information, because then Qwest would have to use the information to bill its customers. AT&T states that it has indicated that it is willing to enact a separate billing and collection agreement with Qwest in which AT&T would receive fair

remuneration for acting as Qwest's billing and collection agent. Finally, AT&T notes that, in Minnesota, the arbitrator found, after considering Qwest's "wholesale discount" remuneration proposal, that "[t]he parties should negotiate a separate agreement to address this issue. Requiring AT&T to do the billing without some consideration is unfair …."

202. We conclude that Qwest's proposed language requires AT&T to act as a billing agent and provide to Qwest specialized bill services. Billing agents are not regulated pursuant to C.R.S. § 40-15-102(10). We agree with AT&T that a separate agreement should be negotiated if Qwest wants AT&T to bill AT&T's local customers for Qwest provided intraLATA service.

203. We approve the following language for § 21.8:

> If, during the term of this Agreement, Qwest offers toll service to CLEC's End User Customers, Qwest must establish its own Billing relationship with such End User Customers. Qwest may not bill CLEC, and CLEC shall have no obligation to pay Qwest, for toll service Qwest provides to CLEC's local End User Customers. In addition, CLEC shall have no obligation to bill CLEC local service End User Customers for toll service provided by Qwest.

N. Issue 35 – Sections 22.1 and 22.4: Pricing

204. AT&T proposes pricing language in § 22.1 to clarify its right to bill Qwest for services AT&T provides to Qwest. AT&T asserts that, to the extent AT&T provides services to Qwest (other than reciprocally charged interconnection services), AT&T expects to be able to apply and charge its tariffed rates, because the rates in the interconnection agreement are not AT&T's rates. They are Qwest's rates. According to AT&T, Qwest's language would force upon AT&T the same obligations that Qwest has under the Act.

205. Qwest contends that AT&T's language is overbroad and lacks necessary specificity around services it would be providing to Qwest. Qwest avers that the language AT&T

seeks to insert is vague (AT&T will charge rates equivalent to Qwest's "unless higher rates are justified by CLEC's higher costs" and "it shall not be necessary that the pricing structures be identical") without specifying any products or services and the terms and conditions associated with these services. To the extent AT&T plans to provide services to Qwest, Qwest argues that the parties should negotiate details of each service and the terms and conditions under which it will be offered and specific pricing, just as has been done in the agreement with regard to the services that Qwest will be providing AT&T.

206. With respect to interim rates (§ 22.4), AT&T contends that its proposed language provides clarity related to rates that have not been specifically approved by this Commission. AT&T proposes to allow the parties to function under the contract even if a rate has not been approved in a Commission cost docket. These rates would be applied on an interim basis. Once the Commission orders rates through a cost-docket, AT&T contends that its proposed language would provide for a true-up back to the date the interim rate was first charged. AT&T also argues that Qwest should not be allowed to incorporate Commission approved rates into the Agreement without amendment. AT&T raises concern that Qwest could charge rates without a CLEC's specific knowledge. Finally, AT&T argues that both parties should have the right to initiate a cost docket stating that AT&T has the right to petition the Commission to review rates for UNEs, collocation and interconnection services.

207. Qwest asserts that the Act does not contemplate the retroactive true-up of rates, and in the past the Colorado Commission has not favored true-ups in generic cost proceedings. Regardless of the parties' position on this issue generally, however, Qwest argues that the Parties' *interconnection agreement* should not *mandate* the retroactive true-up of interim prices without regard to the legal arguments and the specific facts presented to the Commission in a given

generic proceeding. Qwest argues that the Commission's generic proceedings, whether a cost proceeding or other proceeding, provide the appropriate forum for consideration of the propriety of true-ups of interim rates. Qwest objects to AT&T's proposal that would allow AT&T to open cost dockets on Qwest products. If AT&T opposes a specific rate, Qwest asserts that AT&T can file a complaint with the Commission. Qwest argues that AT&T's proposal to require Qwest to incorporate by amendment Commission approved rate changes is unnecessary because Qwest incorporates such rates into its interconnection agreements pursuant to Commission order. Qwest contends that AT&T is well aware of Commission ordered rates.

208. Regarding language proposed for § 22.1, we are not persuaded that AT&T should be allowed to charge unspecified higher rates for similar service if it decides its cost for providing the service are higher. AT&T's language implies that those prices might be found in an applicable tariff. We note that AT&T does not have any interconnection service tariffs on file with this Commission. Therefore, this Commission has not determined the reasonableness of those rates. AT&T has not provided any evidence in this record indicating that the Exhibit A rates would not cover the cost of a service that it might provide to Qwest. We agree with Qwest that AT&T could have specified terms and conditions and specific rates for these services within the interconnection agreement if the rates in Exhibit A would not cover AT&T's costs.

209. We approve the following language for § 22.1:

22.1 <u>General Principle</u>

The rates in Exhibit A apply to the services provided by Qwest to CLEC pursuant to this Agreement. To the extent applicable, the rates in Exhibit A also apply to the services provided by CLEC to Qwest pursuant to this Agreement.

210. Regarding language proposed for § 22.4, we find that AT&T's proposed language is unnecessary. We are not persuaded by AT&T's argument that agreements need to be

amended to incorporate Commission ordered rates because CLECs might not be aware that Qwest rates had changed. We agree with Qwest that AT&T already has rights to address rate concerns with this Commission. We further agree with Qwest that the appropriate forum to argue true-ups of interim rates are appropriate proceedings at the Commission. The Agreement does not need to reserve AT&T's right to argue these rate concerns.

211. We approve the following language for § 22.4:

22.4 Interim Rates

22.4.1 The parties acknowledge that some of the prices contained in Exhibit A have been approved by the Commission in a cost docket. The other prices in Exhibit A have been approved by the Commission on an interim basis, not subject to true up either in the cost docket or in the 271-related proceeding. These interim prices will be considered by the Commission in Phase II of the cost docket. Prices that are considered interim in the Commission proceedings shall be subject to the following provision.

22.4.1.1 If the Interim Rates are reviewed and changed by the Commission, the Parties shall incorporate the rates established by the Commission into this Agreement. Such Commission-approved rates shall be effective as of the date designated by the Commission in its order.

O. Issue 36 – Exhibit A: Pricing

212. There are three sub-issues here: (1) the rate for ISP-bound traffic; (2) the rate for tandem transmission; and (3) the rate for EEL channel performance.

1) ISP-bound traffic rate (§ 7.7 of Exhibit A): Qwest states that, to the extent that the rate for ISP-bound traffic is in dispute, Qwest addresses this dispute as part of Issue 19. As set forth in the Qwest position statement for Issue 19, this Commission has set the recurring rate for ISP-bound traffic at zero ($0.00). Qwest's asserts that its proposed language accurately reflects this in stating that "ISP-bound traffic exchanged between Qwest and CLEC will be billed at the Commission ordered rate of zero (0)."

   AT&T objects to Qwest's proposal that the parties not compensate one another for ISP-bound traffic, because the rate contained in the FCC's *ISP Remand Order*, ¶ 78, of $.0007/mou should be applied.

2) Tandem transmission rate: Qwest states that, to the extent that the tandem transmission rate is in dispute, Qwest addresses this dispute in Issue 18. As set forth in Qwest's position

statement concerning Issue 18, FCC Rule 47 C.F.R. § 51.711 dictates that the ILEC pay the tandem rate in this case. The rule does not call for payment of an assumed transport rate as well, Qwest argues. AT&T is not entitled to "assume" a transport rate that does not mirror what Qwest charges and improperly inflates the per minute of use call termination rate where AT&T's switch(es) qualifies as a tandem. Qwest concludes that its proposal is to pay AT&T a transport rate that is symmetrical to and mirrors the Qwest transport rate.

AT&T's position on the tandem transmission rate is the same as that stated in Issue 18.

3) EEL channel performance rate: Qwest argues that the Commission has allowed Qwest's proposed EEL channel performance rate to go into effect but has opened a new docket to review the proposed rate. To dispute the rate in this arbitration proceeding is duplicative and wasteful given the separate docket devoted to examining this rate.

213. AT&T's position is that rates contained in Exhibit A should be consistent with Commission approved rates resulting from the order in the cost docket, Docket No. 99A-577T. AT&T asserts that, in the cost proceeding, the Commission order stated "rate element not necessary" for the two rate elements in § 9.23.6.5 of Exhibit A. No Commission order in a cost docket has changed this result.

214. The rate for the exchange of ISP-bound traffic was ordered to be zero in our discussion on Issue 19. We approve this rate for Exhibit A to this Agreement.

215. There is no change to Exhibit A required from our decision on Issue 18, and the definition of tandem transmission.

216. In a separate proceeding, Docket No. 03I-213T, the parties recently filed a stipulation that was accepted by the Administrative Law Judge in Decision No. R03-1151, mailed October 9, 2003. This stipulation and decision set the EEL channel performance rate as the same rate for DS0 Unbundled Dedicated Interoffice Transport(UDIT) Low Side Channelization and DS1/DS0 Low Side Channelization; that is: $ 8.48 for DS0 EEL Low Side Channelization and $ 4.83 for DS1/DS0 Low Side Channelization. We approve these rates for Exhibit A to this Agreement.

III. ORDER

A. The Commission Orders That:

1. The issues presented in the Petition for Arbitration, filed by Qwest Corporation on October 31, 2000, are resolved as set forth in the above discussion.

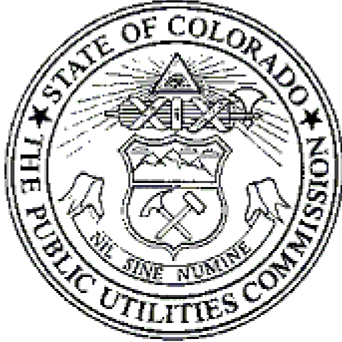
2. Within 30 days of the final Commission decision in this docket, AT&T Communications of the Mountain States, Inc. and TCG-Colorado and Qwest Corporation shall submit a complete proposed interconnection agreement consitent with the above discussion for approval or rejection by the Commission, pursuant to the provisions of 47 U.S.C. § 252(e) of the Telecommunications Act of 1996.

3. The twenty-day period provided for in § 40-6-114(1), C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this decision.

4. This Order is effective immediately upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING October 14, 2003.

(S E A L)



ATTEST: A TRUE COPY

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

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JIM DYER

Commissioners

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