

IN THE MATTER OF THE APPLICATION OF)
QWEST CORPORATION REGARDING)
RELIEF UNDER SECTION 271 OF THE)
FEDERAL TELECOMMUNICATIONS ACT OF)
1996, WYOMING'S PARTICIPATION IN A)
MULTI-STATE SECTION 271 PROCESS, AND)
APPROVAL OF ITS STATEMENT OF)
GENERALLY AVAILABLE TERMS)
)

Docket No. 70000-TA-00-599
(Record No. 5924)

Final Report to the
Wyoming Public Service Commission

“General Terms and Conditions, Section 272 & Track A Report”
(Group 5 Report)

Prepared on Behalf of the Wyoming Public Service Commission

December 14, 2001



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Preliminary Report to the Wyoming Public Service Commission
“General Terms and Conditions, Section 272 & Track A Report”
(Group 5 Report)

Prepared on Behalf of the Wyoming Public Service Commission

Introduction:

Scope of this Report

QSI Consulting submits this report on the General Terms and Conditions, Section 272, and Track A Report (“Group 5 Report”) to the Wyoming Public Service Commission (WPSC). This report deals with the General Terms and Conditions issues to which the Facilitator has proposed resolutions which have direct bearing on the form of the SGAT as well as the Section 272 and Track A compliance provisions and the Facilitator’s proposed conclusions concerning Qwest’s compliance with those provisions.

The Group 5 Report covers issues that are different from issues covered in the previous Group Reports in these proceedings. Previous reports dealt with services and network elements related to specific items in the 14-point competitive checklist set forth in Section 271 of the federal Telecommunications Act of 1996 (“the Act”). This report reviews material that concerns the terms and conditions under which all items in the 14-point checklist must be offered and two other Section 271 requirements Bell Operating Companies (“BOCs”) such as Qwest must comply with to gain in-region, interLATA long-distance authority. These two separate requirements will be referred to henceforth in this Report as Section 272 and Track A respectively. Formally, they concern the safeguards for competition that govern the operation of a BOC’s required separate long-distance affiliate and the presence of facilities-based competitors in a state.

The public interest requirement of Section 271 was originally to be a part of the Group 5 Report. However, since Qwest's QPAP filing has been deemed part of the public interest requirement of the SGAT review, the public interest requirement will be part of an additional Group Report 5A to be filed at a later date which will include the Facilitator's recommendations on all public interest SGAT issues.

The Group 5 Report's discussion of General Terms and Conditions follows a similar format to that employed in the previous four reports. The Report reviews issues resolved in the Multistate Workshops, of which there are 19. An additional 18 issues, plus one carried over from the Group 1 Report, remained in dispute at the conclusion of the workshops. The Group 5 Report discusses the positions and arguments of the parties and provides a recommended resolution for each of these 19 issues. QSI's Report provides an analysis for the Commission's review, based on this information as well as the comments filed by parties subsequent to the Facilitator's findings.

The Section 272 and Track A material did not lend itself to discrete issues that could be identified as resolved or disputed. However, the Report does identify portions of these requirements with which Qwest is found to be compliant, while also identifying portions where further action is required. In this report, QSI has provided comment and analysis with respect to these issues as well.

GENERAL TERMS AND CONDITIONS Disputed Issues And Proposed Resolutions

Eighteen General Terms and Conditions issues remained in dispute at the conclusion of the Multistate Workshops. In addition one issue was carried over from the Group 1 Report. The Group 5 Report discusses the positions and arguments of the parties and provides a recommended resolution for each of these 19 issues.

General Terms and Conditions were not included in the original Multistate agenda, but were added as it became clear they have an appreciable effect on the relationship between Qwest and Competitive Local Exchange Carriers (“CLECs”). As the Report notes, although they are not part of the 14-point checklist, they significantly influence Qwest’s implementation of plans to meet the checklist requirements.

Disputed Issues: Carryover

1. Landowner Consent to Agreement Disclosure

Report page 15, Qwest did not comment, AT&T did not comment, CAS did not comment.

Background

AT&T argued that CLECs need access to agreements between Qwest and private landowners and building owners to learn the scope of those agreements. AT&T’s interest is in knowing what the scope of its own offerings to those owners could be. Qwest countered that it could not disclose the agreements to CLECs unless it received consent from the owners because it would be exposed to liability for disclosing sensitive information.¹ CLECs opposed the consent requirement as unnecessary and unwieldy

¹ This information could include the rates Qwest is charging, thus perhaps removing some bargaining leverage from the owners. On the other hand, if the CLECs do not know enough about the Qwest facilities

given it would potentially have to be exercised for every owner to which CLECs might like to offer service.

The Group 1 Report recommended adding Section 10.8.4.1.3.1 to the SGAT, a section that gave CLECs the option of (a) gaining access to the agreements without seeking consent from the owners if the CLECs agreed to indemnify Qwest for any legal action arising from such access or (b) obtaining the consent from the owners.

Qwest accepted this resolution, but AT&T objected, saying the general indemnity section of the SGAT should apply rather than creating a specific section for this issue. The basis of AT&T's argument is the legal actions could result in large litigation costs and it is unfair for CLECs to bear all the risk for those costs.

The Facilitator noted that AT&T's assertion that the litigation costs associated with Qwest disclosing the contents of landowner and building owner agreements could be large is probably incorrect. However, even if AT&T were right, the proper ground for a resolution is determining which party causes the costs. The unequivocal answer is that CLECs are the source of any legal costs that might arise and thus should pay them. If CLECs are concerned about these expenses, the recommended resolution offers them a way to avoid them, namely by seeking consent from owners. To adopt the SGAT general indemnity rule is also inappropriate as it addresses failure on the part of Qwest to perform an SGAT obligation, not an outcome caused by Qwest complying with an SGAT clause on behalf of CLECs as is the case in this situation. The original recommended resolution stands.

to want to make an offer to the owners, the owners have no alternative from the CLECs to consider. The presumption is that owners are on the whole better off with two or more choices. Therefore, access to the agreements should be encouraged.

Analysis

- The Facilitator's proposed issue resolution (PIR) was not challenged.

Recommendation

QSI agrees with the PIR.

Disputed Issues: New

1. Comparability of Terms for New Products or Services

Report page 23, Qwest comments page 5, AT&T did not comment, CAS did not comment.

Background:

AT&T proposed a new SGAT section that would require Qwest to offer new products and services at substantially the same rates, terms, and conditions as existing products when the existing products are comparable. Qwest objected, saying new product and service prices are governed by existing laws and regulations, that CLECs have input to new product and service offerings under the change management process (CICMP), Qwest's rates are subject to Commission review, and "comparable products and services" is vague and would open the door to many disputes.

The Facilitator notes that the established SGAT standards and methods for resolving terms and conditions disputes are considered sufficient to govern Qwest. These methods adequately provide for timely and effective resolution of disputes. Qwest is also correct in arguing that comparability is a vague concept that would be difficult to implement. Thus, AT&T's proposal would introduce uncertainty into this process without improving it in any other way.

Analysis:

- The Facilitator's PIR was not challenged.

Recommendation

QSI agrees with the PIR.

2. *Limiting Durations on Picked and Chosen Provisions*

Report page 24, Qwest comments page 5, AT&T comments page 4, CAS did not comment.

Background:

AT&T takes the position that as CLECs pick and choose provisions from interconnection and other agreements with Qwest that the term of any given provision is not tied to the expiration date of the particular agreement from which it is taken. AT&T states that unreasonable costs and technical infeasibility are reasons Qwest can stop abiding by provisions, not the original effective date. Qwest argues that this interpretation enables CLECs to extend particular terms to infinity by continuously adopting provisions from new agreements and making the effective date for all provisions the latest date among the provisions. Qwest said the FCC requires carriers opting in to accept all terms of a provision, including the expiration date of the original agreement.

The Facilitator notes that Qwest's ability to change terms and conditions over time is at stake. Qwest, like any business, must have the ability to alter terms and conditions as the business environment and technologies change. AT&T's proposal creates the possibility of Qwest having to continue to offer services under terms and conditions in a set of circumstances for which they no longer make sense. No evidence is presented that

such an obligation serves any useful purpose. CLECs can choose provisions from existing agreements with the longest duration and make that the expiration date for the provision. Such a rule is consistent with allowing Qwest flexibility in that it is an offering Qwest has already agreed to.

Analysis:

- AT&T notes in its comments at page 4 that the Facilitator draws his decision from conclusions that are contrary to the law and facts.
- AT&T contends that the decision allows Qwest to limit a CLEC's right to pick and choose contract provisions.
- AT&T contends that Qwest is creating a barrier to competition by demanding that interconnection provisions prematurely expire. This would result (according to AT&T) in delays in that CLECs will be required to arbitrate more agreements rather than just opting in.
- AT page 6 of its comments, AT&T cites language from FCC rules that set out Qwest's obligation – which it contends is inconsistent with the Report's decision.
- AT&T characterizes Qwest's desire to “sunset” its contracts as a delay inducing barrier.

Further Analysis:

- Mr. Hickey pointed out (transcripts 158), that the length of the offering is not one of the terms and conditions under which the UNE is offered.
- He agreed with the Facilitator's rationale that AT&T argument would prohibit Qwest from limiting the term of any offering.

Recommendation:

QSI agrees with the PIR. The recommended resolution does create the possibility of CLECs operating under agreements with different expiration dates for provisions, but the alternative is to grant CLECs the ability to keep particular rates and terms in effect forever.

3. *Applying “Legitimately Related” Terms Under Pick and Choose*

Report page 25, Qwest comments page 6, AT&T comments page 4, CAS did not comment.

Background

AT&T objected to Qwest imposing on CLECs the obligation to accept more provisions from agreements than the specific provisions the CLECs wanted to pick and choose. AT&T cited an example from Wyoming of Qwest requiring CLECs to accept unidentified provisions in order to opt in to a single point-of-connection provision. Qwest argued it had the ability to impose the obligation on CLECs if the provisions were “legitimately related” to one another. Qwest furthermore offered new language in the form of new SGAT Section 1.8.2 and an addition to Section 4.0. The first change requires Qwest to provide in writing why it believed given provisions are related, while the second defines the conditions under which Qwest can impose the obligation. Qwest said its ability to do so already is limited by Section 1.8.1 that places the burden of demonstrating relatedness on Qwest.

The Facilitator notes that Qwest’s changes are sufficient when combined with the existing language to prevent abuse of the condition. There should not be an expectation,

however, that there will not be disputes. Section 4.0 makes the need to establish business relationships among parties the criterion for evaluating relatedness. This criterion will inevitably be the source of difference of opinions. These disputes will have to be settled on a case-by-case basis.

Analysis:

- AT&T contends that the Facilitator has ignored evidence presented by AT&T that demonstrates Qwest's abuse of the "legitimately related" requirement – stating instead, that Qwest's newly offered – but yet to be implemented – SGAT language solves the problem.
- AT&T points to a Wyoming proceeding in which Qwest's abusive behavior is demonstrated and to which (according to AT&T) Qwest did not refute.
- AT&T argues that the burden lies not with the CLECs, but with Qwest, and that Qwest provided absolutely no evidence to support its arguments.
- AT&T argues that since Qwest has failed to show that it has complied with its SGAT language, that the Commission should be found not to comply with its pick and choose obligations under the Act, and that it should be ordered to put in place a process that the Commission can examine and oversee to ensure that Qwest ceases any further abusive delay tactics when dealing with opt-in matters.
- AT&T further argues that Qwest's proposed language defining "legitimately related" does not comply with law, and offers the following language instead:

"Legitimately Related" terms and conditions are those rates, terms and conditions that relate solely to the individual interconnection, service or element being requested by CLEC under Section 252(i) of the Act, and not those that specifically relate to other interconnection, services or elements in the approved Interconnection Agreement. ~~These Rates, terms and conditions are those that, when taken together, are the necessary rates, terms and conditions for establishing the business relationship between the Parties as to that particular interconnection, service or element. These terms and conditions would not include General Terms and Conditions to the extent that the CLEC Interconnection Agreement already contains the requisite General Terms and Conditions.~~

- AT&T asks that the Commission require Qwest to remove the stricken language from the SGAT and to require Qwest to define its process more specifically.

Further Analysis:

- Mr. Hickey (transcripts page 161) said that due to the fact that resolution must occur on a case-by-case basis, that Qwest had gone as far as they could go with respect to the definition of “legitimately related”.

Recommendation:

QSI agrees with the PIR.

4. Successive Opting Into Other Agreements

Report page 26, Qwest comments page 6, AT&T did not comment, CAS did not comment.

Background:

AT&T argues that Qwest denies CLECs their right to opt into successive agreements created by CLECs that originate from original Qwest-CLEC agreements. AT&T says Qwest forces CLECs to take provisions from original agreements, not from agreements CLECs have created.

The Facilitator notes that this issue has no practical significance if the recommended resolution of Issue 2 is adopted, with possibly one exception. Once the duration of provisions is the same whether provisions are found in original agreements or in agreements created by CLECs picking and choosing, the same set of terms and conditions

ought to be available to CLECs somewhere among all the agreements in effect. Thus, it should matter not at all to Qwest that CLECs be able to choose any existing agreement, including an agreement created by another CLEC picking and choosing provisions from various other agreements.

The one circumstance where having this right might matter is where Qwest and a CLEC agree to extend the expiration date of a provision in a new agreement as that CLEC opts in to a combination of existing agreements. Other CLECs also ought to be able to opt in to that extended duration of the provision. This new expiration date would not be in the original agreement, so protecting CLECs right to pick it does matter. Therefore, the SGAT should be amended to reinforce this idea that a term or condition created in the opting in process should be available to all CLECs. The Facilitator offers specific language for the amendment.

Analysis:

- The Facilitator's decision was not challenged.

Recommendation:

QSI agrees with the PIR.

5. *Conflicts Between the SGAT and Other Documents*

Report page 27, Qwest comments page 7, AT&T did not comment, CAS did not comment.

Background:

The SGAT contains references to tariffs, technical publications, and other Qwest documents. AT&T asserted Qwest has the ability to improperly change the SGAT by changing these referenced tariffs. Qwest, AT&T said, had the sole discretion to change tariffs and therefore the changes were not subject to review. XO voiced an objection with a similar theme, saying Qwest should not be able to import any term from other documents such as tariffs and technical publications. XO asked that any such change should be stopped from going into effect by a CLEC complaint and dealt with in the SGAT dispute resolution process. Qwest countered that its proposed changes should prevail unless specifically overturned by a commission. Qwest did agree to SGAT language that reinforced the idea that the SGAT prevailed over other documents.

The Facilitator notes that it is not surprising that the SGAT refers to a tariff (or statute, regulation or rule) given the vast number of terms and conditions present in the SGAT. Where the SGAT refers to a specific tariff, the most recent version of that tariff is the controlling authority, which is appropriate when the purpose is to keep the SGAT up to date with subsequent changes. However, if the intent is to keep particular tariff language in effect in the SGAT, then the SGAT should use that language and not the reference. CLECs have had the opportunity to ask for specific language in this proceeding. AT&T, moreover, has mischaracterized the ability of Qwest to change the SGAT unilaterally. CLECs can participate in proceedings that establish tariffs and thus have a chance to make their arguments about particular tariffs before Qwest can put them into effect. The SGAT does not allow tariff language to take effect without such proceedings, so CLECs are protected. Furthermore, it is important that Commissions

retain the right to change the SGAT through changes in tariffs. Retaining the current approach reserves that right for commissions.

As for XO's request that the status quo prevail while Commissions consider disputed changes, the recommendation is that Qwest's view be allowed to prevail while the dispute is considered. Qwest is providing services and as the provider is in the best position to determine for itself what it believes to be appropriate terms and conditions necessary to offer the service. This power is not open-ended, however. Where the parties do not agree, an outside authority is expected to act promptly to resolve the disagreement.

Analysis:

- The Facilitator's decision was not challenged.

Recommendation:

QSI agrees with the PIR.

6. *Implementing Changes in Legal Requirements*

Report page 29, Qwest comments page 7, AT&T comments page 9, CAS did not comment.

Background:

AT&T argues for a period of transition whenever a change in law leads to changes in the SGAT. The basis for this position is that it is easier for Qwest to stop providing a service formerly required by the SGAT than it is for Qwest to start offering a service newly required in the SGAT. In the first situation, CLECs can be abruptly left without

the means to carry on business, while in the second they have to wait for Qwest to gear up its product offerings. AT&T wants a period where existing terms and conditions remain in place so that CLECs can make adjustments made necessary by the changes in law. Qwest revised SGAT Section 2.2 to allow a 60-day status quo period to allow for the negotiation of disagreements, which would be followed by the SGAT dispute resolution process if those negotiations should fail. If disputes are not resolved quickly, interim operating agreements could be adopted for the life of the dispute. Qwest wants any resolutions of disputes made effective the date of the original change, arguing CLECS otherwise have an incentive to delay in resolving disputes.

The Facilitator notes that Qwest's SGAT change and other aspects of its offered change, including true-up to the original date, are an adequate response to this issue. These accommodations will encourage a reasonable and prompt transition.

Analysis:

- AT&T begins its criticism of the Facilitator's conclusion by saying that he does not understand the issue.
- AT&T argues that the reasoning used by the Facilitator in reaching his decision is "circular at best" (see page 10, AT&T comments).
- AT&T argues that the SGAT should say that the SGAT is consistent with appropriate state contract law, and with the U.S. Constitution, and that it governs over conflicting documents, and that the defined amendment process should be consistent with State and Federal law.
- AT&T argues that the Facilitator's recommendation would allow Qwest to unilaterally modify its contract with CLECs – via tariff changes.
- AT&T also argues that this provision would unduly burden CLECs and the Commission with a multi-layered arbitration process.

- AT&T states that the Facilitator's decision overrides general contractual and constitutional principles, and that the Commission reject the Facilitator's resolution, and instead, adopt the following language:

2.2 The provisions in this Agreement are based, in large part, on the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof (the "Existing Rules"). Among the Existing Rules are the results of arbitrated decisions by the Commission, which are currently being challenged by Qwest or CLEC. Among the Existing Rules are certain FCC rules and orders that are the subject of, or affected by, the opinion issued by the Supreme Court of the United States in *AT&T Corp., et al. v. Iowa Utilities Board, et al.* on January 25, 1999. Many of the Existing Rules, including rules concerning which Network Elements are subject to unbundling requirements, may be changed or modified during legal proceedings that follow the Supreme Court opinion. Among the Existing Rules are the FCC's orders regarding BOCs' applications under Section 271 of the Act. Qwest is basing the offerings in this Agreement on the Existing Rules, including the FCC's orders on BOC 271 applications. Nothing in this Agreement shall be deemed an admission by Qwest concerning the interpretation or effect of the Existing Rules or an admission by Qwest that the Existing Rules should not be vacated, dismissed, stayed or modified. Nothing in this Agreement shall preclude or estop Qwest or CLEC from taking any position in any forum concerning the proper interpretation or effect of the Existing Rules or concerning whether the Existing Rules should be changed, dismissed, stayed or modified, provided that such positioning shall not interfere with performance of the obligations set forth herein.

2.2.1 In the event that any legally binding legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of CLEC or Qwest to perform any material terms of this Agreement, CLEC or Qwest may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within thirty (30) days after such notice, or if at any time during such 30-day period the Parties shall have ceased to negotiate such new terms for a continuous period of fifteen (15) days, the dispute shall be resolved as provided in Section 5.18, for expedited Dispute Resolution. For purposes of this Section 2.2.1, legally binding means that the legal ruling has not been stayed, no request for a stay is pending, and if any deadline for requesting a stay is designated by statute or regulation, it has passed.

2.2.2 During the pendency of any renegotiation or dispute resolution pursuant to Section 2.2.1 above, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement, unless the Commission, the

Federal Communications Commission, or a court of competent jurisdiction determines that modifications to this Agreement are required to bring it into compliance with the Act, in which case the Parties shall perform their obligations in accordance with such determination or ruling.

Further Analysis:

- The Facilitator's opinion is that Qwest has made significant concessions, which accommodate AT&T's concerns regarding the initial language, and promote reasonably prompt adjustments that should accompany changes in legal requirements. In short, the SGAT will adequately protect CLECs in the event that changes to the SGAT become necessary.

Recommendation:

QSI agrees with the PIR.

7. *Second-Party Liability Limitations*

Report page 30, Qwest comments page 7, AT&T comments page 12, CAS did not comment.

Background:

AT&T requested several changes in SGAT Section 5.8 dealing with liability. Its suggested provisions generally would broaden Qwest's obligations. AT&T wanted: (a) liability assessed by a state commission addressed; (b) changes addressing the SGAT general damages provision and its relationship with the QPAP; (c) removal of a limit on damages to the amount paid for services; (d) allowing consequential damages for gross negligence and for bodily injury, death or damage to tangible property; and (e) expanding Qwest's liability when CLEC customers act fraudulently. Qwest's responses are that the

QPAP concern is addressed adequately, allowing consequential damages is not industry practice, and expanding the liability for fraud is not warranted.

The Facilitator notes that the sub-issue regarding state commissions and liability is deferred to Issue 9. The sub-issue concerning the SGAT and the QPAP is deferred until the QPAP Report is issued. Otherwise, the issues at stake here are exceptions to a rule accepted in business generally and telecommunications specifically limiting damages to what is foreseeable and insurable. Thus indirect, incidental, and consequential damages usually are excluded. Meanwhile, the liability for foreseeable risks typically is assigned to the party creating the risks. Managing those risks is a reasonable responsibility and recovering the costs of that risk management through prices charged is also reasonable.

Qwest's language limiting its liability for general damages to the price paid for services is appropriate. It appears in Section 5.8.2. The recommended resolution for the section concerning the gross negligence and bodily injury, death, or damage to tangible property, the subject of Section 5.8.4, has many facets. First, both parties should bear exposure to liability for damages to tangible property, a principle that ensures parties will take care as they work around each other's property. The party causing the damage is to be responsible. Second, gross negligence is not the appropriate standard to apply in determining liability in other cases, willful or intentional misconduct is. Gross negligence, as Qwest argues, is too vague. Finally, sole negligence shall determine liability. Harmed parties can seek insurance beforehand in cases where they materially contribute to the loss. These recommendations are incorporated in a suggested revised Section 5.8.4.

A revised Section 5.8.6 addresses the fraud and liability issue. This revision refuses to adopt AT&T language that would make Qwest liable for fraud when it is CLEC customers using CLEC services to perpetrate the fraud. On the other hand, when fraud is due to an act or omission by Qwest, Qwest bears the responsibility. Qwest also has to assist CLECs in stopping fraud when it becomes aware of it, even if Qwest has played no role in allowing or enabling the fraud.

Analysis:

- AT&T argues that there is “absolutely no evidentiary support—that Qwest’s proffered SGAT limitations are “consistent with general commercial practice and, more particularly, with the provisions of telecommunications tariffs””.
- AT&T finds 2 deficiencies in the Facilitator’s reasoning:
 - 1. it overlooks that the limitations of liability in tariffs, which apply to mass marketed retail services are not the appropriate standard by which to judge contracts between a few CLECs and Qwest.
 - 2. that the Report fails to appreciate that these types of retail tariff limitations are not applied to wholesale local service inter-carrier relationships nor to commercial contracts generally.
- AT&T argues that the real issue is how much damage may Qwest do to an individual CLEC, not the cost of the service the CLEC paid for.
- AT&T further argues that under the Post Entry Performance Plan or the SGAT CLEC may suffer harm from Qwest’s breach and not be compensated at all.
- AT&T argues that when it is harmed by Qwest, it could recover nothing that approaches the actual cost of the harm caused, while Qwest would “blissfully” avoid any accountability.
- AT&T points out that under such conditions, Qwest’s promises to perform under the contract, the SGAT or even the Act become illusory, since it suffers no threat of liability should it fail to perform.

- AT&T also notes that even though the proposed limitations are reciprocal, they protect Qwest, and not the CLECs (page 14).
- AT&T, in an attempt to level the playing field, proposes the following language:

5.8.1 Each Party shall be liable to the other for direct damages for any loss, defect or equipment failure including without limitation any penalty, reparation or liquidated damages assessed by the Commission or under a Commission-ordered agreement (including without limitation penalties or liquidated damages assessed as a result of cable cuts), resulting from the causing Party's conduct or the conduct of its agents or contractors.

5.8.2 Neither Party shall be liable to the other for indirect, incidental, consequential, or special damages, including (without limitation) damages for lost profits, lost revenues, lost savings suffered by the other Party regardless of the form of action, whether in contract, warranty, strict liability, tort, including (without limitation) negligence of any kind and regardless of whether the Parties know the possibility that such damages could result. For purposes of this Section 5.8.2, amounts due and owing to CLEC, or CLECs as a group, pursuant to any backsliding plan applicable to this Agreement shall not be considered to be indirect, incidental, consequential, or special damages.

5.8.4 Nothing contained in this Section shall limit either Party's liability to the other for (i) willful or intentional misconduct (including gross negligence) or (ii) bodily injury, death or damage to tangible real or tangible personal property proximately caused by such Party's negligent act or omission or that of their respective agents, subcontractors or employees.

5.8.5 Nothing contained in this Section 5.8 shall limit either Party's obligations of indemnification specified in Section 5.9 of this Agreement, nor shall this Section 5.8 limit a Party's liability for failing to make any payment due under this Agreement.²

5.8.6 CLEC is liable for all fraud associated with service to its end-users and accounts. Qwest takes no responsibility, will not investigate, and will make no adjustments to CLEC's account in cases of fraud unless Qwest is responsible for such fraud, whether the result of an intentional act of Qwest, gross negligence of Qwest, or otherwise. Notwithstanding the above, if Qwest becomes aware of potential fraud with respect to CLEC's accounts, Qwest will promptly inform CLEC and, at the direction of CLEC, take reasonable action to mitigate the fraud where such action is possible.³

² SGAT Lite.

³ ATT Comments at pp. 33-35.

- AT&T also notes that although Qwest has language in § 5.8.2 that reads “If the Parties enter into a Performance Assurance Plan under this Agreement, nothing in this Section 5.8.2 shall limit amounts due and owing under any Performance Assurance Plan”, but that during the Multi-State workshops, Qwest announced that the PAP/PEPP was an exclusive remedy for the CLEC if adopted. AT&T feels that this is limiting at page 15-16 of its comments.

Further Analysis:

- At page 162 of the transcript, Mr. Hickey explains, in response to AT&T’s argument, that if there were an imposition of tariff language within the SGAT, or language within the SGAT that imposed responsibilities for all forms of damage, including consequential, that would be inconsistent with the past practice of treating consequential damages.
- In short, Mr. Hickey states that expanding second-party damages as advocated by AT&T would be inconsistent with Wyoming law (transcripts, 148).

Recommendation:

QSI agrees with the PIR.

8. *Third-Party Indemnification*

Report page 33, Qwest comments page 9, AT&T comments page 16, CAS did not comment.

Background:

AT&T is concerned that Section 5.9.1.2 does too much to restrict Qwest liability for damages CLECs must pay to end users. AT&T asserts it does not do enough to create incentives for Qwest to avoid anti-competitive and discriminatory conduct. AT&T offers language that it maintains would achieve this end, arguing the language better reflects a

competitive market outcome. Qwest's response is that making wholesale suppliers responsible for claims in the way AT&T wants will encourage CLECs to engage in overly generous offers to customers because the CLECs will be able to shift the cost to Qwest. Qwest says Section 5.9.1.2 reasonably indemnifies Qwest against such claims.

The Facilitator notes that AT&T's claim of mirroring the competitive market with its language is rejected. Customer compensation typically is significantly restricted in the event of failure to deliver service. If CLECs want to offer more to end-users, they should charge more for the premium service, and not shift the burden to Qwest. As for creating incentives for Qwest to avoid anti-competitive and discriminatory conduct, the QPAP is the best vehicle, not liability packages. Hence, that sub-issue is deferred to the QPAP Report. Finally, Qwest should not be indemnified against its actions that cause bodily injury to CLEC customers or damage to CLEC tangible property. Having Qwest bear liability in such instances is consistent with the principle of the party causing the harm to bear the liability, a principle applied throughout this Report. Qwest's 5.9.1.2 must be amended to accomplish this goal, so the Report offers an amended 5.9.1.2 for that purpose.

Analysis:

- AT&T essentially asserts that the Facilitator's conclusion that AT&T's request is not appropriate is based on "utter make-believe".
- AT&T further accuses the Facilitator of engaging in "pure speculation" about Qwest's wholesale prices related to indemnity provisions. AT&T notes that the Facilitator's decision-making process represents an abuse of process that the Commission should reject.

- AT&T asserts that there is absolutely no evidence on the record to support the Facilitator's conclusion, and that the conclusion is "astounding".
- AT&T objects to the decision, saying that it allows Qwest to have a "home-free" card when Qwest causes CLECs harm and the CLEC becomes the subject of end-user or personal injury claims due to Qwest's conduct.
- The Facilitator claims that AT&T did not provide evidence to support its claim that existing agreements contain indemnity arrangements that are more similar to what would be negotiated in a competitive market. However, AT&T notes that AT&T did provide language from Commission approved agreements in Colorado, Arizona, Utah and South Dakota.
- AT&T proposes that the Commission adopt the following language in order to resolve this situation:

5.9.2 The indemnification provided herein shall be conditioned upon:

5.9.2.1 The indemnified Party shall promptly notify the indemnifying Party of any action taken against the indemnified Party relating to the indemnification. Failure to so notify the indemnifying Party shall not relieve the indemnifying Party of any liability that the indemnifying Party might have, except to the extent that such failure prejudices the indemnifying Party's ability to defend such claim.

5.9.2.2 If the indemnifying Party wishes to defend against such action, it shall give written notice to the indemnified party of acceptance of the defense of such action. In such event, the indemnifying Party shall have sole authority to defend any such action, including the selection of legal counsel, and the indemnified Party may engage separate legal counsel only at its sole cost and expense. In the event that the indemnifying Party does not accept the defense of an action, the indemnified Party shall have the right to employ counsel for such defense at the expense of the indemnifying Party. Each Party agrees to cooperate and to cause its employees and agents to cooperate with the other Party in the defense of any such action and the relevant records of each Party shall be available to the other Party with respect to any such defense.

5.9.2.3 In no event shall the indemnifying Party settle or consent to any judgment pertaining to any such action without the prior written consent of the indemnified Party. In the event the indemnified Party withholds such consent, the indemnified Party may, at its cost, take over such defense, provided that, in such event, the indemnifying Party shall not be responsible for, nor shall

it be obligated to indemnify the relevant indemnified party against, any cost or liability in excess of such refused compromise or settlement.

Further Analysis:

- Mr. Hickey notes that Qwest has addressed what may have been a misunderstanding by Mr. Antonuk in its “Proposed Findings” at paragraphs 69 and 70, which clears up some confusion with respect to the words “indemnifying” and “indemnified”.
- The language consented to by Qwest is consistent with language that has been approved in Colorado, Arizona, Utah and South Dakota with respect to this issue.

Recommendation:

QSI agrees with the PIR. QSI notes that AT&T’s criticism of the Facilitator, and his decisions should be examined carefully. It appears that AT&T is questioning Mr. Antonuk’s motives and his qualifications to perform his duties. Perhaps the Commission should comment on AT&T’s accusatory comments in order to preserve the integrity of this process.

9. *Responsibility for Retail Service Quality Assessments Against CLECs*

Report page 35, Qwest comments page 9, AT&T did not comment, CAS comments page 1.

Background:

XO asserted that when a CLEC must pay penalties for failure to meet state commission retail service standards because Qwest fails to meet its SGAT obligations Qwest should pay the assessments.

The Facilitator notes that the SGAT is not the proper mechanism for dealing with this matter. Commissions may not want to follow a rigid rule such as XO proposes. This rule removes all responsibility for providing compliant service from CLECs, who may legitimately be held responsible for failure to monitor the quality of service provided by a wholesaler. This principle is in place in other industries, even those where the wholesaler is also a competitor with the firm. The best way to deal with this matter is in state rulemaking proceedings that set the standards and liability for payments. CLECs have the opportunity to exert influence in these arenas, while Commissions retain the ability to assign roles in consumer protection.

Analysis:

- In its comments, CAS warns the Wyoming Public Service Commission to assure that no provision of the SGAT or the Qwest Performance Assurance Plan “QPAP” interfere with the Wyoming Commission’s jurisdiction to regulate quality of service between providers, for example, by limiting the type of remedies the Commission might otherwise impose.

Recommendation:

QSI agrees with the PIR, but urges the Commission to consider the CAS’s warning regarding jurisdictional issues. This may be accomplished by adding some appropriate language to the SGAT.

10. *Intellectual Property*

Report page 35, Qwest comments page 10, AT&T comments page 20, CAS did not comment.

Background:

AT&T offered revised Section 5.10 and language virtually identical to that revision appears in Qwest's frozen SGAT, although Qwest has not formally accepted the change.

The Facilitator notes that the issue can be considered closed if AT&T does not object to the variations from its proposal Qwest introduced in the frozen SGAT. Thus, if AT&T does not voice objections in the 10-day comments, the matter should be resolved.

Analysis:

- AT&T notes that Qwest supplied its "frozen SGAT" late in the process, but that AT&T will work with Qwest regarding that language.
- Additionally, AT&T notes that the parties have agreed upon the language attached to AT&T's brief, and that the definitions section is closed with the exception of the "legitimately related" issue discussed above.

Recommendation:

QSI agrees with the PIR.

11. Continuing SGAT Validity After the Sale of Exchanges

Report page 36, Qwest comments page 10, AT&T comments page 20, CAS did not comment.

Background:

AT&T proposed several provisions that would apply when Qwest sells exchanges in which CLECs are serving end users under terms and conditions of the SGAT. All are

intended to prevent CLECs from suddenly having the SGAT withdrawn as a governing document.

AT&T's proposals include: (a) requiring the transferee to be bound by the SGAT until a new agreement can be negotiated; (b) providing 180 days notice (less if the transaction moves swiftly) of the transfer to the CLECs; (c) placing an obligation on Qwest to facilitate discussions between CLECs and the transferee to keep the SGAT in place; (d) serve transfer application copies on all CLECs; and (e) deny Qwest the ability to contest CLEC participation in transfer approval proceeding or to contest the authority of a commission to impose an SGAT obligation on the transferee.

Qwest agreed to provide as much notice as possible and to facilitate SGAT continuance discussions, leaving sub-issues 1, 4 and 5 in dispute. Qwest objected to these requests, saying they would be unreasonable restrictions and devalue Qwest's property.

The Facilitator notes that it is reasonable for a transition providing adequate time for adjustment after a transfer for parties to be in the SGAT. The goal is to provide for negotiations between the transferee and CLECs, for commissions to consider whether they have the authority and desire to impose conditions, and for CLECs to have a period in which to seek new suppliers if the transferee does not want to continue the SGAT.

It is inappropriate, as AT&T would do, to mandate that transferees keep an SGAT in effect until its termination date and to preclude Qwest from participating in commission debate over conditions. In the first case, the rules governing transferees may not be the same as they are for a BOC (a PAP would not apply to many transferees, for example). In the second, Qwest cannot be required to give up a right of participation incorporated in

law. As for notice, Qwest need only serve CLECs with notice, not the pending agreements. CLECs have a duty to seek agreements if they believe they are affected.

It is appropriate, on the other hand, to provide CLECs a period in which to seek continuance of the SGAT or relief from a commission in case the negotiations with the transferee are fruitless. An addition to the SGAT in the form of Section 5.12.2 is offered as a resolution. The language provides that transferees shall be successors to SGATs for 90 days from notice to CLECs of the transfers, or longer if a state commission orders. The addition also states Qwest shall use its best efforts to facilitate transfer discussions between CLECs and the transferee. The proposal gives Qwest a choice between this situation and giving notice more than 60 days in advance, according to the Report.

Analysis:

- AT&T , in its comments at page 20, emphasizes the importance of this provision, since the Multi-State States are the locations wherein Qwest is most likely to sell its exchanges. Therefore, AT&T requests the following minor modifications to the Facilitator's proposed language, that AT&T believes are consistent with the Facilitator's original intent:

5.12.2 In the event that Qwest transfers to any ~~unaffiliated~~ party exchanges including end users that a CLEC serves in whole or in part through facilities or services provided by Qwest under this SGAT, the transferee shall be deemed a successor to Qwest's responsibilities hereunder for a period of 90 days from notice to CLEC of completion of such transfer or until such later time as the Commission may direct pursuant to the Commission's then applicable statutory authority to impose such responsibilities either as a condition of the transfer or under such other state statutory authority as may give it such power. In the event of such a proposed transfer, Qwest shall use its best efforts to facilitate discussions between CLEC and the Transferee with respect to the Transferee's assumption of Qwest's obligations pursuant to the terms of this Agreement.

- QSI also notes that the intent of the proposed Section 5.12.2 is to create a 90-day period after notice of a sale of exchanges is given in which CLECs can rely on the SGAT. Thus, it finds the Facilitator's concluding comment about giving notice 60 days ahead of time confusing and in need of clarification.

Further Analysis:

- In declining to accept Qwest's proposed language, Mr. Hickey notes that such language may restrict Qwest's ability to sell exchanges (transcript, 167).
- Further, he notes that CLECs will have ample time to negotiate their own terms with the purchaser of the assets.

Recommendation:

QSI agrees with the PIR.

12. Misuse of Competitive Information

Report page 38, Qwest comments page 11, AT&T comments page 21, CAS did not comment.

Background:

AT&T provided evidence that Qwest misused information when it contacted a Minnesota customer seeking to have the customer reconsider switching away from Qwest. AT&T asserted Qwest must have learned of the impending loss of the customer through the LSR AT&T submitted. AT&T contended Qwest should be denied Section 271 approval until it demonstrated such events could not happen.

The Facilitator notes that using information gained through an LSR or ordering systems is a serious anti-competitive practice, and one only Qwest would be in position

to exploit. However, one incident does not serve as sufficient evidence of a pattern of abuse. Qwest's workshop participants could not answer whether Qwest personnel could learn of a customer leaving from information submitted in the LSR, and AT&T did not demonstrate Qwest learned of the customer's decision to leave Qwest through the LSR. The Report identifies several other possible means for Qwest gaining the information. Nonetheless, Qwest has a responsibility to prevent using its position to its advantage in a similar manner. The recommended resolution is for Qwest to report within 30 days to the state commissions what its program is to minimize the possibility of, discourage, detect, and punish this conduct.

Analysis:

- AT&T complains that during the workshops, Qwest failed to provide information on its practices to prevent the misuse of wholesale customer information, and that the Facilitator demanded nothing from Qwest with respect to this information.
- AT&T also notes that it provided un-refuted evidence relating to this issue, which the Facilitator attacks in the Report, and speculates how Qwest representatives might have obtained illicit information.
- The Facilitator also notes that AT&T should have shown a pattern of behavior, rather than relying in an isolated instance.
- AT&T further complains that the Facilitator allowed Qwest to augment the record by providing a report on what steps it takes to prevent misuse of such information – but that it is clear from AT&T's perspective that Qwest fails those steps.
- AT&T feels that it should also be allowed to augment the record to address the Facilitator's speculation. AT&T feels that it can provide evidence that will show that Qwest has misused the information, and that it can establish a pattern of such misuse – that it is not an isolated incident.

Further Analysis:

- Mr. Hickey notes (transcripts 168), in response to AT&T's claim that it was not afforded adequate opportunity to present relevant evidence (as opposed to Qwest), that AT&T should not be allowed to augment the record.
- Mr. Hickey stated that all parties (including the CLECs) were invited to come forward with the evidence, and that AT&T only offered one anecdotal story out of one of the 14 states that Qwest does business in.
- Further, Mr. Hickey states that Qwest only submitted additional information in response to Mr. Antonuk's request.

Recommendation:

QSI agrees that this misuse of data is very serious, and could be potentially damaging to competition in Wyoming. Therefore, QSI recommends that during deliberations, the Commission explore the option to leave this issue open, and allow AT&T to submit additional information, as Qwest was allowed to do.

13. Access of Qwest Personnel to Forecast Data

Report page 39, Qwest comments page 11, AT&T did not comment, CAS did not comment.

Background:

CLECs had points to make about aggregated and firm-specific forecast data. XO said Qwest legal staff should not have access to aggregated CLEC forecast information. Discovery, XO asserted, is the proper means for Qwest to obtain the information in regulatory filings. XO stated Qwest should be able to use the forecast information only in ways specified in the SGAT.

AT&T said the SGAT description of Qwest employees who can use individual forecast information is too loose. AT&T added that Qwest should be restricted to using the information only for specified purposes, saying Qwest could be transforming or manipulating the information put it to other uses.

Qwest said SGAT Sections 5.16.9.1 and 5.16.9.1.1 prohibit the disclosure of individual and aggregate CLEC forecast data to marketing, sales, and strategic planning personnel. Qwest stated the SGAT sections state explicitly that only wholesale account managers, wholesale LIS and collocation product managers, network, and growth planning personnel can use forecasts. In addition, Qwest attorneys can use the information in regard to legal issues about particular forecasts.

The Facilitator notes that Qwest's SGAT generally limits the use of the forecast data to appropriate personnel. However, Section 5.16.9.1 (the Report says Section 15.16.9.1, but this is most likely a typographical error) that further restricts the access of legal personnel. Under the change, the Qwest legal personnel could have access in cases where the quality or timeliness of the forecast is at issue, but no access otherwise. Section 5.16.9.1.1 also should be amended to restrict the use of aggregate forecast data in regulatory proceedings. The offered language gives Qwest the obligation to give commissions the aggregated data upon a request from the commissions once Qwest has initiated appropriate protective measures and given notice to the CLECs of the request. The revision not only provides for protection of sensitive CLEC information, but also does not allow Qwest to use the aggregated information in any other way.

Analysis:

- The Facilitator's decision was not challenged.

Recommendation:

QSI agrees with the PIR.

14. Change Management Process

Report page 41, Qwest comments page 12, AT&T did not comment, CAS did not comment.

Background:

AT&T argues the Texas 271 Order makes clear a change management process meeting five criteria must appear in the SGAT. The criteria are: (a) clearly organized and accessible change management process information; (b) substantial CLEC participation in the process creation and operation; (c) a procedure for timely dispute resolution; (d) availability of a stable test environment that mirrors the production environment; and (e) adequate documentation available for CLEC use in building an electronic gateway.

The Facilitator notes that Qwest's change management process, Co-Provider Industry Change Management Process (CICMP), is not complete. Thus, the record does not provide a basis for reaching a conclusion regarding Section 12.2.6 of the SGAT, which is where the CICMP appears.

Analysis:

- The Facilitator's decision was not challenged.

Recommendation:

QSI agrees with the PIR. The Commission will have to review this issue at a later date when CICMP is complete. Qwest will not be considered to have satisfied this portion of the General Terms and Conditions 271 requirement until the CICMP review is completed and the CICMP process found to be satisfactory for the purposes of 271.

15. Bona Fide Request Process

Report page 41, Qwest comments page 12, AT&T did not comment, CAS did not comment.

Background:

AT&T said Qwest's bona fide request (BFR) process in Section 17 of the SGAT is not non-discriminatory. Its failings, according to AT&T, are: (a) no evidence that Qwest uses processes similar to the BFR to add services requested by its end-user customers when its tariffs do not provide for the services, (b) no notice of BFRs performed previously, and (c) no criteria for standardizing products or services that result from repeat BFRs.

Qwest responded to the second issue raised by AT&T by pointing to Section 17.12. The section provides that Qwest will not require additional BFRs when CLECs bring similar cases to Qwest and says it will accept the burden of proof for showing differences when it does require another BFR. Product prices for such offerings will be at individual case basis prices, however, until the product is standardized. Qwest also will refund BFR application fees if it has denied a similar request previously. Qwest said it would not

offer notice of BFRs because CLECs that have gained a product from the process may have a proprietary interest in that product. Qwest also rejected automatically making offerings from BFRs into standardized products.

The Facilitator notes that the comparison of the BFR and Qwest's processes for non-standard requests from retail customers is invalid. BFRs are usually concerned with technical feasibility and whether access is necessary to make CLECs competitive. Qwest, on the other hand, does not take up these issues internally. The cost analysis performed in each process also is different. Thus, there is no need for the processes to be similar.

Qwest's argument that notice of BFRs will violate CLEC proprietary rights also is misplaced. CLECs gain access to Qwest's network in BFRs, not something similar to a patent. If one CLEC has access, all should. Moreover, BFRs that are granted most often are the result of technical breakthroughs, not CLEC insights into how to combine Qwest facilities. Thus, the SGAT should tilt toward non-discriminatory treatment of CLECs versus protecting individual CLEC business practices. In addition, disclosure need not give away all CLEC secrets. Other CLECs should be told of the form of access, not the contents of the BFR.

The Report offers SGAT language to balance these interests. The new language calls for a topical list of BFRs to be made available containing just enough description for CLECs to understand the general nature of products gained through BFRs. CLECs also should be able to receive upon request the terms and conditions of granted requests. Finally, any CLEC should be able to have the same offering under the same terms and conditions, which may include ICB pricing if the circumstances warrant.

Qwest had noted that only 17 BFRs have been filed under the SGAT. Thus, there is little history for evaluating Qwest's performance in turning granted BFRs into standardized products. Having an efficient process for doing so is desirable as it reduces costs for CLECs. The Report goes no further at this time, stating that the requirement of notice may do much to advance the goal of standardization.

Analysis:

- The Facilitator's decision was not challenged.

Recommendation:

QSI agrees with the PIR, but notes no location is identified for the proposed SGAT language.

16. Scope of Audit Provisions

Report page 44, Qwest comments page 13, AT&T did not comment, CAS did not comment.

Background:

AT&T wants Section 18 of the SGAT, which deals with audits, amended so that audits can be made into areas other than billing. It cites protection of proprietary documents as one area in which audits would be useful to CLECs. Qwest answers that the dispute resolution process is available for such inquiries and that it is sufficient to address CLEC needs. Qwest sees the request to broaden audit authority as being too intrusive.

The Facilitator notes that there is a distinction between “audits” and “examinations.” Billing is an appropriate subject for audits, which are limited in frequency by the SGAT, because parties may make mistakes and errors that need to be reconciled. Exchanges of proprietary information also are subject to mistakes and errors, which is an argument for making the process subject to audit. However, since the number of examinations allowed under the SGAT is unlimited, it may not be appropriate to extend that right to other areas. Unlike billing examinations, which are limited in scope by their content, examinations of proprietary information processes may be far-reaching and open-ended. It is recommended, therefore, that the request to expand the range of possible audits be granted, but not the request to expand the range of examinations.

The auditing provisions in the QPAP, which will be part of the SGAT, are sufficient to address the matter of performance measurement verification, so the SGAT does not need to address it elsewhere.

An addition to the SGAT auditing section is offered to implement the recommendations. The language also introduces the idea that the audited as well as requesting party may ask for an independent auditor.

Analysis:

- The Facilitator’s decision was not challenged.

Recommendation:

QSI agrees with the PIR. The specific location of the suggested language needs to be identified.

17. Scope of Special Request Process

Report page 46, Qwest comments page 14, AT&T did not comment, CAS did not comment.

Background:

AT&T wants the special request process (SPR) to be available for more than UNE combination requests. The SPR is more streamlined than the BFR, omitting consideration of technical feasibility, and thus would handle requests that do not include technical feasibility questions more quickly. AT&T wants this option available for all non-standard offerings where technical feasibility is not an issue. Qwest says the SGAT is intended to address the working of the SPR, not its applicability.

The Facilitator notes that Qwest's view that the range of application of the SPR is out of bounds as a workshop topic is incorrect. Moreover, AT&T's request for broadening the scope of the SPR is reasonable. However, Exhibit F of the SGAT seems to grant to CLECs the ability to use the SPR for more than UNE combinations, so it is not immediately evident what it is AT&T hopes to gain.

AT&T also wanted parity for the SPR for the same reasons it wanted parity for BFRs, which is as inappropriate a comparison here as it was in the BFR in Issue 15. The same resolution applies to this issue.

Analysis:

- The Facilitator's decision was not challenged.

Recommendation:

QSI agrees with the PIR.

18. *Parity of Individual Case Basis Process with Qwest Retail Operations*

Report page 46, Qwest comments page 14, AT&T did not comment, CAS did not comment.

Background:

AT&T incorporated reference the parity arguments raised in Issues 15 and 17 for the individual case basis (ICB) process.

The Facilitator notes that ICB and Qwest retail processes do not have comparable purposes and thus no demonstration of parity between them is necessary. The resolution is the same as for similar arguments made in Issues 15 and 17.

Analysis:

- The Facilitator's decision was not challenged.

Recommendation:

QSI agrees with the PIR.

SECTION 272

Section 272 of the Telecommunications Act of 1996 imposes substantial structural and nonstructural safeguards applicable to the provision of in-region interLATA service by BOCs such as Qwest. The rationale for including Section 272 matters in a 271 proceeding is the FCC has said that section 271(d)(3)(B) of the Act makes compliance with section 272 an independent ground for denying relief under section 271.⁴

Section 272 imposes a series of specific requirements, whose purposes include: (a) preventing improper cost allocation and cross-subsidization between Qwest and its §272 affiliate, and (b) assuring that Qwest does not discriminate in favor of this affiliate.⁵ In summary, the provisions of Section 272 that are in dispute here require that:

- Qwest Communications provide in-region interLATA service through an affiliate that is separate from Qwest Communications (the BOC) [§272(a)]
- The §272 affiliate “maintain books, records, and accounts in the manner prescribed by the Commission, which shall be separate from the books, records and accounts maintained by” Qwest Communications [§272(b)(2)]
- The §272 affiliate have “separate officers, directors and employees” from those of Qwest Communications [§272(b)(3)]
- Transactions with Qwest Communications be conducted “on an arm’s length basis with any such transactions reduced to writing and available for public inspection” [§272(b)(5)]

⁴ *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271 (released Oct. 13, 1998) (“Bellsouth Louisiana II Order”); at ¶ 322.

⁵ *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404 (Dec. 22, 1999), (FCC BANY Order) at ¶401.

- Qwest Communications not discriminate in favor of its §272 affiliate in any dealings between the two [§272(c)(1)]
- Qwest Communications account for all transactions with its §272 affiliate in accord with FCC accounting principles [§271(c)(2)].

Qwest has designated Qwest Communications Corporation as its long-distance affiliate for Section 272 purposes.

Section 272 Discussion Format

Whereas earlier reports and the General Terms and Conditions section of this Group 5 Report discussed SGAT language disputes issue by issue and offered a recommended resolution, the Group 5 Report does not present Section 272 matters in quite the same way. Instead of a proposed SGAT with sections intended to address specific Qwest wholesale offerings, the material in dispute for Section 272 is composed of six provisions and Qwest's evidence it is complying with the provisions. The Report considers each provision, four of which have more than one component, and provides a recommended conclusion for each element.

Provisions:

A. Separate Affiliate Requirements

1. Separation of Ownership

Report page 49, Qwest did not comment, AT&T did not comment, CAS did not comment.

Background:

Qwest Communications (QC) is an affiliate of Qwest Communications International. QC is the BOC, which is the provider of local service in the Qwest territory and the applicant in the Section 271 process. QC must provide in-region, interLATA (long-distance) service through an affiliated company that has separate ownership. QC is owned by Qwest Communications International (QCI). QCI also owns Qwest Services Corporation (QSC), which in turn owns Qwest Communications Corporation (QCC). As noted, it is QCC that has been designated as the Section 272 affiliate. Thus, QC and QCC must have separate ownership. Qwest (in this instance and nearly all others in this report, this means QC) has testified that QC and QCC own no stock in each other. No party presented evidence to the contrary.

The Facilitator notes that the evidence supports a conclusion that QC and QCC meet the separate ownership test of Section 272.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

2. Prior Conduct

Report page 49, Qwest did not comment, AT&T did not comment, CAS did not comment.

Background:

AT&T presented three cases that it asserted show Qwest has a history of non-compliance with the separate affiliate requirement. AT&T said the FCC found Qwest or U S West, its predecessor before the mid-2000 merger of Qwest and U S West, in violation in all three instances. The rulings concerned: (a) a 1998 pre-merger U S West-Qwest agreement for Qwest to provide in-region, interLATA service; (b) U S West provision of non-local directory assistance to in-region subscribers in 1999; and (c) Qwest's 1-800-4US-WEST calling card service in 2001.

Qwest responded that the three cases were evidence of differences of opinion as to the interpretation of what it means to provide in-region, interLATA service and not a pattern of non-compliance. Qwest also said this past behavior was not indicative of how it would operate in the future.

The Facilitator notes that the proper approach to this matter is asking two sequential questions. Has Qwest offered in-region, interLATA service? If yes, has Qwest done so through a separate affiliate? AT&T has shown the answer to the first question is affirmative, and that it was QC or its U S West predecessor that provided the service, not a separate affiliate. However, Qwest or U S West failed to use a separate affiliate because they believed that what they offered were not in-region, interLATA services. When ordered to stop providing the services, Qwest or U S West did.

These violations were Section 271 violations, however, not Section 272 violations. Qwest did not attempt to subvert the separate affiliate requirement in any of the cases. It has shown it has created an appropriate subsidiary to serve that purpose. Therefore, the three cases cited by AT&T are not evidence to warrant drawing a conclusion of Section

272 failure. To reach that conclusion requires using Section 271 evidence to make predictions about Section 272 issues.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

A. Books and Records

1. *Generally Accepted Accounting Principles (GAAP)*

Report page 51, Qwest comments page 6, AT&T did not comment, CAS comments page 2.

Background:

Qwest asserted QCC has followed GAAP. Both QCC and Qwest Long Distance (QLD), an affiliate that formerly was the designated Section 272 company, used accrual accounting as called for by GAAP. AT&T said that an examination of Qwest's books and records showed QCC and QLD failures to follow GAAP. AT&T's list included: (a) failure to record transactions between QC and QCC between July 2000 and April 2001; (b) artificially high billing rates for services provided by other Qwest affiliates to QCC, creating cross subsidies and barriers to third parties using the services; (c) failure to accrue and pay expenses for services rendered to QLD in a timely manner; and (d) billing monthly services to QLD only yearly.

Qwest agreed it had not recorded certain QC-QCC transactions and failed to accrue certain expenses. In both cases, it said the transactions occurred before QCC had been designated as the Section 272 affiliate. Qwest also said the accrued expenses cited were a small amount, less than 1 percent of QCC's annual transactions in dollars. Qwest also had explanations for some of the non-complying accruals.

Qwest asserted that finding a handful of transactions in error was not a serious matter, and was to be expected given Qwest had switched its designated Section 272 affiliate from QLD to QCC in January 2001. It took several months for the transition to be complete. Qwest's record of compliance improved to zero percent discrepancies in April and May 2001 after the process was complete. The improvement was aided by several control measures Qwest put in place that will be ongoing, among them monitoring of asset transfers, training of various kinds for involved personnel, and establishing a compliance hotline. These mechanisms, Qwest argued, were similar to those employed by other BOCs that had received Section 271 authority from the FCC.

The Facilitator notes that neither too little nor too much attention should be paid to QCC books and records before its designation as the Section 272 affiliate. The transactions are evaluated with an eye toward what they say about Qwest's future performance. This approach reveals Qwest failed to record accrued expenses and interest in a timely manner for QCC before it became the Section 272 affiliate. Once it became the affiliate, Qwest moved with alacrity to make QCC accounting practices compliant, an effort that indicates Qwest will strive to comply going forward but does not eliminate concern given the total record. The record shows Qwest likely treated QC-QCC

transactions differently than it would have the same transactions had a third party been involved.

The recommendation is for independent testing to be conducted of Qwest's practices for the period April 2001 to August 2001. The test shall evaluate whether: (a) Qwest is accurate, complete, and timely as it records QC-QCC transactions; (b) the QC-QCC relationship is carried out at arms length; and (c) there are reasonable assurances practices addressing the first two points will continue. A qualified independent party⁶ shall carry out the examination with results reported to commissions no later than November 15, 2001. The report shall enable regulators to form independent conclusions. The materiality standard applied in the testing shall consider only transactions between QC and QCC, not other QC transactions.

This ordered review is an examination, not an audit. Its purpose is to verify that Qwest's April and May results from 2001 have continued and will continue because of practices put in place. The results of those two months are encouraging, but constitute too short a span with too little time to be reviewed to draw a conclusion that Qwest is compliant with this Section 272 provision.

Analysis:

- CAS notes that “[T]here is no reason why Qwest should have any instances of GAAP non-compliance, no matter how “isolated””.
- CAS therefore recommends that the Commission withhold a favorable recommendation on Section 272 compliance until Qwest has made an additional showing that it is and can remain GAAP compliant.

⁶ Liberty Consulting is excluded from consideration since it is recommending the examination.

Further Analysis:

- Ms. Young (transcript page 188) states that CAS doesn't have a lot of concerns, in light of the KPMG report that Qwest filed as required by Mr. Antonuk. However, Ms. Young noted that she has not thoroughly reviewed the report. She did note that she understands that there is very little financial impact related to the GAAP inconsistencies. In her opinion, she is content to have the Commission "make its judgment".
- Ms. Young also notes at page 176 that the CAS is not urging a "perfection standard", and that she "would be very surprised if any company, regardless of its size, could be perfect under GAAP".
- Mr. Korber further established that of the discrepancies totaling \$2.6 million, that \$2.4 million was due to a single instance associated with audio-conferencing services. Mr. Munn noted that that single discrepancy was due to human error, and not in line with Qwest policies.
- Mr. Oxley (at page 38 of the transcript) further verified that when looking at these discrepancies, that the direction is actually to the detriment of the affiliate. He also noted that these problems were associated with "teething troubles" rather than corporate policy.
- Additionally, Mr. Oxley beginning at page 41 of the transcript established that the CAM report may provide additional comfort to the Commission. However, Mr. Munn noted that the CAM report should not be a condition of 271 authority.
- At page 44, Mr. Oxley discussed the idea of the Commission using the CAM report as a "contingency" in its 271 recommendation. Mr. Munn did not like Mr. Oxley's idea.

Recommendation:

QSI believes that the KPMG report revealed imperfections that should be acceptable to CAS. **QSI therefore agrees with the Facilitator's conclusion.** The Commission may want to consider Mr. Oxley's "CAM contingency" idea.

2. Materiality

Report page 55, Qwest did not comment, AT&T did not comment, CAS did not comment.

Background:

Qwest relied on the opinion of an outside auditor of QCI's consolidated operations as evidence that QCI follows GAAP in all material respects. Qwest said the FCC had found such evidence about the parent company adequate in the Louisiana II 271 Order. AT&T stated that using QCI as the basis for a conclusion was not proper. QCC is a small part of the parent company's operations, most of which have no bearing on QCC operations. Thus, an evaluation of materiality should be limited to QCC transactions not the consolidated operations of its parent. Moreover, all errors and discrepancies should be reported.

The Facilitator notes that the focus of the independent audits to which Qwest refers is overall results, not the activities of small units. The test procedures employed in the audit may not have encompassed a sufficient sample of QCC activity to be of value as a record for evaluation of materiality. As for judging materiality, AT&T's implicit standard of

perfection is too rigid. Therefore, the examination ordered in Issue 1 shall include materiality, but the universe shall be QC-QCC transactions.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

3. Documentation

Report page 56, Qwest did not comment, AT&T did not comment, CAS did not comment.

Background:

AT&T said QC ceased posting to its website material disclosure information regarding Section 272 in January 2000. The information cited includes service agreements, work and task orders issued under those agreements, and details of transactions related to the agreements and orders. The absence of the information, AT&T asserted, means there is not a sufficient audit trail from January 2000 until April 2001.

The Facilitator notes that the absence of the transaction details is not troubling as the purpose is not to aid an audit, but rather to assist third parties in deciding if they want to use the services provided to Qwest affiliates. The required information for an audit can exist elsewhere. The examination required in Issue 1 should be sufficient to test

consistency of what is purported to be offered to affiliates with what actually is provided. That examination is adequate for dealing with the concerns raised by AT&T.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

4. Internal Controls

Report page 57, Qwest did not comment, AT&T did not comment, CAS did not comment.

Background:

AT&T relied on its argument that Qwest has not performed accrual and billing in a timely manner as evidence that Qwest does not have adequate controls over its Books and Records.

The Facilitator notes that the examination will address this element as it does the others.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

5. Separate Charts of Accounts

Report page 58, Qwest did not comment, AT&T did not comment, CAS did not comment.

Background:

AT&T found Qwest to be slow in providing charts of accounts for QC, QCC, and QLD. The accounts were found to satisfy the separateness criterion. AT&T maintained the slow response demonstrated a lack of diligence in compliance.

The Facilitator notes that the charts were found to exist and to be separate, which is what matters.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

6. Separate Accounting Software

Report page 58, Qwest did not comment, AT&T did not comment, CAS did not comment.

Background:

AT&T said QC and QLD may not be using separate accounting software. Moreover, Qwest's assertion that one affiliate cannot gain access to another is in question because

one billing transaction had been found to be reversed, implying one code worked for both Qwest entities.

The Facilitator notes that there is no requirement that accounting software be separate. Moreover, AT&T has since acknowledged other evidence shows the software of the affiliates is separate. The reversal of a billing transaction does not demonstrate one Qwest entity can make entries while posing as another entity, which would be a problem.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

C. Separate Officers, Directors, and Employees

1. Routine Employee Transfers

Report page 59, Qwest comments page 10, AT&T did not comment, CAS did not comment.

Background:

AT&T says there has been a “revolving door atmosphere” as employees have moved between QC and QCC or QLD. AT&T states this movement has subverted the intent of having separate officers, directors, and employees. Qwest said simultaneous employment is banned, not movement between affiliates. Fewer than 100 employees had moved between QC and the long-distance affiliates. Qwest also said it has taken steps such as

requiring employees leaving the 272 affiliate to return assets and documents, be reminded of nondisclosure rules, inform employees of disciplinary consequences for violating the separateness rules, and physically separate the offices of the affiliates.

The Facilitator notes that constant movement of employees between Qwest entities could compromise independence of operations, but the identified movement of 100 employees out of several thousand is not evidence of unusual transfer rates. Qwest's other steps are sufficient to create a climate for independent operations. The biennial audit is one mechanism that will monitor the implementation of this promise of independence.

Analysis:

- The Facilitator's conclusion was not challenged.

Further Analysis:

- At page 45 of the transcript, Chairman Ellenbecker asked Mr. Munn to explain the Company's position with regard to this issue.
- Mr. Munn responded in part by noting that the FCC has rejected the contention that sharing services between a BOC and its 272 affiliate would undermine the separate employee requirement. He also noted that as an additional safeguard designed to prevent abuse, all sharing activities are posted on the internet, so the information is publicly available.

Recommendation:

QSI agrees with the Facilitator's conclusion.

2. 100 Percent Usage

Report page 60, Qwest comments page 11, AT&T did not comment, CAS did not comment.

Background:

AT&T asserts QC has assigned many employees to full-time duty with the 272 affiliates. Qwest says such assignments are the result of acceptable sharing of services between the affiliates. Qwest says the assignments are not open-ended, and usually are related to specified periods or projects. Qwest has adopted a new policy prohibiting any employee from having such assignments more than four months in twelve.

The Facilitator notes that service sharing is allowed, as Qwest maintains. It represents opportunities for economies of scale for Qwest, so it also makes business sense to engage in assigning employee time to different affiliates. Only when such assignments are long-lasting are they an indication of impropriety. Qwest's four-month limit in any twelve months is an acceptable rule. Future monitoring can confirm whether Qwest is in compliance with the 4-month rule..

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

3. Award Program Participation

Report page 61, Qwest comments page 11, AT&T did not comment, CAS did not comment.

Background:

AT&T said incentive programs for employees had resulted in employees formerly assigned to the long-distance affiliate receiving awards after they went to work for QC. Furthermore, QC team awards emphasized customer referrals and cost-saving ideas and included QLD employees as among those eligible for the awards. Qwest said the FCC had rejected prohibiting such intertwined compensation.

The Facilitator notes that the FCC said overall performance of a parent company is an acceptable component in compensation packages for employees of different affiliates. If such programs create incentives for anti-competitive behavior or misuse of information, further inquiry is in order. Rewards for making referrals to affiliates as well as the unit of primary employment do not create such incentives for Qwest employees.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

4. Comparing Payroll Registers

Report page 62, Qwest did not comment, AT&T did not comment, CAS did not comment.

Background:

Qwest argues that a comparison it performed of payroll registers for QC and the 272 affiliates showed no overlap. AT&T responded that such comparisons had been undertaken only recently, so there is an insufficient history on which to base a finding of compliance.

The Facilitator notes that there is no evidence that payroll register comparison have been ongoing for any length of time. Qwest's performance of the comparison is evidence it understands it has an obligation conduct such comparisons as a means of detecting prohibited simultaneous employment. The biennial audit will test whether Qwest continues to meet this obligation.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

5. Separate Payroll Administration

Report page 63, Qwest did not comment, AT&T did not comment, CAS did not comment.

Background:

AT&T said that QC's providing payroll administration to QCC compromises the required operating independence. Qwest asserted that separate payroll administration is not a requirement, but that offering payroll administration at the same terms and conditions as provided to QCC is, and that QC is doing so. AT&T said QC also conducts recruiting for QCC and that it was further evidence of non-independence.

The Facilitator notes that as stated previously, sharing common services is good business practice and not prohibited by the Act.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

6. Officer Overlap

Report page 63, Qwest comments page 12, AT&T did not comment, CAS did not comment.

Background:

Qwest said an individual who had been an officer of QCC gave up that status on March 26, 2001, the date QCC became the 272 affiliate. The individual has since been an employee and officer of QSC and a director of QC.

The Facilitator notes that no simultaneous employment or involvement has been shown. Movement between affiliates is not prohibited, and indeed is expected after mergers.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

D. Transaction Posting Completeness

1. Posting Billing Detail

Report page 64, Qwest comments page 12, AT&T did not comment, CAS did not comment.

Background:

AT&T charged that Qwest's decision to stop website posting of the details of transactions violated the requirement that BOC transactions with its affiliates be "reduced to writing and available for public inspection." Qwest said posting of agreements and work orders were adequate. Parties willing to sign non-disclosure agreements could inspect the details of the transactions. The FCC, Qwest said, had agreed when it did not require SBC to make such postings.

The Facilitator notes that the posting requirement is intended to accomplish two goals. The first is to enable CLECs to have enough information to make business

decisions concerning using Qwest services. Transaction detail is not necessarily needed for this purpose. The ordered examination under Books and Records will evaluate the sufficiency of Qwest postings.

The second purpose of transaction detail posting is to allow audits or other formal examinations to be conducted. Again, a public posting is not necessary to satisfy this requirement. The non-disclosure agreement requirement is justified.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

2. Initiation of the Posting of QCC Transactions

Report page 66, Qwest did not comment, AT&T did not comment, CAS did not comment.

Background:

Qwest argued QCC became subject to 272 posting requirements upon the date of its designation as the long-distance affiliate, March 26, 2001. AT&T asserted January 1, 2001, was the date. Thus, Qwest's failure to post from then until March 26, 2001, constituted non-compliance. AT&T also argued July 2000 was a date posting should have begun, and the when QLD was the affiliate, posting did not begin until September 1998, two years after it should have.

The Facilitator notes that Qwest has met the obligations. It is now posting for its designated 272 affiliate. AT&T's assertions that earlier posting was required are not supported by law.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

3. Indefinite Service Completion Dates

Report page 67, Qwest did not comment, AT&T did not comment, CAS did not comment.

Background:

AT&T said transaction postings must have the time span or estimated completion date of a project. Some Qwest postings have indefinite completion dates. Qwest said that was because the service offerings are ongoing for an indefinite period.

The Facilitator notes that it is common for commercial agreements to have indefinite terms. There is no basis for finding that the FCC or the Act intended for Qwest and other BOCs to be precluded from offering such terms.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

4. Verifications

Report page 68, Qwest did not comment, AT&T did not comment, CAS did not comment.

Background:

AT&T said its evidence showed Qwest did not have an officer sign required certificates for transaction information in 1998 and 1999, and that the wrong officer signed for QC in March 2001. Qwest said its failure to have signed certificates in 1998 and 1999 were due to a misunderstanding of the 272 requirement, which it thought applied only after a filing of a 272 application. The incorrect signature was due to a vacancy in a position and was replaced.

The Facilitator notes that QC currently recognizes its obligation to have signed verification certificates, so its past practices are not an issue. The improper signing in 2001 is an issue. It likely came about because of the transition Qwest was making in its designated 272 affiliate. Thus, the Books and Record examination ordered should determine if Qwest has put appropriate controls in place in the intervening interval to prevent the error from recurring.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

F. Non-Discrimination

Report page 69, Qwest comments page 15, AT&T did not comment, CAS did not comment.

Background:

Qwest cannot discriminate in favor of its 272 affiliate. AT&T says Qwest has allowed its 272 affiliate to make late payments. AT&T also says QCC may receive preferred treatment in obtaining information, establishing interconnection, access to OSS, and more.

The Facilitator notes that AT&T's objections have been dealt with in other parts of the Multistate Workshops and Reports.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

G. Compliance with FCC Accounting Principles

Report page 70, Qwest did not comment, AT&T did not comment, CAS did not comment.

Background:

AT&T states the examples of non-compliance it has identified also show non-compliance with FCC accounting principles.

The Facilitator notes that this issue has been dealt with satisfactorily in the Books and Records provision. Qwest was found in compliance with GAAP, which is sufficient.

Analysis:

- The Facilitator's conclusion was not challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

TRACK A

Track A refers to the presence of facilities-based competitors in a BOC state.⁷ The FCC has identified in the Ameritech Michigan Order four elements for the Track A provision. They are addressed in the following pages.

Track A and the public interest requirement were addressed by some of the same testimony. Consideration of the public interest has been deferred to the QPAP Report, so it will play no part in the Group 5 Report.

A. Existence of Binding, Approved Interconnection Agreements

Report page 72, Qwest comments page 4, AT&T did not comment, CAS comments page 2.

Background:

The requirement is that the BOC have signed one or more interconnection agreements. The FCC has stated that agreements approved under negotiation and arbitration terms of Section 252 of the Act are considered binding for the purposes of Track A. Such agreements specify the rates, terms, and conditions under which the BOC will provide access and interconnection. Qwest showed that as of April 30, 2001, it had a total of 52 interconnection agreements in Wyoming. The agreements included 22 wireline, 11 wireless, paging and EAS, and 19 resale-only. Whether all these agreements are with CLECs still operating is in some dispute, but there is no dispute that there are several binding interconnection agreements in effect in Wyoming.

⁷ BOCs have the option of meeting either Track A or Track B in a Section 271 application. Track B can apply only when no competitors are present. Qwest has selected Track A as the requirement with which it will comply.

The Facilitator notes that Qwest has met the Track A requirement of having one or more binding agreements in place in Wyoming.

Analysis:

- The Facilitator's conclusion was not challenged.

Further Analysis:

- At page 183 of the transcript, Ms. Young says that under Qwest's current agreements, that it can not demonstrate that going forward on Track A is in the public interest. Ms. Young noted that she would likely discuss this more at the December 10 oral argument. The Commission may want to refer to that transcript before making a final decision.
- Ms. Young believes that Qwest does not "in any way shape or form" qualify under at least two of the three required elements.

Recommendation:

QSI agrees with the Facilitator's conclusion. However, the Commission may want to review the 12/10/01 transcripts to review Ms. Young's additional comments.

B. Provision of Access and Interconnection to Competitors

Report page 73, Qwest comments page 6, AT&T did not comment, CAS comments page 2.

Background:

Qwest has to be providing interconnection to unaffiliated CLECs in a state. No geographical or market share provisions are part of the requirement.

The Facilitator notes that Qwest presented un rebutted evidence it has leased 25,163 unbundled loops in Wyoming spread among a total of 6 CLECs, thus meeting the requirement.

Analysis:

- The Facilitator's conclusion was not specifically challenged.

Recommendation:

QSI agrees with the Facilitator's conclusion.

C. Existence of Competing Residential and Business Service Suppliers

1. Market Share of Competing Providers

Report page 74, Qwest comments page 7, AT&T comments page 3, CAS comments page 2.

Background:

The FCC has said the number of customers served by CLECs in a state has to be more than a *de minimis* number and include both residential and business customers. AT&T argued the FCC has said in the Ameritech Michigan Order that the CLEC offering has to be an actual commercial alternative. AT&T said CLECs have lines serving very few customers, 0.3 percent of the overall population of the Qwest region.

The Facilitator notes that AT&T's method of calculating CLEC market share for the Qwest region is unsound. Residential lines or some other factor other than population should be the denominator. Moreover, the FCC said in the Ameritech Michigan Order

that a CLEC need not serve any minimum market share to be considered a competing provider. The FCC also has approved an SBC 271 authority application in Oklahoma where CLECs had an estimated 5.5 percent of the lines in SBC's service territory. With no market share test, it can be concluded that Qwest has met this provision.

Analysis:

- AT&T argues that the residential penetration in Wyoming is clearly *de minimus*.
- AT&T joins the Consumer Staff in arguing that the Facilitator's reliance upon the presence of Silver Star in Afton is misplaced. Both AT&T and the CAS encourage the Commission to review the Reply Brief of the Wyoming Consumer Advocate Staff regarding this matter.
- AT&T also notes that the Facilitator did not address the concerns raised by the CAS on the record in this proceeding.

Further Analysis:

- Ms. Young remained unconvinced that there is really facilities-based competition in Wyoming. She further states at page 187 of the transcript that Qwest should carry that burden, but has failed to do so. Ms. Young does not provide specifics with respect to where the failure has occurred, but rather directs the Commission to review the criticism of Mr. Tietzel's estimation methodology.
- QSI notes that the standard set by the FCC is ambiguous, and subject to differing interpretations. The arguments surrounding the methodologies used detract from the real issue.

Recommendation:

QSI withholds recommendation pending a further discussion of this matter during deliberations. While Ms. Young indicates problems, she does not get into specifics.

Here arguments would be much stronger if the Commission had some specific allegations to review.

2. Estimates of Bypass Lines

Report page 76, Qwest comments page 7, AT&T comments page 4, CAS comments page 2.

Background:

Qwest presented estimates of residential and business end users served by facility bypass for each state as of April 30, 2001. The totals for Wyoming are 42 residential lines and 797 business lines. Qwest said it had to use estimates because CLECs would not release their line counts, citing confidentiality.

Qwest's estimation method begins with the number of ported numbers. Qwest has an exact count for this measurement. It also says it is a valid number to use because numbers are ported only when a CLEC serves a customer over its network with the same telephone number or over a loop leased from Qwest. Qwest divided the ported telephone numbers by 2, assuming that CLECs served only half the telephone numbers ported to them. It then subtracted lines obtained as CLEC UNEs from the result to avoid double counting. Qwest obtained the residential and business estimates by assuming residential customers are 5 percent of the resulting number and business customers are 95 percent. Qwest says the method is conservative, producing much lower estimates in each category of customer than an SBC method accepted by the FCC in its Kansas/Oklahoma proceeding.

AT&T criticized Qwest's estimating method, saying no relationship between ported numbers and CLEC customers had been demonstrated.

The Facilitator notes that Qwest reliance on estimates for line counts is necessary because it cannot gain the cooperation of CLECs. In addition, the FCC has accepted the use of estimates in successful 271 applications. Moreover, where Qwest has firm numbers, such as UNE loops, it incorporates them into its estimation methods. No party provided evidence that Qwest's use of ported numbers in its estimates is unwarranted. The estimate was conservative because it did not allow for CLEC customers who do not port numbers and it cut the number in half to allow for departures of customers from CLECs, a substantial reduction for which no party offered an alternative. Criticisms that the claim of conservative outcomes is an admission of inaccuracy are off the mark. The method is imperfect, but it is not unreasonable. Moreover, Qwest corrected its arithmetical inconsistencies when identified and no party offered persuasive evidence to the contrary. The specific allocation of customers between residential and business is crude. As such it must be supported by actual evidence that residential service is being provided in states. Many CLECs said in response to Qwest discovery that they are providing only business service.

Analysis:

- AT&T begins its criticism of the Facilitator's conclusion by once again calling into question the ability of the Facilitator to make unbiased decisions, saying that the Facilitator has a "predilection for Qwest's overall position in these proceedings".
- AT&T notes that Qwest's methodology for estimating CLEC facilities-based line counts is inherently unreliable because there is no statistical link between ported

- numbers and CLEC-owned facilities. It is not up to AT&T to provide a better or more reliable methodology; that is Qwest's obligation, and it has failed to do so.
- AT&T also notes that Qwest has repeatedly changed the methodology it uses for estimating CLEC facilities-based line counts as this debate has moved from forum to forum, and these changes have manipulated the results derived, and that moreover, Qwest has repeatedly attempted to confound and confuse reasonable attempts to refute those results by, *inter alia*, omitting important inputs from its direct case, and then supplying those inputs only in its rebuttal.
 - Finally, AT&T argues that applying the SBC method used in Kansas and Oklahoma to other states—and specifically to the seven states at issue here—is not appropriate because the results achieved are inflated.

Further Analysis:

- Mr. Munn at page 79 of the transcript notes that Mr. Antonuk chastised AT&T saying that its arguments with respect to this issue “stretched the limits of proper advocacy”.
- Mr. Munn goes on to say that the CAS allegation that the McLeod evidence presented by Qwest should be discounted should be rejected. Qwest has presented evidence that McLeod and Qwest do have an interconnection agreement, and that McLeod is in fact providing retail service via UNE-P.
- Mr. Munn at page 80 goes on to provide reasons why the Commission should reject other AT&T and CAS arguments.

Recommendation:

QSI withholds recommendation pending the oral phase of this proceeding.

3. Number of CLECs serving End Users (Numbered 4 in the Report)

Report page 80, Qwest did not comment, AT&T did not comment 4, CAS comments page 2.

Background:

Qwest showed state by state the CLECs and the services it believes they are providing under interconnection agreements. The Wyoming data shows three CLECs, one of which is confidential. The other two are Silver Star (operating in Afton and Jackson with its own facilities), and McLeodUSA (operating in Cheyenne and Casper).

The Facilitator concludes the Track A requirement is met in Wyoming.

Analysis:

- The Facilitator's conclusion was challenged by CAS and AT&T. (See above).

Further Analysis:

- See CAS and AT&T arguments above.

Recommendation:

QSI agrees with the Facilitator's conclusion.

D. Existence of Facilities-Based Competitors

Report page 80, Qwest did not comment, AT&T did not comment 4, CAS comments page 2.

Background:

The requirement is that it be determined if CLECs are using CLEC facilities or such facilities in combination with resale. CLECs using UNEs in whole or in part are said to be using their own facilities.

The Facilitator notes that the conclusion is the same as for the preceding issue.

Analysis:

- The Facilitator's conclusion was not specifically challenged.

Further Analysis:

- See CAS and AT&T arguments above.

Recommendation:

QSI agrees with the Facilitator's conclusion.

NOTE: CAS arguments were not specific, but should be considered in the Commission's decision is each of the Track A issues.