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OPEN MEETING AGENDA ITEM

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BEFORE THE ARIZONA CORPORATION COMMISSION

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ARIZONA CORPORATION COMMISSION
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**IN THE MATTER OF U S WEST
COMMUNICATIONS, INC.'S
COMPLIANCE WITH § 271 OF THE
TELECOMMUNICATIONS ACT OF 1996**

Docket No. T-00000A-97-0238
**AT&T'S OFFER OF
SUPPLEMENTAL AUTHORITY
REGARDING CHECKLIST ITEM 2
AND PUBLIC INTEREST**

AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively, "AT&T") submit this offer of supplemental authority in connection with checklist item 2 and the public interest portion of Qwest Corporation's ("Qwest") application for section 271 authority under the Telecommunications Act of 1996.

Throughout the course of these proceedings, AT&T has explained the need to include language on comprehensive testing in Qwest's Statement of Generally Available Terms and Conditions ("SGAT"). AT&T has demonstrated that Qwest has engaged in a variety of strategies, and utilized numerous ploys, to frustrate AT&T's ability to perform comprehensive testing under the terms of its Interconnection Agreement in Minnesota. Qwest's behavior is limited only by the imagination of its management.

The Administrative Law Judge ("ALJ") in her Recommended Order on Checklist Item 2, Disputed Issues 1c-d, discusses the need to include AT&T's proposed comprehensive testing language in the SGAT, and the ALJ directs the parties to, once more, negotiate language on comprehensive testing. If the parties cannot agree, the Staff

is instructed to provide its own recommendation for comprehensive testing language. AT&T did not file exceptions on this issue because it had provided its reasons for the need for adopting its proposal, and those reasons were generally set forth in the ALJ's Recommendation.

Judge Mihalchick, the Administrative Law Judge in the Minnesota complaint case¹ has issued his Findings of Fact, Conclusions of Law, and Recommendation, attached hereto as Exhibit A. The recommended decision was handed down February 22, 2002, in connection with a complaint initiated by AT&T against Qwest for, *inter alia*, violation of the interconnection agreement between the parties, and Qwest's failure to provide adequate systems testing in accordance with the terms and conditions of that interconnection agreement.

The recommended decision contains a detailed discussion of the facts of the case, and concludes that:

Qwest committed a knowing, intentional, and material violation of its obligation to engage in cooperative testing under §14.1 of the Interconnection Agreement by its refusal to conduct AT&T's UNE-P test from September 14, 2000, to May 11, 2001. Such action also constitutes a knowing and intentional refusal to provide a service, product, or facility to a telecommunications carrier in accordance with a contract under Minn. Stat. §237.121(a)(4). Qwest is therefore subject to penalties under Minn. State. §237.462, subd. 1, (1) and (3).

Qwest failed to act in good faith and committed knowing, intentional, and material violations of its obligations to act in good faith under the Interconnection Agreement and under Section 251(c)(1) of the Act by the following conduct:

- a) Creating a specious position to support its refusal to conduct AT&T's UNE-P test, when that refusal was actually based upon what Qwest saw as an assault against its 271 initiative and by its desire to prevent or delay AT&T from conducting a true market entry test – both pure retail business interests of Qwest.

¹ See Judge Rodda's Recommended Order, para. 40.

is instructed to provide its own recommendation for comprehensive testing language. AT&T did not file exceptions on this issue because it had provided its reasons for the need for adopting its proposal, and those reasons were generally set forth in the ALJ's Recommendation.

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a) Creating a specious position to support its refusal to conduct AT&T's UNE-P test, when that refusal was actually based upon what Qwest saw as an assault against its 271 initiative and by its desire to prevent or delay AT&T from conducting a true market entry test – both pure retail business interests of Qwest.

¹ See Judge Rodda's Recommended Order, para. 40.

b) Imposing its position regarding its testing obligations upon AT&T, whether specious or correct, without informing AT&T, by delaying AT&T's opportunity to challenge that position, by concealing its true intent to allow only certification testing, and by attempting to avoid and by delaying the UNE-P test by engaging AT&T in long and unnecessarily difficult negotiations over UNE-P testing that Qwest never intended to allow. These deceptions continued from September 14, 2000, until April 6, 2001, when Qwest filed its Answer and counterclaim declaring openly for the first time that it would not do the UNE-P test unless AT&T demonstrated to its satisfaction that it had legitimate business plans to enter the market.

c) Sending the letter of August 29, 2001, to AT&T making false and misleading statements.

Such actions also constitute knowing and intentional failure to disclose necessary information under Minn. Stat. §237.121(a)(1). Qwest is therefore subject to penalties under Minn. Stat. §237.462, subd. 1, (1), (3) and (4).

See Findings of Fact, Conclusions of Law, and Recommendation, *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc., Against Qwest Corporation*, Office of Administrative Hearings for the Minnesota Public Utilities Commission, OAH Docket No. 12-2500-14262-2, MPUC Docket No. P-421/C-01-391, issued February 22, 2002, at p. 33 (paragraphs 13 and 14 of Conclusions of Law section), attached here as Exhibit A.

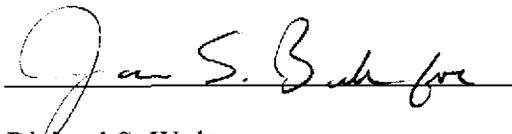
The recommended decision goes on to emphasize that Qwest's violations were continuous and on-going. The ALJ also found that the violations were knowing and intentional, and are characterized as "a continuing pattern of conduct." See Exhibit A, at 34. The ALJ also found that, during the course of the proceedings on the complaint, Qwest *deliberately fabricated evidence* in an attempt to assert that AT&T did not intend to enter the local exchange market in Minnesota. *Id.* at 30.

These findings not only demonstrate an on-going pattern of anticompetitive behavior on the part of Qwest, they also show Qwest's willingness to prevaricate, thereby interfering with any regulatory commissions ability to determine the true facts at hand. Qwest's behavior here has been less than admirable, and it demonstrates a compelling need to adopt AT&T's language on comprehensive testing, *without the need for any further negotiation*. AT&T further submits that this showing is *predictive of future behavior*, and that it is *not in the public interest* at this time for Qwest to receive a favorable recommendation on its application for section 271 approval.

WHEREFORE AT&T renews its request that this Commission a) adopt AT&T's recommended language on comprehensive testing , and b) enter a finding that a grant of Qwest's 271 application is not in the public interest.

Respectfully submitted this 6th day of March 2002.

**AT&T COMMUNICATIONS
OF THE MOUNTAIN STATES, INC.,
AND TCG PHOENIX**

By: 

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CERTIFICATE OF SERVICE

I hereby certify that the original and 10 copies of AT&T's Offer Of Supplemental Authority Regarding Checklist Item 2 And Public Interest on behalf of AT&T Communications of the Mountain States, Inc. and TCG Phoenix, regarding Docket No. T-00000A-97-0238, were hand delivered this 6th day of March, 2002, to:

Arizona Corporation Commission
Docket Control – Utilities Division
1200 West Washington Street
Phoenix, AZ 85007

and that a copy of the foregoing was hand-delivered this 6th day of March, 2001 to the following:

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and that a copy of the foregoing was sent via United States Mail, postage prepaid, on the 6th day of March, 2002 to the following:

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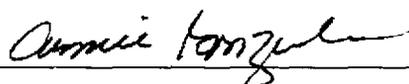
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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Complaint of AT&T
Communications of the Midwest, Inc.
Against Qwest Corporation

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Hearings in this matter were conducted on July 9-11 and July 26-27, 2001, by Administrative Law Judge Steve M. Mihalchick in the Small Hearing Room of the Minnesota Public Utilities Commission, 200 Metro Square Building, 121 East 7th Place, St. Paul, Minnesota. The record was closed October 1, 2001, upon receipt of supplemental affidavits from Qwest and AT&T.

Mary B. Tribby, AT&T, 1875 Lawrence Street, 15th Floor, Denver, Colorado 80202 and W. Patrick Judge, Briggs & Morgan, P.A., 332 Minnesota Street, Suite W-2200, St. Paul, Minnesota 55101, appeared on behalf of AT&T Communications of the Midwest, Inc. (AT&T). Jason D. Topp, Qwest Corporation, 200 South Fifth Street, Room 395, Minneapolis, Minnesota 55402 and Robert E. Cattnach, Dorsey & Whitney, 50 South 6th St., Minneapolis, Minnesota 55402, appeared on behalf of Qwest Corporation (Qwest). Steven H. Alpert and Peter R. Marker, Assistant Attorneys General, Minnesota Attorney General's Office, 525 Park Street, Suite 200, St. Paul, Minnesota 55103, appeared for the Department of Commerce (the Department or DOC).

ISSUES

1. Did Qwest's position that AT&T intended to use AT&T's proposed UNE-P testing only for the purpose of opposing Qwest's Section 271 application, and not for market entry evaluation or preparation, relieve Qwest of its legal obligation to cooperate in such testing? The Administrative Law Judge concludes that it did not.

2. Did Qwest knowingly and intentionally violate the Interconnection Agreement and state and federal law in its dealings with AT&T regarding UNE-P testing? The Administrative Law Judge concludes that it did, from mid-September 2000 to mid-May 2001.

3. Did Qwest engage in anti-competitive behavior in its dealings with AT&T and the UNE-P testing? The Administrative Law Judge concludes that it did, from mid-September 2000 to mid-May 2001.

4. Did AT&T knowingly and intentionally violate the Interconnection Agreement and state and federal law in its dealings with Qwest regarding UNE-P testing? The Administrative Law Judge concludes that it did not.

5. Should a penalty be considered by the Commission? The Administrative Law Judge concludes it should and recommends that a penalty of \$1,195,000 be imposed upon Qwest.

NOTICE

Notice is hereby given that pursuant to Minnesota Statute § 14.61, and the Rules of Practice of the Public Utilities Commission and the Office of Administrative Hearings, exceptions to this report, if any, by any party adversely affected must be filed within twenty (20) days of the mailing date hereof or such other date as established by the Commission's Executive Secretary or as agreed to by the Parties with the Commission's Executive Secretary.

Questions regarding filing of exceptions should be directed to Dr. Burl Haar, Executive Secretary, Minnesota Public Utilities Commission, Suite 350 Metro Square, 121 Seventh Place East, St. Paul, Minnesota 55101. Exceptions must be specific and stated and numbered separately. Oral argument before a majority of the Commission will be permitted to all parties adversely affected by the Administrative Law Judge's recommendation who request such argument. Such request must accompany the filed exceptions or reply, and an original and 14 copies of each document should be filed with the Commission.

The Minnesota Public Utilities Commission will make the final determination of the matter after the expiration of the period for filing exceptions as set forth above, or after oral argument, if such is requested and had in the matter.

Further notice is hereby given that the Commission may, at its own discretion, accept or reject the Administrative Law Judge's recommendation and that said recommendation has no legal effect unless expressly adopted by the Commission as its final order.

Based upon the record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

The Interconnection Agreement

1. Section 251(c) of the Telecommunications Act of 1996 (the Act) requires incumbent local exchange carriers (ILECs) to provide competitive local exchange carriers (CLECs) with interconnection, access to unbundled network elements (UNEs), and collocation "on rates, terms and conditions that are just, reasonable and nondiscriminatory. . . ." Section 251(c)(1) requires ILECs and CLECs to negotiate agreements in good faith regarding these obligations.

2. In 1997, AT&T and Qwest's predecessor, U S WEST Communications (USWC), executed an interconnection agreement (the Interconnection Agreement) that was approved by the Commission. Section 14.1 of the Interconnection Agreement contains several provisions concerning "Cooperative Testing", including the following:

14.1 Cooperative Testing

14.1.1 Definition

Cooperative Testing means that USWC shall cooperate with AT&T upon request or as needed to: (a) ensure that the Network Elements and Ancillary Functions and additional requirements being provided to AT&T by USWC are in compliance with the requirements of the Agreement; (b) test the overall functionality of various Network Elements and Ancillary Functions provided by USWC to AT&T in combination with each other or in combination with other equipment and facilities provided by AT&T or third parties; and (c) ensure that all operational interfaces and processes are in place and functioning properly and efficiently (I) for the provisioning and maintenance of Network Elements and Ancillary Functions, and (II) so that all appropriate billing data can be provided to AT&T.

- 14.1.2.1 USWC shall provide AT&T, for testing purposes, access at any interface between a USWC Network Element or Combination and AT&T equipment or facilities. Such test access shall be sufficient to ensure that the applicable requirements can be tested by AT&T. This access shall be available seven (7) days per week, twenty-four (24) hours per day.
- 14.1.2.2 AT&T may test any interfaces, Network Elements or Ancillary Functions and additional requirements provided by USWC pursuant to this Agreement.
- 14.1.2.5 USWC shall provide AT&T upon request any applicable test results from USWC testing activities on a Network Element, Ancillary Function, Additional Requirement or the underlying equipment providing AT&T a Network Element, Ancillary Function or Additional Requirement. AT&T may review such testing results and may ask USWC to rectify any deficiencies that are detected.
- 14.1.2.7 Upon AT&T's request, USWC shall provide technical staff to meet with AT&T representatives to provide required support for Cooperative Testing.
- 14.1.2.12 USWC shall participate in Cooperative Testing upon AT&T's request to test any operational interface or process used to provide Network Elements, Ancillary Functions or services to AT&T.

14.1.2.13 AT&T and USWC shall endeavor to complete Cooperative Testing expeditiously.

14.1.2.15 USWC shall participate in Cooperative Testing whenever it is deemed necessary by AT&T to ensure service performance, reliability and customer serviceability.¹

3. The Interconnection Agreement also has a provision relating to good faith of the parties and the obligation to negotiate further when necessary, as follows:

SCOPE OF AGREEMENT

In the performance of their obligations under this Agreement, the Parties shall act in good faith and consistently with the intent of the Act. Where notice, approval or similar action by a Party is permitted or required by any provision of this Agreement (including, without limitation, the obligation of the Parties to further negotiate the resolution of new or open issues under this Agreement), such action shall not be unreasonably delayed, withheld or conditioned.²

4. Summarizing § 14.1, Qwest must cooperate in testing when a test is requested or necessary and when it is for one or more of the purposes specified. AT&T and the Department acknowledge that there is also a requirement that the test be reasonable.

UNE-P and OSS

5. Under the Act, a CLEC may choose to provide local telephone service in an area by leasing all of the network elements needed to provide local telephone service from an ILEC. This is known as the Unbundled Network Element Platform (UNE-P)³. It includes all the elements of each loop to every customer of the CLEC, as well as all the switching and support services the ILEC uses to provide service to those customers. Thus, the CLEC is totally dependent upon the ILEC's performance on behalf of the CLEC in delivering the local service to the CLEC's customers. Although it is composed of unbundled network elements, the UNE-P is itself considered an unbundled network element.

6. UNE-P, like all leased network elements, is ordered through the ILEC's Operations Support System (OSS). The CLEC also links to the ILEC's OSS for receiving billing information and to request repair and maintenance activities for the ILEC's customers.

¹ Ex. 1031.

² Ex. 1032.

³ Hearing Transcript (Tr.) 605-06; 734.

7. Qwest provides three OSS interfaces that CLECs may use: IMA GUI (Intermediated Access, Graphical User Interface), IMA EDI (Intermediated Access, Electronic Data Interface), and faxes sent to Qwest's IIS fax imaging system.⁴

8. With the GUI, a CLEC representative first types the order from its customer into the CLEC's own computer system. Then the CLEC representative retypes the same order into Qwest's systems over the GUI, which is similar to a web page.⁵ EDI involves less manual data entry. With EDI, the CLEC representative types an order from a customer into the CLEC's system. The CLEC's system then converts it into a format that Qwest's EDI systems can read and transmits it to Qwest's EDI system, perhaps batched with other orders.⁶ It is expensive for a CLEC to design and purchase the hardware and software necessary to communicate with Qwest's systems over the EDI,⁷ but the order volumes anticipated if AT&T were to enter the market using UNE-P can only be handled with the EDI; using the GUI or fax methods would not be feasible.

9. When GUI and EDI orders are sent to Qwest's OSS, they either "flow through" electronically or "drop out" for human intervention on Qwest's end. Human intervention creates more errors because service representatives must perform repetitive typing tasks.⁸

10. The Qwest IMA EDI is relatively new and its use, particularly for ordering UNE-P, has not been fully tested under market conditions. Prior to February 2001, Qwest had not received any UNE-P orders through the EDI interface. From February through May 2001, Qwest processed a total of 29 orders via EDI, none of which flowed-through.⁹ In May 2001, 3 of 22 orders (approx. 14%) flowed through.¹⁰

The UNE-P Test, 1-2-3 Test, and ROC Test

11. The UNE-P test at issue in this matter was designed by Edward Gibbs, an AT&T Division Manager in charge of "national friendlies testing," and two other AT&T employees.¹¹ The test they intended for Minnesota was the same as the UNE-P tests that had been used with other ILECs.¹² Gibbs felt that the test had been validated over time and should not be changed.¹³ The UNE-P test uses 1000 residential lines installed at one AT&T location where all the lines can be tested and monitored by an AT&T technician. While 1000 lines is desired to assure validity, AT&T has run the test with fewer lines where necessary.¹⁴

⁴ Ex. 20.

⁵ Tr. 603-05.

⁶ Tr. 605.

⁷ Tr. 607.

⁸ Tr. 602-03.

⁹ Ex. 1023, p. 18.

¹⁰ *Id.*; Ex. 1023.

¹¹ Tr. 709.

¹² Ex. 46 at 142-43.

¹³ Ex. 46 at 72.

¹⁴ Ex. 46 at 59, 88, 107.

12. For a CLEC the size of AT&T and potential number of local service customers it would likely have in Minnesota, it was not unreasonable to test 1000 lines to simulate real-world commercial conditions.¹⁵ In New York, where AT&T offers local service using UNE-P, it has experienced ordering volumes of 8,000 UNE-P lines per day.¹⁶ In an internal e-mail written December 18, 2000, Eric Hyde of Qwest's Network Services wrote that he had some concern about the short time given to provision so many retail lines for the UNE-P test, but stated that Qwest must get to the point of being able to accommodate these volumes over time.¹⁷

13. Because AT&T was contemplating a residential offering of local service, it was important to Gibbs that residential lines be used in the UNE-P test to accurately simulate Qwest's actions in converting residential lines to UNE-P. Again, the need was valid and reasonable. Residential lines carry different USOC codes than business lines, so orders might be handled differently by Qwest systems.¹⁸ Likewise, different Qwest offices provision residential lines and business lines.¹⁹ It was reasonable to require residential test lines to simulate real world order processing.

14. It was also part of Gibbs' design that Qwest be "blind" to the test, that it not know what items would be tested, or at least in what numbers and combinations, so that Qwest systems would respond in a real-world manner using the systems and employees who would respond to similar orders normally.

15. To use the UNE-P test in Minnesota, Gibbs' team would create a database in which each line is given a fictitious name and suite number, along with a telephone number when assigned by Qwest.²⁰ At some point, the actual lines would be installed.

16. The next preliminary step in the UNE-P test process would be to perform certification testing. For Gibbs, and commonly in the industry, certification testing means the process of determining whether the ILEC and CLEC systems can communicate over the EDI interface, whether the CLEC system can place orders in conformance with the ILEC's business rules, and whether the ILEC system responds appropriately to the orders. Problems are corrected until the certifications are successful.²¹ For Gibbs' team, the major tasks in the certification phase are interpreting Qwest's business rules, coding them into the UNE-P test's gateway program, and correcting the code if testing and meetings with Qwest turn up errors.²²

¹⁵ Ex. 2088, p. 15.

¹⁶ Tr. 571, 1269-70.

¹⁷ Ex. 1014.

¹⁸ Tr. 668, 674; 802.

¹⁹ Tr. 56, 67, 1159.

²⁰ Tr. 721.

²¹ It is not necessary that either the AT&T or the Qwest computers communicating over the EDI be located in Minnesota.

²² Tr. 712-725.

17. Under Gibbs' design, only when certification is complete can the operational phase of the UNE-P test be started.²³ This part of the test places orders to Qwest in volumes large enough to simulate market levels adequately, assess Qwest's performance, and detect errors by either of them that only occur at operational levels.²⁴ This phase tests Qwest's systems and measures customer serviceability and service reliability. AT&T's Consumer Business Unit would then use the information gained as part of assessing market entry viability.²⁵

18. Once AT&T understands the Qwest EDI for testing purposes, it can also use it's understanding to develop the systems it will use for actual market entry and for placing orders from real customers over another EDI interface program rather than from its testing gateway program. However, Qwest revises it's EDI every several months, so changes are continual and some of the knowledge gained becomes dated before it can be used.

19. Because AT&T has reasonably deemed the UNE-P test necessary to ensure service performance, reliability, and customer serviceability, the UNE-P test falls squarely within the parameters established by § 14.1.2.15 of the Interconnection Agreement, as well as other sections.

20. Qwest offers an enhanced certification process to CLECs known as IMA EDI Production Readiness Testing. This test is used to assure that the CLEC and ILEC "systems can adequately 'talk' to each other both for normal and error conditions."²⁶ The test incorporates a three stage approach consisting of 1) connectivity testing, 2) interoperability testing, and 3) controlled production. Thus, it was referred to as the "1-2-3 test" or "normal three-step process" in this proceeding.

21. The "controlled production" stage of the 1-2-3 test carries it somewhat beyond a traditional "certification" test because it involves Qwest's downstream systems in actually processing the requests. Thus, it has the Qwest systems transmit additional information to the CLEC, such as firm order confirmations. It verifies the CLEC's ability to send valid transactions and requests, acknowledge transactions generated by Qwest, and display Qwest responses. Thus, it also verifies the CLEC's supporting business processes.

22. According to Lynn Notarianni, a Director in Qwest Information Technologies, Qwest has and will expand the controlled production phase to accommodate a CLEC's testing needs.²⁷ However, Qwest is willing to do so only to the extent Qwest feels is necessary, not to the extent the CLEC feels is necessary. Thus, with regard to AT&T's requested UNE-P test, she testified that the controlled production phase of the 1-2-3 test, "provides AT&T with the opportunity to accomplish a live-

²³ Tr. 723-725.

²⁴ Tr. 738-742.

²⁵ Tr. 732, 734, 777.

²⁶ Ex. 20 at 2.

²⁷ Tr. 306-08.

production environment test on a more limited but sufficient volume than being requested in the AT&T trial proposal.”²⁸

23. The tests to be run during the 1-2-3 test are selected by the CLEC, which provides a list of “scenarios” of things it desires to have tested to Qwest. Qwest then reviews the list and advises the CLEC of any corrections that must be made to the scenarios.²⁹

24. The purpose of the 1-2-3 test, including its controlled production step, is to test CLEC ability to communicate with and react appropriately to information received from the Qwest systems through the IMA EDI. It is not designed to and does not test any communication or production function performed by Qwest.³⁰ It is not a “blind” test for Qwest. It assumes that the Qwest systems function properly and is designed to assure that the CLEC systems can work with the Qwest systems.

25. Even though Qwest considers it to be “sufficient” as a live-production environment test for AT&T, the 1-2-3 test as designed and offered by Qwest provides only the preliminary “certification” portion of the UNE-P test requested by AT&T. It does not provide any testing of the ability of Qwest to respond to orders and provide services at volumes sufficient to approximate real market conditions that the UNE-P test is designed to test. Completing a scenario once successfully is not sufficient to simulate a market—it must be repeated many times to ensure that Qwest’s systems are likely to respond correctly substantially every time. The 1-2-3 test does not do that; AT&T’s UNE-P test does.

26. The 1-2-3 test fulfills only some of the requirements of cooperative testing available under the Interconnection Agreement. It partially fulfills the requirements of 14.1.1(c) and 14.1.2.12 for testing of interfaces and processes, but not under real market conditions. It does not fulfill the requirements of 14.1.1(a) and (b) and 14.1.2.2 for testing of network elements or the overall functionality of various network elements in combination with each other or in combination with other equipment and facilities provided by AT&T. AT&T’s UNE-P test does fulfill these requirements.

27. Under Qwest’s procedures, successful completion of the 1-2-3 test is sufficient to demonstrate that the CLEC can communicate properly with the Qwest systems and that the CLEC can then, if it so chooses, enter the market and place orders that Qwest will accept. Several CLECs have done so with certain products. AT&T itself has done so with Local Number Portability and Unbundled Loops.³¹ That, however, does not make it unreasonable for a CLEC to request additional testing to obtain reasonable assurance that Qwest can actually deliver the services and functions requested by the CLEC.

²⁸ Ex. 20 at 4.

²⁹ *Id.* And, see Ex. 21.

³⁰ Tr. 295; Ex. 21

³¹ Ex. 20.

28. A Regional Oversight Committee (ROC) has been established by 13 of the 14 states in Qwest's service territory, including Minnesota. The ROC has adopted a Master Test Plan to evaluate the operational readiness, performance and capability of Qwest to provide pre-ordering, ordering, provisioning, maintenance and repair, and billing OSS functionality to CLECs. The Master Test Plan, administered by KPMG Consulting, uses Hewlett-Packard to simulate a CLEC and conduct a third party test of the Qwest OSS (the ROC test).³²

29. The ROC test is now in progress. It executes "numerous" production transactions as test cases to validate that Qwest's systems and processes can support various product offerings, including UNE-P. It examines Qwest's end-to-end business processes and operations, including maintenance and repair, by executing 420 UNE-P test cases.³³ The ROC test is a "military-style" test, which means errors encountered on each run are corrected and the test case is repeated until it is passed.³⁴

30. The ROC test and the AT&T UNE-P test are different in structure and purpose. For example, the ROC test does not test AT&T's likely volumes; the use of Hewlett-Packard as a pseudo CLEC does not accurately simulate AT&T's practices; and the ROC test uses "virtual lines" instead of working lines.³⁵

31. The results of the ROC test are expected to be used by Qwest in its Section 271 applications to demonstrate successful performance of its OSS.³⁶ Qwest's 271 initiative is one its top priorities.³⁷

AT&T Decision to Test UNE-P

32. AT&T's Consumer Business Unit had developed business plans for UNE-P residential service offerings in a number of states. Thomas Pelto, AT&T's Vice President for Law and Government Affairs, had identified Minnesota to the Consumer Business Unit as a good state for UNE-P. Pelto based his recommendation upon previous Commission actions that he interpreted as the most favorable to UNE-P of all the states in Qwest's territory. After considering this information and other factors, the Consumer Business Unit decided to conduct a UNE-P test in Minnesota.³⁸

33. AT&T has done UNE-P testing and has entered the UNE-P market in a number of states not served by Qwest. In New York, AT&T offers local service using UNE-P and has 900,000 customers; in Texas it has 400,000.³⁹ On the other hand,

³² Ex. 24.

³³ Tr. 295-96; Ex. 20 and 24.

³⁴ Ex. 24 at 11.

³⁵ Tr. 622, 627-31, 823, 827, 1171, 1318, 1322, 1324; Ex. 2088 at 3-5.

³⁶ Ex. 24 at 13.

³⁷ Tr. 259.

³⁸ Tr. 1218.

³⁹ Tr. 1269-70.

AT&T has recently announced entry in one market before doing UNE-P testing of the sort proposed in this matter.⁴⁰

34. The information gained and problems corrected in the UNE-P test in Minnesota would be used by AT&T in any evaluating and making a UNE-P offering in Minnesota or other states in Qwest's territory. However, because AT&T had had difficulties in the past working with Qwest to resolve problems with Qwest's services, AT&T also intended to use the UNE-P test as a tool to resolve any problems encountered during the test. AT&T also expected to report the data in Qwest's Section 271 cases, again for the purpose of using the leverage to resolve problems that would inhibit using UNE-P to provide local service.⁴¹

UNE-P Test Negotiations

35. AT&T's Consumer Business Unit asked Pelto and Gregory Terry to pursue a test agreement with Qwest to engage in a UNE-P test.⁴² Terry, an AT&T executive based in Denver, is in charge of relations with ILECs in AT&T's Western and Southern Regions, including Qwest, Bell South, Sprint and others.⁴³

36. About September 14, 2000, Pelto called Steve Davis, Qwest's National Vice President for Policy and Law, to inform him that AT&T was going to be making a request for a friendly test in Minnesota. Davis had formerly worked for AT&T. Through discussions Davis and other Qwest managers had had with managers of other RBOCs, Davis was already aware of AT&T's UNE-P testing with other RBOCs and their complaints that AT&T had used the results unfairly in regulatory proceedings. He was already of the opinion that AT&T's only purpose for the UNE-P test was to manufacture evidence to use against Qwest in Qwest's 271 applications and was ready with a response to AT&T's request. The position was that unless Qwest became convinced that AT&T was truly using the test to evaluate market entry and not just compiling data to oppose Qwest's 271 efforts, Qwest would refuse to do AT&T's UNE-P test. Qwest maintained that position from then until May 11, 2001.

37. When Pelto called, Davis asked Pelto if AT&T would commit to enter the UNE-P market in Minnesota if the test was successful. Pelto declined to respond. In Davis' view, Pelto "kind of sheepishly refused to answer." That, for Davis, confirmed his previous conclusion that the UNE-P test had nothing to do with market entry.⁴⁴

38. Pelto's refusal to guarantee market entry to Davis was reasonable and appropriate. There are several variables beyond testing for a CLEC to evaluate when considering market entry (e.g. cost of capital, number of competitors, general state of the market), and the actual test results may impact the business plan in some way that makes the venture unprofitable. Thus a CLEC can not be expected to guarantee market

⁴⁰ Tr. 783-84, 1160-61.

⁴¹ Tr. 1219.

⁴² Tr. 500.

⁴³ Tr. 492.

⁴⁴ Tr. 253.

entry in order to conduct a desired test.⁴⁵ AT&T told Qwest that it was considering entering the market using UNE-P; which was all it could say. Moreover, Pelto could not legally reveal proprietary competitive information to Qwest, as both he and Davis knew very well.⁴⁶

39. Davis informed Pelto that Qwest would not perform the UNE-P test if the only purpose of the test was to provide data for AT&T to submit in opposition to Qwest's 271 applications. However, he did not inform Pelto that he had, in fact, already concluded that the only purpose of the test was to gather data to use against Qwest in 271 proceedings and had decided that Qwest would not allow the UNE-P test, or any test other than the 1-2-3 test or the ROC test, to proceed. And he did not inform Pelto that it would be up to Qwest to decide whether AT&T had a legitimate purpose for the UNE-P test.⁴⁷

40. Had Davis given an unconditional refusal, AT&T could have attempted to convince Qwest of its error or taken other steps, such as seeking clarification from the Commission. Instead, Davis gave Pelto a vague statement that could be taken as a conditional approval by AT&T, because AT&T knew the UNE-P test was not for 271 purposes only. Moreover, Davis allowed negotiations for the UNE-P test to begin and continue for several months, thereby delaying AT&T in taking any action for those several months.

41. As Pelto had done, on September 14, 2000, Terry called his counterpart at Qwest, Beth Halvorson, Vice President of Wholesale Major Markets, to begin the negotiation process. Halvorson has worldwide accountability for the three major accounts of Qwest: AT&T, WorldCom, and Sprint. She also has responsibility for all wireless and paging companies.⁴⁸ Terry told her that AT&T wished to conduct a UNE-P test in Minnesota. Halvorson understood Terry's description of the test as an internal test using AT&T's employees, ordering residential lines.⁴⁹

42. On September 15, 2000, Terry followed up with a letter to Halvorson.⁵⁰ The letter stated that AT&T was planning to perform an evaluation of using UNEs to provision local service in the Qwest territory, particularly the use of the UNE-P; that they were planning to perform a trial in the Minneapolis-St. Paul area in early 2001, that it would be "an internal trial, using only AT&T employees as test participants," and that the purpose of the test was "to gain experience in such areas as billing, access, trouble

⁴⁵ Ex. 2088 at 12.

⁴⁶ Tr. 1235-36.

⁴⁷ The Department and AT&T argue that Davis gave Pelto an unqualified refusal to participate in the UNE-P test. Their claim is based upon Pelto's testimony that during the September call, Davis told him that Qwest was not going to do the test, Tr. 1261. But Pelto also testified that it was possible, although he did not recall it, that Davis had said that if AT&T had what Davis considered a legitimate purpose for the test other than just a 271 test, Qwest would do the test. Tr. 1260-63. Davis and Qwest felt that they could refuse to test if the test was only for 271 purposes, so it is most likely that he would have told Pelto that.

⁴⁸ Tr. 27-28.

⁴⁹ Tr. 29-30.

⁵⁰ Tr. 987.

reports and fixes, business rules, OSS and other facets of the use of UNE-P to provide local service."⁵¹

43. The letter went on to state that AT&T had already undertaken similar trials with other RBOCs, that AT&T had used brief operational contracts to cover the trials, requested Halvorson's assistance in setting up a team to negotiate an agreement, and identified Michael Hydock of Terry's staff as the AT&T contact for negotiation of a test agreement.⁵²

44. The letter also set out some details of the UNE-P test to provide Qwest "with a global understanding of the trial." First among those was, "Deployment of 1,000 lines at an AT&T location in the Minneapolis area."

45. The letter requested that negotiations begin by September 25, 2000.⁵³

46. AT&T wanted a testing agreement that set forth parameters of the test and certain specifics because the Interconnection Agreement was silent as to testing specifics.⁵⁴ Every other RBOC that AT&T had worked with had ultimately accepted and implemented AT&T's proposed test, although it sometimes took some threats of seeking regulatory assistance to gain agreement.⁵⁵

47. AT&T District Manager Michael Hydock was put in charge of negotiating the test agreement. Hydock talked to test manager Gibbs concerning the details of the test agreement and consulted with other AT&T employees who had negotiated similar test agreements in the past.⁵⁶

48. Apparently unaware of Davis' position, Halvorson immediately set about complying with AT&T's request. She named an executive team to help her deliver what she understood AT&T had requested and faxed copies of Terry's letter to them. The team included Qwest executives from operations, business development, systems and network provisioning, as well as members of her own account team.⁵⁷

49. Hydock and Christine Schwartz of AT&T met with Mark Miller and Christina Valdez of Qwest on September 18, 2000. Miller is Qwest's Wholesale Account Team Manager for the AT&T account. They discussed the number of lines needed for the test, the duration of the test, and the fact that the test had been requested by AT&T's Consumer Business Unit.⁵⁸ Hydock followed up later that day by sending Miller what he called a "plain vanilla" version of an earlier test agreement that AT&T had negotiated with another RBOC for an earlier UNE-P trial. Hydock's e-mail's subject line

⁵¹ Ex. 1.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Tr. 983.

⁵⁵ Ex. 46 (Gibbs Deposition), 56-59.

⁵⁶ Tr. 796.

⁵⁷ Ex. 1; Tr. 30-32.

⁵⁸ Tr. 989-991.

stated, "MN 'Friendly' test." Hydock's message stated that he hoped the draft provided some guidance; it did not specifically require any response.⁵⁹

50. The September 18 draft agreement had been modified from the other RBOC agreement to identify Qwest and AT&T as the parties and Minnesota as the location. It was a complete and fairly detailed document accurately describing the details needed to understand the UNE-P test as proposed by AT&T. The only significant items left blank were the effective dates and two blanks for building locations for the installation of "approximately 1000 Qwest retail 1MR residential lines."⁶⁰

51. In Halvorson's experience, a "friendlies" or "friendly" test is one done using employee or customer volunteers as guinea pigs to test a new product or service on their own phones.⁶¹ AT&T Senior Policy Witness John Finnegan agreed that was a common meaning of the term in the industry. He pointed out that in the Arizona test, there were actual volunteers involved with lines provisioned to their homes. In this case, Gibbs, Terry, and Hydock all often referred to the UNE-P test as the "Friendlies Test," or "MN Friendly Test," even though the AT&T employees being used were the technicians doing the test, not people whose phones were being used. That could be confusing, which Finnegan admitted.⁶²

52. Because of AT&T's use of the term "friendly test" and references to "using AT&T employees as test participants," and despite the fact that AT&T never said the employees would be used "at their homes,"⁶³ and despite the fact that every document to that point and later referred to "an AT&T location," "business location," or "901 Marquette Ave.," Halvorson believed until January that the test involved installation of residential lines to AT&T employee homes.⁶⁴ Miller was aware of the potential conflict between using the word "friendly" and the "business location" language in the draft agreements, but thought it was something that would be corrected or negotiated eventually.⁶⁵

53. AT&T was partially responsible for Halvorson's mistake as to the location of the test lines. AT&T used the term "friendly" in an unusual manner and Halvorson relied upon assumed meanings without reading or without clarifying documents, some of which Qwest wrote, that clearly stated the lines would be installed to an AT&T business location.

⁵⁹ Ex. 2; Tr. 991-992.

⁶⁰ Ex. 2.

⁶¹ Tr. 38. Halvorson also believes that a test is not a "friendly trial at all," if the results are used in an unfriendly manner. Tr. 39.

⁶² Tr. 632-33.

⁶³ Halvorson and Miller testified that Terry and Hydock said the test involved lines to employee homes. Tr. 29-30, 1301. Terry and Hydock testified they did not. Tr. 566, 1059. It is most likely that Terry and Hydock did not make such statements because they specifically and expressly said otherwise in their documents and knew all along that employee homes were not involved.

⁶⁴ Tr. 29-30, 58, 93-94.

⁶⁵ Tr. 1305-06.

54. Miller called Hydock on September 18 or 19 to ask about timelines for completing the agreement. On September 19, Hydock sent Miller an e-mail responding that he would like to finalize the contract by October 13 and wondering whether that was totally out of the question. On October 5, Miller e-mailed back, stating

I have received some feedback and questions about your UNE P trial request. I understand the 3rd Party Testing scheduled could be a duplication of this request. Please let me know if you disagree.⁶⁶

55. On October 6, Hydock replied. He stated that as a CLEC that could be using UNE-P as a market entry strategy, it would be logical that AT&T would want to test facets of offering UNE-P in Qwest's territory. He stated that the proposed AT&T test was not a duplication of third party testing from AT&T's point of view because AT&T was testing its own systems during the process as well, which a third-party test would not do. He reiterated that AT&T was serious about conducting the proposed test and stated that they had had no problems with performing tests with other RBOCs that were also involved in some type of third party test. He asked whether there were any other issues because AT&T was finalizing the contract and would be submitting it to Qwest the week of October 16.⁶⁷

56. Hydock's statement that AT&T was testing its own systems was accurate. Because AT&T would have to rely entirely upon Qwest systems and personnel to provide the local telephone service on behalf of AT&T, operational or production testing would focus primarily on the Qwest systems. But AT&T will have to be involved in ordering service, reporting problems, and receiving billing information, so AT&T also had to use the UNE-P test to determine that it was accurately interpreting Qwest's business rules and properly applying them, not only in the certification phase, but also in the operational phase. Hydock's statement that AT&T had had no problems with performing tests with other RBOCs stretched the truth. AT&T had had some problems with other RBOCs in reaching agreements and with the RBOCs feeling the results had been used unfairly by AT&T. But Qwest was well aware of the RBOCs' complaints. Hydock's statements were not misleading.

57. Miller did not respond to Hydock's question about other issues and never reported that Qwest felt Hydock's brief explanation of why AT&T did not view the test as duplicative was inadequate.

58. On October 17, 2000, Hydock sent Miller a "more defined version" of the proposed testing agreement that specified that the test lines be located at the AT&T tower at 901 Marquette in Minneapolis. It also proposed the use of ROC PIDs rather than Minnesota-specific performance guidelines and eliminated the requirement of weekly meetings and any reference to the use of test data. Hydock suggested a

⁶⁶ Ex. 1036, October 5, 2000, entry. The source of the "feedback" is not in evidence.

⁶⁷ *Id.*, October 6, 2000, entry.

meeting as soon as possible to discuss details and issues.⁶⁸ While AT&T's proposals were subject to negotiation, they didn't change significantly after that point.⁶⁹

59. Qwest responded with a letter dated November 3, 2000, from Halvorson to Terry. In that letter, Halvorson stated that despite various reservations, Qwest would work with AT&T on the UNE-P test. She expressed Qwest's concern about the need for 1000 test lines, saying it seemed far in excess of what was necessary and that they would like to discuss the issue. She also expressed Qwest's belief that the test could be completed in four months or less, but expressed willingness to extend the length of the test if necessary. Halvorson attached a redlined version of the AT&T proposed testing agreement re-styled as a "Project Plan."⁷⁰

60. The re-draft sent by Halvorson retained the AT&T proposal for retail residential lines to be installed at 901 Marquette Avenue. But, instead of providing for 1000 lines, it stated that an "agreed to amount" of lines would be installed. Following a provision that the locations and lines would be treated as residential, it added, "However, when the lines are converted to UNE-P they will carry a business USOC." The re-draft also changed the duration of the test from nine to four months and made other changes.⁷¹

61. On November 7, 2000, Hydock sent an e-mail to Miller saying he wanted to provide some information so Miller would have some time to consider it before Terry responded directly to Halvorson. He expressed concern over the restrictions that Qwest was proposing to place on the test and identified what he determined to be the three big issues remaining (number of test lines, use of performance data, type of performance data reporting), argued AT&T's position on the issues, and proposed alternative language for the use of performance data/confidentiality issue. Hydock further inquired as to whether Qwest's position on these issues was final. He expressed some flexibility on the number of lines for the test, but noted that 1000 lines was far less than the number that would be involved in an actual commercial situation. He stated that AT&T's position had been agreed to by other RBOCs, "albeit with Commission and/or 271 proceeding pressure."⁷² Hydock's statements were accurate.

62. Terry wrote to Halvorson on November 10, 2000, stating, "AT&T has successfully engaged other incumbent LECs to perform these trials on substantially the same terms we proposed to Qwest," and expressing AT&T's position that the constraints on the UNE-P test created by Qwest's suggested modifications to the agreement would jeopardize AT&T's ability to conduct a useful UNE-P operational trial. He asked that Qwest, "reconsider the changes to the test agreement proposed in your letter," and urged resolution of the issues so that the test could commence.⁷³

⁶⁸ Ex. 4; Tr. 1002-05.

⁶⁹ Tr. 1004-05.

⁷⁰ Ex. 5; Tr. 41-42, 1005-06.

⁷¹ Ex. 5; Tr. 1008-09.

⁷² Ex. 1037; Tr. 1010-12.

⁷³ Ex. 6.

63. On November 17, 2000, as part of a monthly executive meeting between AT&T and Qwest, during which many issues were discussed, Terry and Halvorson, with other people on the phone conference, briefly discussed the issues that had been raised in the most recent correspondence. Halvorson stated that Qwest would agree to AT&T's demands for 1000 lines and use of ROC PIDs. She also agreed not to demand confidentiality of the results and to resolve the exact language at a later date.⁷⁴

64. On November 22, 2000, Terry wrote Halvorson to confirm the November 17 agreements and enclosed a redrafted "Project Plan for UNE-P Testing" dated November 1, 2000. It called for installation of the lines on January 15, 2000 (sic) and commencement of the UNE-P test on February 27, 2001, to run for up to four months.⁷⁵ However, the document had not been finalized by AT&T and contained some errors, so Terry's office promptly called Halvorson, asked that she shred the draft because it was not right, and told her another one would be sent.⁷⁶

65. On November 29, 2000, Hydock sent Miller an e-mail advising him, in case he was not aware, that AT&T had mistakenly sent the revised agreement to Halvorson because it was not final, and that the final version would be sent "this week." He also wanted clarification about the business USOC provision. They had some communications about the issue. Two weeks later, December 13, 2000, Hydock sent Miller another redrafted "Project Plan," dated December 12, 2000. This revision included the USOC numbers Qwest had provided, because they turned out not to present a problem. It also changed the install and test commencement dates to March 1, and April 16, 2001, respectively. That change was made because AT&T needed the additional time because of other testing and because it was attempting to run the UNE-P test concurrently with the ROC test. In his cover message, Hydock did not reveal that, but said that the change gave both parties additional time to prepare for the trial. He asked that Qwest review the draft over the next few days and get back with any issues so that the parties could finalize the agreement.⁷⁷

66. Meetings between technical teams for Qwest and AT&T began in December, 2000. The purpose of the meetings was to prepare for and run the 1-2-3 test to certify AT&T's test system, but not to address the additional tests AT&T desired to perform with its UNE-P test.⁷⁸ In fact, the Qwest EDI certification people were largely unaware of the additional testing AT&T desired.⁷⁹

67. On December 21, 2000, Timothy Boykin, an AT&T District Manager, wrote to Halvorson noting that AT&T was building its gateway program for the UNE-P test to interface with IMA EDI, Version 6.0, which had just become available in November. However, AT&T had now been informed that Version 6.0 would only be available until October, 2001, because it would be replaced by later versions. The letter stated that

⁷⁴ Tr. 46-47, 541-42, 1019-20, 1027.

⁷⁵ Ex. 7.

⁷⁶ Ex. 8; Tr. 50, 1021.

⁷⁷ Exs. 11 and 1039; Tr. 1025-26.

⁷⁸ Tr. 413.

⁷⁹ Tr. 299, 885.

because of the delays in getting the agreement signed by Qwest, and delays in certification because Qwest did not provide a test bed environment, and delays because of the time AT&T needed to build its gateway program, AT&T had put off the test commencement date to April 16, 2001. Thus, because AT&T desired that the UNE-P run for nine months, AT&T was requesting that Qwest agree to keep Version 6.0 available for the duration of the test.⁸⁰

68. Qwest considered the letter to be posturing by accusing Qwest of delaying while AT&T had just taken a month to get back to Qwest with a revised agreement. So Halvorson did not respond to the letter. However, at the hearing, on July 9, 2001, Halvorson testified that Boykin had been informed that Qwest would keep Version 6.0 available until the test was completed and that, at any rate, she was stating that on behalf of Qwest at that point.⁸¹

69. During the first week of January, 2001, Miller told Hydock that Qwest would have a response back to AT&T early the next week. On Wednesday, January 10, 2001, Hydock inquired about the status. Miller responded that it might be the next week because a couple more internal people needed to comment.⁸²

70. Sometime in December 2000 or early January 2001, Halvorson realized that AT&T was serious about using lines to 901 Marquette and further realized that Qwest could not, under its existing tariff, provide residential service to a business location. In early or mid-January, Halvorson sought guidance from the policy and regulatory group at Qwest on how to resolve this tariff issue.⁸³ She spoke to Charles Ward, Qwest's Regional Vice President for Policy and Law, about that concern.⁸⁴ Ward spoke to his supervisor, Davis, and they talked about the nature of the test proposal, not the tariff issue.⁸⁵ Davis continued to conclude that the test looked duplicative of the ROC test and that AT&T was proposing the test only to provide additional data to oppose Qwest's 271 initiative, not as a market entry test.⁸⁶

71. Davis' conclusion was still based on reports received in conversations with other RBOC's of AT&T using the data from UNE-P tests in regulatory proceedings against those RBOC's and on his view that the UNE-P could stress Qwest's ordering and provisioning systems to the breakdown level, thereby creating negative results to report. And he still based his conclusion on Pelto's refusal to guaranty market entry if the test proved successful.⁸⁷

72. Davis or Ward provided instructions to the Qwest account team at the time to reform the agreement into a document that was more consistent with Davis' view of

⁸⁰ Ex. 10.

⁸¹ Tr. 101-04.

⁸² Ex. 1041.

⁸³ Tr. 196-98.

⁸⁴ Tr. 221, 224. Ward, like Davis, had also been with AT&T. Pelto had been his supervisor.

⁸⁵ Tr. 221.

⁸⁶ Tr. 221-22, 264.

⁸⁷ Tr. 229, 239-40, 252-53, 281-82.

the sort of testing Qwest would allow. However, they did not provide any advice to Halvorson or her account team about resolving the tariff issue with AT&T.⁸⁸ Prior to this point, Qwest had proceeded with the UNE-P test negotiations with AT&T at a slow, but fairly reasonable pace. Beginning about January 12, 2001, Qwest took deliberate steps to put unnecessary hurdles and delays into the negotiation process.

73. On January 12, 2001, Miller sent Hydock a significantly revised agreement with changes that were returns to old positions in some cases and wholly new issues in others. Qwest changed the title to "Initial Provisioning Plan for UNE-P."⁸⁹ Qwest delayed the start date to June 4, 2001. Qwest rewrote the agreement to delete all references to "testing," which it replaced with references to a "plan" for "addressing" methods, processes and systems for ordering, provisioning, maintenance and repair, and billing associated with UNE-P in Minnesota. Qwest added a provision that it was entering into the Plan, "to assist AT&T with its initiation of UNE-P services." The "Plan" eliminated the use of the ROC PIDs, provided that "Plan results" must remain confidential, and required the installation of business lines instead of residential lines.⁹⁰ Other than these last three items, AT&T never objected to the wholesale language changes that reformed the document from a test agreement into a plan for market entry.

74. Prior to receiving the January 12 draft, Hydock had believed that the differences between the companies had narrowed to virtually nothing, so he found the changes regarding ROC PIDs, confidentiality, and business lines shocking and appalling.⁹¹ In an e-mail dated January 14, 2001, Hydock expressed to Miller "severe concerns" with Qwest's changes and proposed a meeting to discuss the issues. He stated that AT&T would have to evaluate its options, meaning that he was starting to think he would have to pursue options beyond informal negotiations. He felt so because it now seemed to him that just as they came close to agreement, Qwest was going back on resolved issues and injecting new issues. He became worried that the test would not be ready to go as proposed in the April, May time frame.⁹²

75. When Miller received Hydock's e-mail, and in subsequent discussions, he learned that Halvorson had made agreements with AT&T on November 17 that he had not been aware of when he sent out the January 12 draft.⁹³ There were more discussions between AT&T and Qwest, including the regular monthly meeting on January 17, 2001. On January 18, 2001, Hydock sent Halvorson and others an e-mail regarding the time frames for installing the lines and starting the test. It adopted Qwest's last proposed start date of June 4, 2001.⁹⁴

76. On January 25, 2001, Miller sent Hydock what he hoped would be the final version of the UNE-P agreement and asked that Hydock let him know if there was

⁸⁸ Tr. 268.

⁸⁹ Ex. 1042.

⁹⁰ Ex. 1042; Tr 1032-33.

⁹¹ Tr. 1032.

⁹² Ex. 1043; Tr. 1034-35.

⁹³ Tr. 1302-03.

⁹⁴ Ex. 1045.

anything that they had discussed that had not been changed. Qwest had revised its proposal to reflect the agreements reached on November 17, except that Qwest continued to propose the use of business retail lines in place of residential retail lines. That appeared to Hydock to be the only remaining issue.⁹⁵ Halvorson felt the same.⁹⁶

77. On January 26, 2001, Hydock wrote an e-mail to Miller and others stating that AT&T had moved up the desired start date to mid-May, desired to have a meeting on the billing process, and wanted to set up a site visit for a Qwest technician for February 15.⁹⁷

78. Hydock understood Qwest's concern with the tariff issue and indicated to Qwest that AT&T would look at it. He checked with the AT&T testing group and was told that they really wanted to do the test with residential lines.⁹⁸

79. On January 29, 2001, Hydock sent a message to the Qwest team stating that provisioning the lines as business lines pursuant to the tariff requirements was an issue for the AT&T test group and offering a brief explanation why. He also stated, "...other LECs have reached this agreement and have alerted the respective regulatory bodies that this provisioning of the residential lines in a business location is merely done to facilitate a test of LEC interfaces and AT&T OSS on residential lines." Hydock offered to work with Qwest in describing the situation to the Commission, and asked when Qwest's state managers could pursue such a meeting.⁹⁹

80. About January 31, 2001, Miller advised AT&T that Qwest "couldn't confirm" the availability of 1000 lines at 901 Marquette Avenue.¹⁰⁰ On February 2, 2001, Miller sent Hydock another revision of the UNE-P agreement. In the cover message, he stated that Scott Schipper (his supervisor) was "still working with our regulatory folks on the residential and business issue," and that he had "confirmed that we do not have the full spare capacity for the 1000 lines at the Minneapolis location." The only substantive change in the agreement was in the provision on reporting results.¹⁰¹ Miller did not respond to AT&T's invitation to approach the Commission jointly about the tariff issue because that issue was still in the hands of Davis and Ward.¹⁰²

81. Qwest had the option of filing an amended tariff and it knew that there was a good possibility that the tariff could be waived. Waivers of tariffs for testing purposes are a normal occurrence.

82. Because Qwest did not respond to the invitation, in early February 2001, Hydock and Sandy Hofstetter of AT&T met with Commissioner Edward Garvey and Commission staff without Qwest to discuss the tariff lines problem. Commissioner

⁹⁵ Ex. 12; Tr. 1040.

⁹⁶ Tr. 61.

⁹⁷ Ex. 1046.

⁹⁸ Tr. 1046-47.

⁹⁹ Ex. 13; Tr. 1045.

¹⁰⁰ Ex. 1047.

¹⁰¹ Ex. 14.

¹⁰² Tr. 202-03.

Garvey and staff advised them that the use of residential lines for the test should not be a major issue and offered to work with Qwest and AT&T to resolve it.¹⁰³ On February 12, 2001, Hydock sent Miller an e-mail referring to Commissioner Garvey's statements and attaching a new draft of the testing agreement that had been revised to provide for the installation of residential lines, an installation date of April 15, 2001, and a commencement date of "on or after May 1, 2001."¹⁰⁴

83. On or about February 12, 2001, Pelto contacted Ward by telephone and left a voice mail message inquiring as to why the test negotiations were being held up. Pelto received a return voice mail message from Ward the next day, stating that a response would be forthcoming in writing.¹⁰⁵ Hydock sent an e-mail on February 13, also inquiring about the agreement.

84. On February 14, 2001, John Stanoch, a Qwest policy and regulatory official in Minnesota, attended a "Jackson Forum" conducted by Commission Chair Gregory Scott where AT&T complained about Qwest's actions in the negotiations. He reported that to Ward, concluding that it was part of the on-going strategy to make Qwest look bad.¹⁰⁶

85. The scheduled site visit to 901 Marquette was conducted on February 15, 2001, by the AT&T test manager and a Qwest engineer. They determined that 1000 spare pairs (lines) were currently available there for AT&T's use.¹⁰⁷

86. On February 15, 2001, Carla Dickinson, an AT&T manager, sent Tim Bessey, a Qwest account manager, an e-mail with a spreadsheet file laying out the number of lines AT&T needed for certification (about 30), as well as the scenarios they would be using for certification. Bessey promptly sent them on to Halvorson, Miller, and Schipper.¹⁰⁸

87. In mid-February, AT&T was advised that Qwest's account team would no longer be involved in the negotiations. Communications between AT&T and Qwest's negotiating teams then ceased.¹⁰⁹ On or about February 19, after not having seen anything in writing for a week, Pelto again called Ward. This time, he asked simply how long it was going to take Qwest to say "no" to AT&T's test request. Ward responded with a vulgarity indicating that Qwest would not be doing the test, but said they'd respond in writing.

88. On or about February 20, 2001, Stanoch and JoAnn Hanson, another Qwest policy and regulatory official in Minnesota, met with Chair Scott. They told him

¹⁰³ Tr. 1053-1054.

¹⁰⁴ Ex. 15; Tr. 1054.

¹⁰⁵ Tr. 1222.

¹⁰⁶ Ex. 1016.

¹⁰⁷ Exs. 1048-1051; Tr. 1048-52, 1054-55. Qwest later attempted to explain its earlier contrary statement as a matter of confusion on AT&T's part over the meaning of "capacity." Ex. 1049; see also Ex. 46 (Gibbs depo.) at 154-156.

¹⁰⁸ Ex. 1018.

¹⁰⁹ Tr. 1056-57.

that Qwest desired to handle the negotiations with AT&T on a "business-to-business" basis.¹¹⁰

89. On February 21, 2001, Halvorson sent a letter to Pelto and Terry that she had composed under the direction of Davis, with input from Ward, Stanoch, and Hanson.¹¹¹ In the letter, Halvorson stated that she was responding to Hydock and Ward's inquiries as to whether Qwest planned to proceed with the "UNE-P initial implementation plan" in Minnesota. The letter started by claiming that AT&T's initial request "included utilizing UNE-P service at AT&T employees' residential locations." It then said that option had always been available to AT&T under the Interconnection Agreement.

90. The letter went on, "Qwest did not agree with AT&T's written UNE-P trial proposal and instead, has opted to fully engage with AT&T and other CLECs in the ROC OSS trial." Just when Qwest had not agreed was not stated.

91. The February 21 letter said that in the past Qwest and AT&T worked together on large projects without written agreements, and they could do so in this matter as well. Instead, AT&T could simply order UNE-P under the Interconnection Agreement, even large numbers of lines. The letter then stated that AT&T "now" wants the residential lines to be provisioned at 901 Marquette or 200 South 5th Street in Minneapolis.¹¹² Since both of those were "clearly business locations," the letter said that Qwest could not agree to provide residential lines to a business location in violation of its tariff, but would be happy to provide business lines.

92. Qwest's suggestion that AT&T simply order 1,000 UNE-P lines under the Interconnection Agreement was not a legitimate resolution to the situation because it did not allow for the testing of conversion of residential lines to UNE-P lines, which was a legitimate and primary component of the test for AT&T. The tariff issue was easily resolvable at the Commission and Qwest's contention that it could not agree to provide residential lines was not made in good faith. The tariff issue was never an issue for Davis and not the reason that Qwest refused to conduct the test as requested by AT&T. It was merely a bogus justification added to the February 21 letter by Halvorson. Qwest should have offered to go to the Commission with AT&T to resolve the issue or at least said that it would rely on AT&T to obtain a waiver from the Commission. Not doing so was simply another reflection of Qwest's refusal to perform the UNE-P test and to allow AT&T to do only testing that Davis found acceptable.

93. Despite his increasing impression that Qwest was not going to conduct the test proposed by AT&T,¹¹³ Pelto wrote Ward and Halvorson on February 22, 2001, asking that further delay on AT&T's test request cease. He expressed confidence that

¹¹⁰ Ex. 1002.

¹¹¹ Ex. 16; Tr. 205, 267.

¹¹² This statement is evidence that Halvorson is not above distorting the facts. Even by her own testimony, Halvorson had known by early January that the lines were going to 901 Marquette; that's when and why she talked to Ward about the tariff issue.

¹¹³ Tr. 1223, 1271.

the Commission would very likely grant Qwest a waiver from its tariff so that residential lines could be provisioned. Peltó again proposed that Qwest join AT&T in a meeting with the Commission, this time with Commission Chair Scott, and further requested that Qwest commit to working in good faith with AT&T to conduct the requested test.¹¹⁴ Peltó attempted to contact Ward to follow up on the letter and to discuss the test. Ward never responded. The meeting with Chair Scott never occurred because of "calendar issues" with Halvorson and what AT&T regarded as "disinterest" from Qwest.¹¹⁵

94. Lynn Notarianni, an Information Technologies Director for Qwest, became aware of the AT&T test proposal in late February 2001, when she received a telephone call from Hanson, the regulatory person in Minnesota. Hanson asked Notarianni to find out from technical personnel whether Qwest could provide billing information in a certain format AT&T was requesting. Notarianni checked with her boss, who had been involved in the earlier discussions on the UNE-P test. He told Notarianni that there were additional issues.¹¹⁶ She then set up telephone meetings with the account team and other Qwest personnel for March 1 and 2, 2001, so that she could become familiar with the AT&T UNE-P test proposal. These meetings included Notarianni, Hanson, people from Halvorson's wholesale account team, and Andy Crain, a Qwest attorney.¹¹⁷ On March 2, Miller sent Notarianni a copy of AT&T's February 15 list of certification scenarios to Notarianni.¹¹⁸

95. Notarianni then scheduled a meeting for March 7 to discuss what the technical group could do to overcome some of the technical concerns with the testing process and to decide what they could provide for AT&T, because she had come to understand that the request from AT&T was more involved than standard 1-2-3 testing, and contemplated "an entire trial."¹¹⁹

96. Sometime before March 7, 2001, Hanson had a discussion with Commission Chair Scott concerning AT&T's proposed test. Chair Scott told Hanson that the Commission "had jurisdiction to oversee anticompetitive behavior" and "if necessary, the Commission would look at that." Hanson related the "gist" of the conversation to Notarianni prior to the March 7, meeting.¹²⁰

97. On March 5, 2001, Notarianni sent an e-mail to Crain, Hanson, Halvorson, and nine other Qwest managers and attorneys, with copies to Davis and Miller, forwarding an e-mail from Miller with the UNE-P test plan draft attached. She followed that up about an hour later forwarding Miller's e-mail with the certification scenarios attached. On March 6, 2001, Davis replied separately to the two e-mails, apparently as he read them. He copied everyone who had received Notarianni's two e-mails. The first e-mail stated:

¹¹⁴ Ex. 1055.

¹¹⁵ Tr. 1227-29.

¹¹⁶ Tr. 371-73.

¹¹⁷ Tr. 420-21.

¹¹⁸ Ex. 1018.

¹¹⁹ Tr. 296-98.

¹²⁰ Tr. 299-300.

Lynn, I assume that the answer to AT&T continues to be that we are not interested in engaging in an additional 271 systems test. If, on the other hand, AT&T wishes our cooperation in testing the capabilities or interoperability of a system AT&T has developed to provision UNE-P in Minnesota, we would be happy to meet with them to discuss appropriate arrangements.

The second e-mail, sent six minutes later to the same list of people, read: "Why are people talking to these guys about this?"¹²¹

98. The e-mails show that Davis was upset that Notarianni seemed to be ready to move beyond certification testing into working on AT&T's UNE-P test, apparently contrary to a directive he had issued at some prior time.

99. Several Qwest technical, business and operational personnel attended the March 7 telephone meeting, including Notarianni, Miller, Bessey, Christy Doherty (a Qwest vice-president who runs an operations center), EDI implementation contract employees Cim Chambers and Samantha Kratzet, and others.¹²² Notarianni, Chambers, and Kratzet were in Notarianni's side office, the rest were on the telephone.¹²³

100. Chambers and Kratzet each took notes at the meeting. In addition to the list of attendees, Chambers wrote:

Tim: Email this morning from Steve Davis.

- Why talking to AT&T about this? (lead Attorney)
Not in favor of proceeding w/ project as AT&T outlined it.

Strategy - position to take w/ AT&T re: trial.¹²⁴

Christy - conversations w/ Beth Halvorson.
Commission - we are not doing this.

Viewed as a "copy" of the ROC test and not something designed to test their systems.

Qwest is not going to allow them to enter residential markets.

No large test bed . . .

¹²¹ Exs. 2086 and 2087. Qwest did not produce these e-mails during the discovery process, nor were they disclosed on Qwest's privilege log as privileged communications. They were subsequently produced by order of the Administrative Law Judge pursuant to an AT&T motion on July 11, 2001. Tr. 943. Both e-mails were sent directly to Lynn Notarianni and thirteen others, including Qwest attorney Jason Topp.

¹²² Tr. 32, 476.

¹²³ Tr. 298, 380-81, 927.

¹²⁴ The meeting notice referred to this meeting as a "Working meeting on AT&T/UNE-P MN trial." This group of Qwest personnel refer to certification under the 1-2-3 test as "implementation" and the production phase of the UNE-P test as "the trial" or the "friendly" or "friendlies" test.

JoAnn – Regulatory manager

➤ Chairman has told her that we need to move forward.

Copy Tim Bessey on meeting minutes

Invite Tim to meetings¹²⁵

101. Kratzet's notes were similar. They indicate that Davis had said "stop!" and that the Commission had the issue as a complaint. They go on to state:

Andy – Msg w/ Steve Copy of ROC test & not designed to test their systems & how they work with ours.

Joanne Hansen Regulatory Mgr. (Qwest State MN) Chairman Scott,
Commission Chair

*Anti-competitive behavior on Qwest's part to not participate w/
AT&T.

Her notes also indicate that Crain was to get further clarification from Davis and Hanson, that the Implementation Team was to acknowledge with the AT&T team that there were issues over the "friendly test" while proceeding with a regular IMA EDI implementation, and that the Halvorson letter of February 21 was discussed.¹²⁶

102. Chambers and Kratzet were only familiar with IMA EDI implementation through the 1-2-3 test. Prior to March 7, 2001, no one from Qwest and no one from AT&T had ever talked with them about the UNE-P test. All the discussion their group had had with the AT&T team related to IMA EDI implementation. The AT&T people had made some mention of a "friendlies" test, but never explained it. Chambers was aware that Qwest would be interfacing with a different AT&T computer and system than the one she had worked with previously.¹²⁷

103. Chambers' note that "Qwest is not going to allow them to enter residential markets," was a reference to what was explained to the group as a claim that AT&T might make if Qwest refused to perform the UNE-P test as requested.¹²⁸

¹²⁵ Ex. 2027 (emphasis in original).

¹²⁶ Ex. 26 (emphasis in original).

¹²⁷ Tr. 884-885; Ex. 1029.

¹²⁸ Based upon Chambers and Kratzet's notes, the discussion summarized in this note occurred at the end of the discussion about Davis' views, or at the beginning of the discussions about Hanson's discussion with Chair Scott, or in between. While it's possible that it was part of Davis' directions to the group, the evidence is not sufficient to prove that. It is most likely that Crain or one of the others was explaining how Chair Scott or others might view Qwest's refusal to do the UNE-P test as anti-competitive. Notarianni, a generally credible witness despite her inability to remember the Davis e-mail addressed to her, testified believably that she and others on the conference were well aware that refusing to allow

104. The March 7, 2001, meeting confirmed what had been Davis' position since September 14, 2000--Qwest would not do the UNE-P test as requested by AT&T because it was only for 271 purposes; it would only do the 1-2-3 test of AT&T's readiness. Meanwhile, the Notarianni's IMA EDI implementation group was to continue working with AT&T team on the 1-2-3 test.

105. On March 8, 2001, the IMA EDI implementation group met with AT&T. After that meeting, Chambers called Bessey to clarify what her IMA EDI implementation group should say to their AT&T counterparts regarding the UNE-P test. Bessey told Chambers they should not say anything about the surrounding events and just proceed "blindly" as if it were any other IMA EDI implementation. He also told her that all communications regarding the "other items" were to come from the account and public policy teams.¹²⁹

106. Notarianni and her IMA EDI implementation group never offered to expand the 1-2-3 test to include the testing of Qwest's systems requested by AT&T in its UNE-P test. Nor did the account or public policy teams.

107. On or about March 14, 2001, Qwest policy representatives Davis, Hanson, and Stanoch met with Commission Chair Scott to discuss the AT&T test. Davis reiterated Qwest's position that if AT&T truly wanted to enter the market with UNE-P, Qwest would do everything possible to facilitate AT&T's entry into the market, but that Qwest was concerned about AT&T's motives in demanding the particular UNE-P test parameters and questioned the necessity of those parameters. Chair Scott advised Qwest that refusal to allow the AT&T test could be viewed as anticompetitive under Minnesota statutes.¹³⁰

AT&T's Complaint

108. Just prior to March 21, 2001, Pelto again called Davis, this time to give him a "heads up" that AT&T would be filing a complaint against Qwest with the Commission for its refusal to conduct the UNE-P test. Davis told Pelto to "go ahead, file your complaint." He then said that Qwest would not do the test even if the Commission ordered it, but that Qwest might if the Minnesota Supreme Court ordered it.¹³¹

109. On March 21, 2001, AT&T filed a complaint against Qwest with the Commission for Qwest's failure to conduct the proposed test, pursuant to Minn. Stat. § 237.462. The complaint sought penalties, temporary relief, and an expedited review of the matter. Specifically, AT&T alleged violation of § 251(c)(1) of the Telecommunications Act of 1996 (the Act) for Qwest's failure to negotiate in good faith the particular terms and conditions of interconnection. AT&T further alleged knowing and intentional violations of Minn. Stat. § 237.121(a)(2) (prohibits intentionally impairing

AT&T to enter the market was illegal and would have "jumped all over any statement like that." Tr. 467-68.

¹²⁹ Tr. 889; Ex. 1029.

¹³⁰ Ex. 1002; Tr. 245-47.

¹³¹ Tr. 1261.

the speed, quality or efficiency of services offered under contracts); Minn. Stat. § 237.121(a)(4) (unlawful to refuse to provide products, services or facilities in accordance with its contracts); and, Minn. Stat. § 237.121(a)(1) (failure to disclose in timely manner information necessary for the design of equipment that will meet specifications for interconnection).

110. On April 6, 2001, Qwest filed an Answer and Counterclaim with the Commission. In its Counterclaim, Qwest alleged that AT&T violated § 251(c) of the Act by failing to negotiate in good faith. Specifically, Qwest claimed that AT&T's true purpose for conducting the test was for advocacy in 271 proceedings against Qwest, and, therefore, AT&T failed to negotiate in good faith by misrepresenting the reasons for testing. Qwest further stated in its Answer that it was willing to offer AT&T the 1-2-3 testing that it provides to other CLECs and, if discovery established to Qwest's satisfaction that AT&T had legitimate business plans to provide UNE-P that requires testing beyond the 1-2-3 test offered, then Qwest would agree to negotiate a test agreement.¹³²

111. The Commission quickly set a pre-hearing conference for April 19, 2001, pursuant to Minn. Stat. § 237.462, subd. 6(f). At that conference, Qwest continued to take the position that it would be willing to discuss providing more than the 1-2-3 testing offered if AT&T could establish that it needed more testing for business reasons.¹³³ At the April 19 hearing, Qwest also stated that it was having a difficult time agreeing to a waiver of its tariff to address the residential lines to a business location issue, but that if the Commission ordered the tariff waived they would not have much choice but to proceed.¹³⁴ At the conclusion of the hearing, the Commission voted to send the dispute to an Administrative Law Judge for resolution of the claims asserted, and further ordered the temporary relief requested by AT&T.¹³⁵ The Commission also ordered that Qwest's tariff on the residential line issue be waived.¹³⁶

112. On May 1, 2001, the Administrative Law Judge convened a pre-hearing conference to discuss scheduling and discovery issues. Qwest continued to push for discovery of AT&T's business plans in order to assess AT&T's motives for conducting the test and their alleged "need" for doing so.¹³⁷ At the end of the hearing, the Administrative Law Judge ruled that discovery of business plans would not be permitted, but that Qwest could depose one technical employee at AT&T regarding the issue of why the 1-2-3 test would not be enough for AT&T's purposes.¹³⁸ The Administrative Law Judge further found that AT&T apparently acted in good faith in requesting the UNE-P test by virtue of the representations that it had made to the

¹³² Qwest's Memorandum in Opposition to AT&T's Request for Temporary Relief, p. 16.

¹³³ Transcript from April 19 Commission Hearing, p. 67-68.

¹³⁴ *Id.* at 70-72.

¹³⁵ See Order Granting Temporary Relief and Notice and Order for Hearing, issued April 30, 2001. The temporary relief ordered included that certification testing be completed by May 18, 2001, and that Qwest accept and install AT&T's order for 1,000 lines - 800 retail lines to be converted to UNE-P and 200 new UNE-P orders.

¹³⁶ *Id.* at 10.

¹³⁷ Transcript of May 1, 2001 Pre-Hearing Conference, at 19-20, 28-29.

¹³⁸ *Id.* at 83-85.

Commission and the Administrative Law Judge, together with the fact that it is a large telecommunications provider who has entered other states with UNE-P offerings. The Administrative Law Judge further determined that whether AT&T intended to use results of the test for advocacy in Qwest's 271 proceedings was irrelevant, given that the Act specifically established the 271 process as a mechanism to insure that an ILEC is meeting all the requirements of the Act before the FCC allows it to enter the long distance market.¹³⁹ The hearing was scheduled to commence on May 14, 2001.¹⁴⁰

113. Meanwhile, AT&T and Qwest attempted to negotiate a settlement. On May 10, 2001, the deposition of Edward Gibbs of AT&T was taken.¹⁴¹ On Friday, May 11, Qwest filed a Motion to Vacate the Contested Case Hearing. A telephone conference hearing on the motion was held at 3:00 p.m. that day. Qwest argued that the hearing was unnecessary because all issues had been resolved by a Memorandum of Understanding (MOU) and an Initial Testing Plan that had been negotiated between Qwest and AT&T. However, AT&T argued that the MOU had not been finalized and the Department argued that it had not approved the MOU. During the telephone conference, Qwest stated, for the first time, that it would proceed with the test as set out in the Initial Testing Plan, regardless of the results of any further proceedings in this matter. AT&T conceded that Qwest's agreement to proceed satisfied AT&T's testing request, albeit belatedly. The Department also agreed that the testing issues were resolved by the Qwest decision to proceed with the requested testing. During the conference, the Administrative Law Judge determined that the time constraints imposed by the need to determine whether the UNE-P testing should proceed no longer applied, and ordered that the hearing previously scheduled to start May 14, 2001, be continued and that a prehearing conference be held May 15, 2001, to consider various motions and to reschedule subsequent proceedings.¹⁴²

114. Following the prehearing conference on May 15, 2001, the Administrative Law Judge ruled that any settlement agreement that had been executed by AT&T and Qwest had been withdrawn and abandoned by the parties, that the Administrative Law Judge was still vested with the charge of the Commission to make findings on the parties' competing bad faith claims, and that the hearing on those claims would commence on July 9, 2001.¹⁴³

115. Prior to the hearing, Qwest and AT&T proceeded with the UNE-P test. At some point, thereafter, Davis left Pelto a voice message congratulating Pelto on AT&T's

¹³⁹ *First Pre-hearing Order*, dated June 6, 2001, at 3.

¹⁴⁰ Transcript of May 1, 2001 Pre-Hearing Conference, at 94.

¹⁴¹ Ex. 46.

¹⁴² *First Prehearing Order*, ¶¶ 10-14.

¹⁴³ *First Prehearing Order* at p. 5. The Administrative Law Judge also ruled on various discovery motions that had been filed by the parties at this time. Subsequent to the May 15 status conference, Qwest filed a Motion to Certify to the Commission the Issue of Enforceability of the Memorandum of Understanding, which the Administrative Law Judge had already determined was abandoned by the parties. The motion was denied by the Administrative Law Judge in the *Administrative Law Judge's Second Prehearing Order*, issued June 28, 2001.

"sham" test and on "seeking relief in the only one of Qwest's 14 states where the Commission would have required Qwest to do the test."¹⁴⁴

Post-Hearing Actions

116. On July 13, 2001, during the break in the hearings, Dickinson of AT&T, sent Miller of Qwest an e-mail requesting confirmation of Halvorson's testimony on July 9 that Qwest would keep IMA EDI Version 6.0 available for the UNE-P trial through December.¹⁴⁵

117. Qwest's systems are capable of supporting three versions of the EDI software simultaneously, but no more. At the time Qwest was offering Versions 6.0, 7.0, and 8.0. But it had committed to CLECs to upgrade to Version 9.0 on December 8, 2001.¹⁴⁶ Thus, Halvorson's commitment created a problem. Qwest requested a meeting to discuss the problem. That meeting took place on Thursday, August 9, 2001.¹⁴⁷

118. Dickinson and Miller attended the August 9, 2001, meeting, along with several others from AT&T and Qwest. Qwest explained that its systems could not support Version 6.0 after it implemented Version 9.0 on December 8, 2001. It offered AT&T two options: Completely cease testing by December 7 or migrate to Version 7.0 or 8.0. Migration would require recertification, which would take up to 12 weeks to complete. AT&T said it would refer the question to Gibbs and respond to Qwest account manager Bessey.¹⁴⁸

119. Dickinson immediately consulted with Gibbs. Gibbs told her that he had requested funding to migrate to Version 8.0 for purposes of the Minnesota UNE-P test, but it had not yet been approved. He told her to reiterate AT&T's desire to use Version 6.0 through the end of December. At the end of the day, still on August 9, 2001, Dickinson left a voice mail for Miller saying that it looked like AT&T "will not be migrating to another version, 6.0, 7.0, or 8.0, so it looks like the test will be over officially on the 7th of December." She said she could send an e-mail confirmation the next day. She actually sent it Monday, August 13, 2001, stating that per her voice mail, "AT&T will be ending the UNE-P consumer test trial in Minnesota on December 7, 2001." She did not mention that AT&T would not be migrating to a later version of the IMA EDI.¹⁴⁹

120. Miller found the voice mail self-explanatory. However, he did have communications with Jason Topp, Qwest's Minnesota attorney, and Bessey where he indicated that by not upgrading, AT&T was "impairing its ability to enter the market rapidly upon completion of the UNE-P test," because it would have to certify its systems to a later version.

¹⁴⁴ Tr. 1261.

¹⁴⁵ Ex. 67 (Affidavit of Mark Miller, admitted October 1, 2001).

¹⁴⁶ Ex. 67, ¶ 3.

¹⁴⁷ Ex. 67, ¶ 5; Ex. 1057 (Affidavit of Carla Dickinson Pardee, admitted October 1, 2001), ¶ 2.

¹⁴⁸ Ex. 67, ¶ 5; Ex. 1057, ¶¶ 4-6.

¹⁴⁹ Ex. 67, ¶ 6 and Exs. 1 and 2; Ex. 1057, ¶¶ 7-9 and Ex. A.

121. Miller states that he then decided to confirm his understanding of Dickinson's messages because the e-mail had not mentioned the decision not to migrate to a later version. With the help of counsel not identified in his affidavit, Miller drafted a letter to Dickinson and sent it to her on August 29, 2001.¹⁵⁰ It stated:

Re: IMA upgrades and Minnesota UNE-P test completion date

Dear Carla:

This letter confirms your voice mail to me on August 9th, 2001 that AT&T does not plan on upgrading beyond IMA 6.0, and that the Minnesota UNE-P test will be completed on December 7, 2001.

It was signed by Miller and copied to Terry and Halvorson.¹⁵¹

122. On August 30, 2001, Qwest filed a request that it be allowed to supplement the record to put in newly discovered information that demonstrated "AT&T's lack of intention to enter the local market in Minnesota." Attached as that information was a copy of Miller's letter of the day before.¹⁵² After receiving responses from AT&T and the Department, the Administrative Law Judge ordered that Qwest and AT&T file affidavits of Miller and Dickinson explaining that communication, which they did.¹⁵³

123. Qwest's letter to AT&T of August 29, 2001, makes false and misleading statements and implications in the following ways:

a) It falsely claims to be confirming a hasty, end-of-the-day voice mail. Qwest had Dickinson's confirming e-mail in its possession two business days later. The e-mail said the UNE-P test would be ended December 7. Knowing the background of the two alternatives Qwest had given AT&T, Qwest did not need to confirm anything. If Miller had actually been confused about why the e-mail didn't mention not upgrading, he would have asked about the e-mail. Qwest's letter referred to the voice mail because Qwest wanted to capitalize on Dickinson's statement about not upgrading to a newer version of the IMA EDI, and that statement appeared only in the voice mail. The true purpose of Qwest's letter was to *fabricate evidence for this case to bolster Qwest's allegation that the UNE-P test was not for market-entry purposes.*

b) It falsely states that AT&T did not plan on upgrading beyond Version 6.0. That allegation is based upon a false premise that AT&T would have to use its UNE-P test gateway for any subsequent real-market offering of local service using UNE-P and for other services it offers under

¹⁵⁰ Ex. 67, ¶¶ 8 and 9.

¹⁵¹ Ex. 68, Qwest Outside Counsel letter dated August 30, 2001, attachment.

¹⁵² Ex. 68.

¹⁵³ Post-Hearing Order, September 19, 2001; Exs. 67 and 1057.

interconnection agreements with Qwest. The truth is that the voice mail and e-mail only notified Qwest of AT&T's choice between the two alternatives offered by Qwest and that the choice was to end the UNE-P test December 7 rather than to upgrade AT&T's UNE-P test system gateway beyond Version 6.0. The messages had nothing to do with AT&T ever upgrading to later versions for market entry. AT&T will use a later version if and when it enters the UNE-P market in Minnesota or other Qwest states, but that will be on a new and separate EDI system on AT&T's end. Presumably, AT&T already had or was about to upgrade beyond Version 6.0 in its existing systems for ordering Local Number Portability and Unbundled Loops. As Miller pointed out, the new system will take some time for AT&T to program and to have certified, but AT&T will be able to use some of the knowledge it has gained in the UNE-P test.

124. Qwest's August 30, 2001, letter to the Administrative Law Judge claiming that certain information had come to light which it believed demonstrated AT&T's lack of intention to enter the local market was misleading because it was based upon the false and misleading evidence Qwest had fabricated and then carried that distortion further. Anyone with knowledge of the surrounding facts would know that nothing about AT&T's choice of the alternative to end the UNE-P test created any such inference. That Qwest would even make the argument is disturbing. It provides verification of Qwest's lack of candor and self-serving behavior in its dealings with AT&T.

125. Any of the foregoing findings more properly considered to be conclusions of law are adopted as such.

Based upon the foregoing findings, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and Commission have jurisdiction in this matter under Minn. Stat. §§ 14.50 and 237.02, 237.081, 237.16, and 237.462.

2. Minn. Stat. § 237.462, subd. 1, clauses (1), (3), and (4), empower the Commission to assess monetary penalties for knowing and intentional violations of Minn. Stat. § 237.121 and other statutes and rules; a Commission-approved interconnection agreement, if the violation is material; or any duty or obligation imposed under Section 251(a), (b) or (c) of the Telecommunications Act of 1996 that relates to service provided in this state.

3. Minn. Stat. § 237.462, subd. 2, allows the Commission to assess a penalty of between \$100 and \$10,000 per day for each violation, considering:

(1) the willfulness or intent of the violation;

(2) the gravity of the violation, including the harm to customers or competitors;

(3) the history of past violations, including the gravity of past violations, similarity of previous violations to the current violation to be penalized, number of previous violations, the response of the person to the most recent previous violation identified, and the time lapsed since the last violation;

(4) the number of violations;

(5) the economic benefit gained by the person committing the violation;

(6) any corrective action taken or planned by the person committing the violation;

(7) the annual revenue and assets of the company committing the violation, including the assets and revenue of any affiliates that have 50 percent or more common ownership or that own more than 50 percent of the company;

(8) the financial ability of the company, including any affiliates that have 50 percent or more common ownership or that own more than 50 percent of the company, to pay the penalty; and

(9) other factors that justice may require, as determined by the commission. The commission shall specifically identify any additional factors in the commission's order.

4. Under Minn. Stat. § 237.462, subd. 3, the Commission may not assess a penalty under unless the record in the proceeding establishes by a preponderance of the evidence that the penalty is justified based on the factors identified above.

5. Under Minn. R. 1400.7300, subp. 5, AT&T and the Department, because they accuse Qwest of violating the Interconnection Agreement and law, must prove the facts at issue by a preponderance of the evidence.

6. Under Minn. Stat. § 237.121, telecommunications carriers are prohibited from the following practices, among others:

(1) upon request, fail to disclose in a timely and uniform manner information necessary for the design of equipment and services that will meet the specifications for interconnection;

(2) intentionally impair the speed, quality, of efficiency of services , products, or facilities offered to a consumer under a tariff, contract, or price list:

...

(4) refuse to provide a service, product or facility to a telephone company or telecommunications carrier in accordance with its applicable tariffs, price lists, or contracts and with the commission's rules and orders.¹⁵⁴

7. The Interconnection Agreement requires Qwest and AT&T to act in good faith and consistently with the intent of the Act and to provide notice, approval, or similar action without unreasonable delay or condition.

8. AT&T's UNE-P test request fit within the parameters established by § 14.1 of the Interconnection Agreement and was reasonable. Therefore, the Interconnection Agreement required Qwest to cooperate with AT&T in the conduct of the UNE-P test as requested.

9. Section 251(c)(1) of the Act requires ILECs and CLECs to negotiate interconnection agreements in good faith. 47 C.F.R. § 51.301(c), a regulation implementing the Act, lists certain actions and practices that are expressly considered to violate the duty to negotiate in good faith. These include demanding that another party sign a nondisclosure agreement prohibiting a party from providing information requested by the FCC or a state commission, intentionally misleading or coercing another party, and intentionally obstructing or delaying negotiations or resolution of disputes.

10. The Federal Communications Commission has interpreted "good faith" to mean "honesty in fact in the conduct of the transaction concerned," and has stated that "at a minimum the duty to negotiate in good faith "prevents parties from intentionally misleading or coercing parties into reaching an agreement they would not otherwise have made."¹⁵⁵

11. Minnesota courts have defined "bad faith" as "a party's refusal to fulfill some duty or contractual obligation based on an ulterior motive, not an honest mistake regarding one's rights or duties. . . . Actions are done in 'good faith' when done honestly, whether it be negligently or not."¹⁵⁶ Good faith "is an issue of honesty of intent rather than of diligence or negligence."¹⁵⁷

12. Qwest did not fail to act in good faith by attempting to determine for itself its obligations under the Interconnection Agreement. It was entitled to do so. However, Qwest's determination that it could refuse to engage in the cooperative testing requested by AT&T unless it was satisfied that AT&T was using the test for marketing purposes was not simply a mistaken interpretation of its obligation under the Interconnection Agreement. It was a position taken by Qwest before it had examined

¹⁵⁴ Minn. Stat. § 237.121(a)(1) and (a)(4).

¹⁵⁵ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FIRST REPORT AND ORDER*, CC Docket No. 96-98 (rel. August 8, 1996) at 148.

¹⁵⁶ *Sterling Capital Advisors, Inc. v. Herzog*, 575 N.W.2d 121, 125 (Minn. Ct. App. 1998), see also, *Lassen v. First Bank of Eden Prairie*, 514 N.W.2d 831, 837 (Minn. Ct. App. 1994).

¹⁵⁷ *Wohlrabe v. Pownell*, 307 N.W.2d 478, 83 (Minn. 1981).

the terms of the Interconnection Agreement and it was not supported by the terms of the Interconnection Agreement. Instead, the position was developed and used by Qwest in an attempt to prevent AT&T from developing data that AT&T might present to ROC test officials and regulatory bodies in opposition to Qwest's Section 271 applications.

13. Qwest committed a knowing, intentional, and material violation of its obligation to engage in cooperative testing under § 14.1 of the Interconnection Agreement by its refusal to conduct AT&T's UNE-P test from September 14, 2000, to May 11, 2001. Such action also constitutes a knowing and intentional refusal to provide a service, product, or facility to a telecommunications carrier in accordance with a contract under Minn. Stat. § 237.121(a)(4). Qwest is therefore subject to penalties under Minn. Stat. § 237.462, subd. 1, (1) and (3).

14. Qwest failed to act in good faith and committed knowing, intentional, and material violations of its obligations to act in good faith under the Interconnection Agreement and under Section 251(c)(1) of the Act by the following conduct:

a) Creating a specious position to support its refusal to conduct AT&T's UNE-P test, when that refusal was actually based upon what Qwest saw as an assault against its 271 initiative and by its desire to prevent or delay AT&T from conducting a true market entry test--both pure retail business interests of Qwest.

b) Imposing its position regarding its testing obligations upon AT&T, whether specious or correct, without informing AT&T, by delaying AT&T's opportunity to challenge that position, by concealing its true intent to allow only certification testing, and by attempting to avoid and by delaying the UNE-P test by engaging AT&T in long and unnecessarily difficult negotiations over UNE-P testing that Qwest never intended to allow. These deceptions continued from September 14, 2000, until April 6, 2001, when Qwest filed its Answer and Counterclaim declaring openly for the first time that it would not do the UNE-P test unless AT&T demonstrated to its satisfaction that it had legitimate business plans to enter the market.

c) Sending the letter of August 29, 2001, to AT&T making false and misleading statements

Such actions also constitute knowing and intentional failure to disclose necessary information under Minn. Stat. § 237.121(a)(1). Qwest is therefore subject to penalties under Minn. Stat. § 237.462, subd. 1, (1), (3) and (4).

15. Qwest's violations continued from September 14, 2000, to May 11, 2001, a period of 239 days. Substantial penalties are appropriate, considering the following factors:

a) The violations were knowing and intentional.

b) The violations were serious. Qwest's conduct delayed by several months AT&T's ability to enter the local service market via UNE-P in Minnesota and other Qwest states. This harmed AT&T financially and also harmed Minnesota consumers by delaying significant competition in the local service market.

c) There is one significant violation, a continuing pattern of conduct, and several lesser individual violations consistent with that pattern

d) Qwest conduct in this case was for the purpose of protecting its entry into the long-distance market through the Section 271 process. Long-distance will provide very substantial revenue to Qwest.

e) Qwest ultimately agreed to cooperate in AT&T's UNE-P test, but only after AT&T had initiated this complaint proceeding.

f) Qwest has enormous assets, but is suffering revenue problems in the current economy. It has the financial ability to pay significant penalties.

g) Qwest's actions would be appropriate in a competitive market. But this is a regulated market where Qwest's actions are subject to the Act and state law. Its actions were anti-competitive and cannot be condoned under the Act and state law.

16. AT&T's conduct in this matter did not violate the Interconnection Agreement or law. The few statements AT&T made to Qwest that were not totally accurate were minor deviations, concealed no material facts, and did not mislead Qwest. Qwest's Counterclaim against AT&T should be dismissed.

NOTICE

THIS REPORT IS NOT AN ORDER. THE PUBLIC UTILITIES COMMISSION WILL ISSUE THE FINAL AGENCY ORDER, WHICH MAY ADOPT OR DIFFER FROM THE FOLLOWING RECOMMENDATIONS.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATIONS

IT IS RESPECTFULLY RECOMMENDED that the Public Utilities Commission issue an Order:

1. Adopting the foregoing Findings and Conclusions.
2. Assessing monetary penalties under Minn. Stat. § 237.462 against Qwest in the amount of \$5,000.00 per day for 239 days, a total of \$1,195,000.00.

3. Dismissing Qwest's Counterclaim against AT&T.

Dated February 22, 2002

STEVE M. MIHALCHICK
Administrative Law Judge

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For Open Meeting of: 2/7/02

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Docket Number: _____

Docket Number: F-00000A-97-0238

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Jim Irvin	LW	3/6/02
William Mundell	WM	3/6/02
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