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LEWIS AND ROCA LLP
LAWYERS

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman

JAMES M. IRVIN
Commissioner

MARC SPITZER
Commissioner

Arizona Corporation Commission
DOCKETED

MAY 14 2002

DOCKETED BY

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**

WORLDCOM INC.'S NOTICE OF SUPPLEMENTAL FILING OF AUTHORITY ON CHECKLIST NO. 10 –CNAM

On May 8, 2002, the Minnesota Public Utilities Commission, through its Office of Administrative Hearings, issued a recommended Order in which it required Qwest to provide the CNAM database by bulk download. A copy of the Order is attached. The discussion on bulk download of the CNAM database is found at paragraphs 149 through 154.

The Order concludes, in pertinent part, that Qwest's refusal to provide the CNAM database by bulk download is discriminatory and that even Qwest admits that it is now

technically feasible to require access by bulk download. With respect to privacy concerns, the Order points out that WorldCom is subject to the same privacy and confidentiality regulations as Qwest and, as long as WorldCom has the privacy indicator associated with the CNAM record, it will be able to block release of the Caller ID information at the switch, the same way Qwest would. In addition, the Order provides that Qwest is free to omit from the CNAM database the listings stored by other CLECs unless WorldCom can demonstrate that it has obtained permission from those CLECs to obtain the information.

Due to the expense of copying and mailing this Order, WorldCom also requests that it only be required to file the Order with the official Commission and hand-delivered copies. All other parties will be provided electronic copies of the Order. If for any reason a party wants a copy of the Order, please contact the undersigned.

RESPECTFULLY SUBMITTED this 14th day of May, 2002.

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– AND –

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Attorneys for WorldCom, Inc.

ORIGINAL and ten (10) copies of the foregoing (with attachment) filed this 14th day of May, 2002, with:

Arizona Corporation Commission
Docket Control – Utilities Division
1200 W. Washington Street
Phoenix, Arizona 85007

COPY of the foregoing (with attachment) hand-delivered this 14th day of May, 2002, to:

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OAH Docket No. 12-2500-14485-2
PUC Docket No. P-421/C1-01-1370

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

In the Matter of a Commission Investigation Into Qwest's Compliance with Section 271(c)(2)(B) of the Telecommunications Act of 1996; Checklist Items 3, 7, 8, 9, 10, and 12

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

This matter came on for hearing on March 4-6, 2002, by Administrative Law Judge Steve M. Mihalchick in the Large Hearing Room of the Minnesota Public Utilities Commission, 200 Metro Square Building, 121 East 7th Place, St. Paul, Minnesota. The record was closed March 29, 2002, upon receipt of post-hearing briefs. Administrative Law Judge Kathleen A. Sheehy assisted in preparation of this report.

Robert E. Cattanach and Shannon Heim, Dorsey & Whitney, 50 S. Sixth St., Minneapolis, Minnesota 55402; Mary Rose Hughes and Kelly Cameron, Perkins Coie, 607 14th Street NW, Washington, D.C. 20005; and Jason Topp, Qwest Corporation, 200 S. Fifth Street, Room 395, Minneapolis, Minnesota 55402, appeared on behalf of Qwest Corporation (Qwest).

Rebecca DeCook, 1875 Lawrence St., 15th Floor, Denver, Colorado 80202, appeared on behalf of AT&T Communications of the Midwest, Inc., AT&T Local Services on behalf of TCG Minnesota, and AT&T Broadband Phone Company of Minnesota, Inc. (collectively AT&T).

Gregory R. Merz, Gray, Plant, Mooty, Mooty & Bennett, 3400 City Center, 33 S. Sixth St., Minneapolis, Minnesota 55402, and Lesley Lehr, 638 Summit Avenue, St. Paul, Minnesota 55105, appeared for WorldCom, Inc. (WorldCom).

Ginny Zeller and Priti Patel, 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).

Jeanne M. Cochran and Mary Crowson, Assistant Attorneys General, Minnesota Attorney General's Office, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101, appeared for the Residential Utility and Small Business Division (OAG/RUD).

Cecilia Ray, Moss & Barnett, 90 S. Seventh St., Suite 4800, Minneapolis, Minnesota 55402, appeared for Ace Telephone Association; BEVCOMM, Inc.;

Encore Communications; HomeTown Solutions, LLC; Hutchinson Telecommunications, Inc.; Mainstreet Communications, Inc.; NorthStar Access, LLC; Otter Tail TelCom, LLC; Paul Bunyan Rural Telephone Cooperative; Tekstar Communications, Inc.; Unitel Communications; U.S. Link, Inc.; and VAL-Ed Joint Venture, LLP, d/b/a 702 Communications (collectively the CLEC Coalition).

Lillian Brion appeared on behalf of the staff of the Minnesota Public Utilities Commission.

NOTICE

Notice is hereby given that pursuant to Minn. Stat. § 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 20 days of the mailing date hereof or such other date as established by the Commission's Executive Secretary.

Questions regarding the 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, MN 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 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.

STATEMENT OF ISSUES

The issues in this matter are whether Qwest has demonstrated by a preponderance of the evidence that it meets the competitive checklist requirements of 47 U.S.C. § 271(c)(2)(B) in the following areas:

Checklist Item 3: Does Qwest provide nondiscriminatory access to its poles, ducts, conduits, and rights-of-way at just and reasonable rates in accordance with the requirements of § 224?

Checklist Item 7: Does Qwest provide nondiscriminatory access to (I) 911 and E911 services; (II) directory assistance services to allow other carriers' customers to obtain telephone numbers; and (III) operator call completion services?

Checklist Item 8: Does Qwest provide white pages directory listings for customers of other carriers' telephone exchange service?

Checklist Item 9: Does Qwest provide nondiscriminatory access to telephone numbers for assignment to other carriers' telephone exchange service customers?

Checklist Item 10: Does Qwest provide nondiscriminatory access to databases and associated signaling necessary for call routing and completion?

Checklist Item 12: Does Qwest provide nondiscriminatory access to such services or information as are necessary to allow requesting carriers to implement local dialing parity in accordance with the requirements of § 251(b)(3)?

Based upon all the proceedings herein, the Administrative Law Judges makes the following:

FINDINGS OF FACT

Statutory Framework—Jurisdiction and Authority

1. The Telecommunications Act of 1996 conditions entry by a Bell Operating Company (BOC) into the provision of in-region interLATA services upon compliance with certain provisions of 47 U.S.C. § 271. BOCs must apply to the Federal Communications Commission (FCC) for authorization to provide interLATA services originating in any in-region state. The FCC must issue a written determination on each application no later than 90 days after receiving such application.[1]

2. Section 271 requires the FCC to make various findings before approving BOC entry. In order for the FCC to approve a BOC's application to provide in-region interLATA services, a BOC must first demonstrate, with respect to each state for which it seeks authorization, that it satisfies the requirements of either § 271(c)(1)(A) (Track A) or § 271(c)(1)(B) (Track B).[2] The BOC must also show that (1) it has "fully implemented the competitive checklist" contained in § 271(c)(2)(B); (2) the requested authorization will be carried out in accordance with the requirements of § 272; and (3) the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience, and

[1] 47 U.S.C. § 271, § 271(d)(1)-(3).
[2] *Id.* at § 271(d)(3)(A).

necessity." [3] The statute specifies that, unless the FCC finds that these criteria have been satisfied, the FCC shall not approve the requested authorization.

3. The FCC must consult with the relevant state commission to verify whether the BOC has opened its local markets to competition in compliance with the requirements of § 271(c). State commissions have the responsibility under § 271(d)(2)(B) to advise the FCC whether to grant or deny the BOC's request to provide interLATA service within that state. The FCC has defined the state commission's primary goal as development of a comprehensive factual record concerning BOC compliance with the requirements of section 271 and the status of local competition.[4]

Procedural Background

4. On September 11, 2001, the Minnesota Public Utilities Commission issued a Notice and Order for Hearing in In the Matter of an Investigation Regarding Qwest's Compliance with Section 271 of the Telecommunications Act of 1996 with Respect to the Provision of InterLATA Services Originating in Minnesota, Docket No. P-421/C1-96-1114. The Commission referred the matter to the Office of Administrative Hearings for contested case proceedings.

5. This matter was divided into several specialized dockets. Each docket addresses issues arising from a different aspect of the Act's standards for § 271 approval. This docket, No. 1370, addresses compliance with the "non-OSS" competitive checklist items in 47 U.S.C. § 271(c)(2)(B)(iii), (vii)-(x), and (xii).

6. On or about October 1, 2001, Qwest filed a petition with the Minnesota PUC seeking a finding of compliance with these checklist items.

7. The issue of whether Qwest has met the threshold requirements for following "Track A" under 47 U.S.C. § 271(c)(1)(A) will be addressed in Docket 1373, the "Public Interest" docket. This docket, No. 1370, has proceeded under the assumption that the Track A requirements have been met.[5]

Legal Standards and Burden of Proof

8. Congress has determined that a BOC's entry into the long-distance market could be anticompetitive unless the BOC's local market power is first demonstrably eroded by eliminating barriers to local competition. Qwest therefore must show that it has made real, significant, and irreversible steps to

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[3] *Id.* at § 271(d)(3)(C).

[4] *See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543 ¶ 30 (1997) (Ameritech Michigan Order).

[5] Second Prehearing Order ¶ 2, October 18, 2001.

open its local market, both in statements of policy and in actual implementation of policy.[6]

9. In demonstrating its compliance, Qwest must show that it has a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item, and that it is furnishing, or is ready to furnish, the checklist items in quantities that competitors may reasonably demand and at an acceptable level of quality. Qwest at all times bears the burden of proof of compliance with § 271, even if no party challenges its compliance with a particular requirement.[7] The standard of proof is the preponderance of the evidence, meaning "the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it."[8]

10. In particular, Qwest must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis. For those functions that Qwest provides to competing carriers that are analogous to the functions Qwest provides to itself in connection with its own retail service offerings, Qwest must provide access to competing carriers in "substantially the same time and manner" as it provides to itself. For those functions that have no retail analogue, Qwest must demonstrate that the access it provides to competing carriers would offer an efficient carrier a "meaningful opportunity to compete."[9]

11. The most probative evidence of nondiscriminatory access to interconnection and UNEs is actual commercial usage, and performance measures are an especially effective means of providing evidence of the quality and timeliness of the access provided by a BOC to requesting carriers.[10] The FCC has determined that, in demonstrating a prima facie case, a BOC relying on performance data will:

a) provide sufficient performance data to support its contention that the statutory requirements are satisfied;

b) identify the facial disparities between the applicant's performance for itself and its performance for competitors;

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[6] *See* Ameritech Michigan Order ¶ 18.
[7] *In the Matter of the Application of Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, 8994 ¶ 11 (2001) (Verizon Massachusetts Order).
[8] Minn. R. 1400.7300, subp. 5; Ameritech Michigan Order ¶¶ 45-46.
[9] *See In the Matter of Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 3971 ¶44 (1999) (Bell Atlantic New York Order).
[10] *Id.*, 15 FCC Rcd at 3974 ¶ 53.

c) explain why those facial disparities are anomalous, caused by forces beyond the applicant's control (e.g., competing carrier-caused errors), or have no meaningful adverse impact on a competing carrier's ability to obtain and serve customers; and

d) provide the underlying data, analysis, and methodologies necessary to enable the Commission and commentators meaningfully to evaluate and contest the validity of the applicant's explanations for performance disparities, including, for example, carrier specific carrier-to-carrier performance data.[11]

12. If performance data aggregate the performance of the BOC and competing carriers, the BOC must either disaggregate the data or explain why disaggregation is not technically feasible or is unnecessary given the method by which competing carriers obtain access to interconnection or to UNEs. The absence of such an explanation or any other corroborative evidence that the BOC is providing nondiscriminatory access may preclude a finding that a BOC is in compliance with a checklist item.[12]

13. A BOC's promises of future performance to address particular concerns raised by opponents have no probative value in demonstrating present compliance with the requirements of § 271. Paper promises do not, and cannot, satisfy a BOC's burden of proof.[13]

14. Once a BOC has made a prima facie case showing that the requirements of § 271 have been met, opponents must produce evidence and arguments to show that the BOC does not satisfy the requirements of § 271. In considering the evidence of opponents, mere unsupported allegations will not suffice. Although anecdotal evidence may be indicative of systemic failures, isolated incidents may not be sufficient to overcome a prima facie case. Moreover, a BOC may overcome anecdotal evidence by, for example, providing objective performance data that demonstrate that it satisfies the statutory nondiscrimination requirement.[14] The FCC also looks favorably on BOC measures designed to correct problems promptly and to prevent similar problems in the future. It does not hold BOCs to a standard of perfection, but it does require them to establish methods to respond effectively to problems as they occur and to prevent similar failures in the future.[15]

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[11] Verizon Massachusetts Order, 16 FCC Rcd at 8994-95 ¶12.
[12] *In the Matter of the Application of BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana,* 13 FCC Rcd 20599, 20743 ¶ 245 (1998) (Bell South Louisiana II Order).
[13] Ameritech Michigan Order, 12 FCC Rcd at 20573-74 ¶ 55.
[14] Bell Atlantic New York Order, 15 FCC Rcd at 3973 ¶¶ 49-50.
[15] BellSouth Louisiana II Order at 20638 ¶ 57.

Checklist Item 3: Poles, Ducts, Conduits, and Rights-of-Way

15. Section 271(c)(2)(B)(iii) of the Act requires Qwest to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way (PDROW) owned or controlled by the BOC at just and reasonable rates in accordance with the requirements of § 224. In the *Local Competition Order*, the FCC interpreted § 251(b)(4) as requiring nondiscriminatory access to LEC poles, ducts, conduits, and rights-of-way for competing providers of telecommunications services in accordance with the requirements of § 224.[16] In addition, it interpreted the revised requirements of § 224 governing rates, terms, and conditions for telecommunications carriers' attachments to utility poles in the *Pole Attachment Telecommunications Rate Order.*[17] Section 224(f)(1) states that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Notwithstanding this requirement, § 224(f)(2) permits a utility providing electric service to deny access to its poles, ducts, conduits, and rights-of-way, on a nondiscriminatory basis, "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."

16. In its *BellSouth Louisiana II Order*, the FCC concluded that BellSouth demonstrated that it was providing nondiscriminatory access to its poles, ducts, conduits, and rights-of-way at just and reasonable rates, terms and conditions by demonstrating that it has established nondiscriminatory procedures for: (1) evaluating facilities requests pursuant to Section 224 of the Act and the Local Competition Order; (2) granting competitors nondiscriminatory access to information on facilities availability; (3) permitting competitors to use non-BellSouth workers to complete site preparation; and (4) compliance with state and federal rates. The FCC also concluded there that BellSouth must provide competing telecommunications carriers with access to its poles, ducts, conduits, and rights-of-way on reasonable terms and conditions comparable to those which it provides itself and within reasonable time frames and that procedures for an attachment application should ensure expeditious processing so that "*no [BOC] can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications . . . equipment by those seeking to compete in those fields.*"[18]

17. The Minnesota PUC has considered issues surrounding access to poles and conduit in various arbitration cases, including arbitration proceedings in 1996 involving US West[19] and GTE Minnesota.[20] With respect to issues raised

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[16] Bell Atlantic New York Order, 15 FCC Rcd at 4092-93 ¶ 263; *Local Competition Order*, 11 FCC Rcd at 16073.

[17] *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amend of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, 13 FCC Rcd 6777 (1998) (Pole Attachment Telecommunications Rate Order).

[18] BellSouth Louisiana Order II, *¶ 176.*

[19] *In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest. Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for*

relating to access to poles, ducts, conduits, and rights-of-way, the Minnesota PUC's reconsideration order in the AT&T/GTE proceeding recognized and affirmed the FCC's positions regarding (1) parity in providing nondiscriminatory access; (2) the inability of an ILEC to reserve space for its own future use rather than provide access to a competitor; and (3) the expansion of capacity at the request of another carrier.[21]

18. Checklist Item 3 implements a general goal of the Act to hasten competition in local markets by providing ways for CLECs to obtain access to the ILEC's "bottleneck facilities," rather than requiring each CLEC to reproduce those facilities. Requiring ILECs to share such facilities serves to (1) accelerate the deployment of competitive facilities; (2) constrain "unnecessary" costs to CLECs; (3) minimize waste; and (4) reduce the duplication of facilities in public rights-of-way.[22]

19. Through the testimony of Thomas R. Freeberg, Qwest asserts that it offers access to its PDROW to retail competitors pursuant to its commission-approved interconnection agreements using a nondiscriminatory process that involves two broad steps or phases.[23] First, Qwest provides CLECs with access to information necessary to plan their use of PDROW. Second, Qwest processes CLEC applications for access to PDROW using the same standards and business rules that Qwest applies to its own PDROW needs and projects.

20. The other parties disagree, contending that:

a) Freeberg's testimony lacks foundation,

b) Qwest illegally imposes reciprocal obligations,

c) Qwest's interconnection agreements do not insure CLEC access to Qwest's rights-of-way in multi-tenant environments or to the right-of-way agreements,

d) Qwest's interconnection agreements do not impose the FCC-mandated response time of 45 days, and

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Arbitration with US WEST Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, MN PUC Docket No. P-442, 421/M-96-855 *et al*, Order Resolving Arbitration Issues and Initiating a US West Cost Proceeding, December 2, 1996. ("US West Consolidated Arbitration Order")

[20] *In the Matter of AT&T Communications of the Midwest, Inc.'s Petition for Arbitration with Contel of Minnesota, Inc. d/b/a GTE Minnesota under Section 252(b) of the Federal Telecommunications Act of 1996*, MN PUC Docket No. P-442, 407/M-96-939, Order Resolving Arbitration Issues and Opening Cost Proceeding, December 2, 1996 ("AT&T/GTE Arbitration Order") and Order Resolving Issues after Reconsideration and Approving Interconnection Agreement, March 14, 1997. ("AT&T/GTE Arbitration Reconsideration Order")

[21] *Id.* at 53-60.

[22] Ex. 168 at 3-4.

[23] *See generally* Ex. 155 at 7-11; Ex. 156 at 21.

e) Qwest has imposed prohibitive restrictions and burdens on CLEC access to duct, conduits, and other facilities.

21. ***Foundation for Testimony.*** In its post-hearing brief, the Department contends that Freeberg lacks foundation to provide testimony about Checklist Item 3 because, in the past two years, he has not had a position that has required him to process CLEC requests for access to PDROW or directly supervise Qwest employees who process such requests. The Department did not object to his prefiled testimony prior to the hearing, as required by Paragraph 25 of the First Prehearing Order of October 3, 2001, which states:

> Except for good cause shown, objections by any party relating to the qualifications of a witness or the admissibility of any portion of a witness's prefiled testimony shall be considered waived unless the objecting party states in writing its objection with particularity to the Administrative Law Judge and serves a copy of such objections on the Commission and all other parties prior to commencement of the evidentiary hearing. If an objection is made by a party, the party shall be permitted to lay further foundation for the objection through cross-examination of the witness. Any prefiled testimony which is not objected to shall be admitted during the evidentiary hearings without the necessity of laying foundation for the testimony.

Thus, the Department's objection was not timely and has been waived. Moreover, Freeberg had sufficient education, experience, and information available to him to present the evidence that he did present on behalf of Qwest. He is authorized by Quest to make representations on behalf of Qwest. While it is clear that he was not personally involved in or did not personally observe many of the facts he reported, the same is true of virtually every expert witness presented and many of the other witnesses as well. Opportunity to observe was one of the factors applied in assessing witness testimony in the matter.

22. ***Reciprocal Obligations.*** The Department and AT&T argue that, contrary to federal and state law, Qwest conditions CLEC access to PDROW upon receiving reciprocal access from CLECs. Qwest claims that it does not require reciprocity. It appears that Qwest attempts to impose reciprocity requirements, but that it is possible for CLECs to avoid them if the CLECs know where to look and have the fortitude to demand compliance.

23. The Act does not require CLECs to provide reciprocal access to poles, ducts, conduits and rights-of-way, and it does not permit ILECs to make such access contingent on a CLEC agreeing to such reciprocity. To the contrary, the FCC has expressly stated in the *Local Competition First Report and Order*

that "no incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224 or section 251(b)(4)."[24]

24. The PUC confirmed the FCC's statement as controlling authority in Minnesota during the original interconnection arbitrations between U S WEST, AT&T, and MCI by rejecting reciprocity language recommended by the arbitration panel and instead approving contract language that did not require reciprocity.[25] The United States District Court for the District of Minnesota affirmed the decision, stating, "Because U S WEST is a incumbent LEC, it cannot seek reciprocity from AT&T and MCIMetro in relation to access to rights-of-way."[26]

25. Qwest initially submitted only the Arizona Dial Tone Interconnection Agreement (ADT Agreement) to establish its "concrete and specific legal obligation" to furnish "nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by" Qwest.[27] But, Paragraph 10.8.1.4 of the ADT Interconnection Agreement requires Arizona Dial Tone to provide reciprocal access with respect to access to poles, ducts, conduits and rights-of-way,[28] and, thus, violates the law.

26. According to Qwest witness Freeberg, many CLECs in Minnesota do not own PDROW and, therefore, provisions requiring reciprocity of access to PDROW, such as those contained in the Arizona Dial Tone Agreement, do not apply.[29] That fact does not make an unlawful provision lawful. And it is hardly license for Qwest to impose reciprocity requirements on Minnesota CLECs contrary to the FCC, PUC and court rulings, which it has continued to do.[30]

27. In negotiations with a CLEC named SBCT in October 2001, Qwest's lead negotiator told SBCT that Qwest was entitled to the reciprocal access language it had proposed for that interconnection agreement and refused to remove the provision. SBCT was able to avoid the provision by opting into another Qwest interconnection agreement that did not have that provision.[31] Qwest argues that this demonstrates that it does not impose reciprocity requirements. On the contrary, it demonstrates that Qwest will, whenever possible, seek to impose reciprocity requirements on CLECs without the inclination, knowledge, and resources to oppose Qwest.

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[24] Local Competition First Report and Order ¶ 1231.
[25] *AT&T Communications of the Midwest, Inc.; MCIMetro Access Transmission Services, Inc.; MFS Communications Company; U S WEST Communications, Inc.* Docket No. P-422,421/M-96-855; P-5321,421/M-96-909; P-3167,421/M-96-729 (December 2, 1996) at section VI.A.4.
[26] *U S WEST Communications, Inc. v. Garvey et al.*, Civ. 97-913 ADM/AJB, Memorandum Opinion and Order (March 31,1999) at 42.
[27] Ex. 148, LAS-7.2.
[28] Ex. 148, LAS-7.2 ¶ 10.8.1.4.
[29] *See* Ex. 156 at 17.
[30] Ex. 168 at 21-22.
[31] Ex. 168, SCL-3.

28. In its rebuttal testimony, Qwest offered an interconnection agreement between Qwest and FTTH Communications, LLC (FTTH Interconnection Agreement), that does not contain the reciprocity requirement. Section 10.8.1.4 of both the FTTH Agreement and Qwest's SGAT, filed in Minnesota on October 1, 2001, states, "Intentionally Left Blank."[32] Thus, Qwest argues, pursuant to the pick and choose provisions of the Act,[33] any CLEC in Minnesota that seeks to avoid reciprocity of access obligations can opt into the relevant provisions of the Minnesota SGAT or agreements such as the FTTH Agreement, which do not require reciprocity.

29. In this case, Qwest chose to rely on interconnection agreements rather than its SGAT to demonstrate compliance with Section 271. Thus, the SGAT cannot be relied upon on this particular issue.

30. The Department argues that the FTTH Agreement cannot be relied upon because FTTH is not certificated as a CLEC in Minnesota and is not a "competing provider" of telephone exchange service to anyone. Nonetheless, Qwest has represented to the Commission that the FTTH Agreement is one from which CLECs may pick and choose and Qwest is bound by that representation. Moreover, the FTTH Agreement contains several new provisions that address concerns that have been raised by CLECs and regulators and indicates attempts by Qwest to come into compliance. Therefore, Qwest may rely upon the FTTH Agreement to demonstrate compliance with § 271 requirements.

31. AT&T argues that because there is no pick and choose provision in the FTTH Agreement, it is not known how a CLEC would pick and choose rights under the agreement and what limitations Qwest would seek to impose on the CLEC's "pick." Further, AT&T argues, in other interconnection agreements, Qwest has required that other terms and conditions must also be opted into by a CLEC; to do so here might impose conditions upon an unconditional right granted by law. However, that is speculative. Qwest is required to allow CLECs to pick and choose by the Act and Qwest has no right to restrict that option, particularly in the absence of any specific language on pick and choose.

32. AT&T argues that it is meaningless to opt into a section of an agreement that simply states "intentionally left blank." But it is unlikely that a CLEC would make such an election without making a clear statement that the effect is to replace the requirements of the previously-existing reciprocity provision. Moreover, Section 10.8.1.4 is the number typically used by Qwest for the reciprocity provision, so there should be no confusion.

33. The fact that a CLEC can opt into a provision in the FTTH Agreement that says Section 10.8.1.4 is "intentionally left blank" demonstrates

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[32] *See* Ex. 133, MSB 7(I).6 (FTTH Agreement) § 10.8.1.4; Minnesota SGAT § 10.8.1.4. Qwest apparently drafts all of its interconnection agreements using a template agreement with Section 10.8.1.4 as the reciprocity requirement.

[33] *See* 47 U.S.C. § 252(i).

that Qwest has a specific and concrete legal obligation to provide access to PDROW without reciprocal access.

34. ***Access to "Owned and Controlled" Rights-of-Way.*** Again, the Act requires a CLEC to provide nondiscriminatory access to the PDROW "owned or controlled" by it.[34] The ADT Agreement, in Section 10.8.1.3, provides that Qwest will provide access to rights-of-way as follows:

> 10.8.1.3 Rights of Way (ROW) - Where it has ownership or control to do so, Qwest will provide to CLEC, via an Access Agreement in the form of Attachment 4 to Exhibit D, access to available ROW for the purpose of placing telecommunications facilities. ROW includes land or other property owned or controlled by Qwest and may run under, on, above, across, along or through public or private property or enter multi-unit buildings.
>
> > 10.8.1.3.1 ROW means a real property interest in privately-owned real property, but expressly excluding any public, governmental, federal or Native American, or other quasi-public or non-private lands, sufficient to permit Qwest to place telecommunications facilities on such real property; such property owner may permit Qwest to install and maintain facilities under, on, above, across, along or through private property or enter multi-unit buildings.[35]

Section 10.8.1.5 of the ADT Agreement provides:

> The phrase "ownership or control to do so" means the legal right, as a matter of state law, to convey an interest in real or personal property.

35. In the *MTE Order*, the FCC discussed the definitions of "rights-of-way" and "ownership or control."

> 76. . . . We interpret the term "rights-of-way" in the context of buildings to include, at a minimum, defined areas such as ducts or conduits that are being used or have been specifically identified for use as part of the utility's transportation and distribution network. We also clarify that a utility's ability voluntarily to provide access to an area and obtain compensation for doing so is a prerequisite to utility ownership or control under Section 224. . . .
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> 85. In order for a right of access to be triggered under Section 224, the property to which access is sought not only must be a utility pole, duct, conduit, or right-of-way, but it must be "owned or

[34] 47 U.S.C. § 271(2)(B)(iii).
[35] Ex. 148, LAS-7.2, §§ 10.8.1.3 and 10.8.1.3.1.

> controlled" by the utility. In this regard, we have previously held that "[t]he scope of a utility's ownership or control of an easement or right-of-way is a matter of state law." Specifically, "the access obligations of Section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access." . . .
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> 87. We conclude that our analysis in the *Local Competition First Report and Order* remains valid, and applies to ducts, conduits, and rights-of-way in buildings as well as to those in other locations. . . .[36]

36. AT&T and the Department argue that defining "owns or controls" as the legal right "to convey an interest in real or personal property" is too restrictive and that the "ownership or control" analysis that must be conducted is whether Qwest's ownership or control extend to allowing Qwest to grant a CLEC access to Qwest's right-of-way. The point raised is a matter of semantics because if Qwest permits a CLEC to have access to a right-of-way to which it has access, Qwest is conveying an interest in real property. But "conveying an interest in real property" will often be understood to mean conveying a broader property right such as a fee or leasehold interest, and Qwest would seldom, if ever, have such a right. Thus, the language in the ADT Agreement is vague and does not constitute a specific and concrete legal obligation to provide access to rights-of-way where Qwest has the right to grant such access to CLECs. The ADT Agreement does not demonstrate compliance with § 271 in this regard.

37. In the FTTH Agreement, Qwest added provisions to Sections 10.8.1.3.1 and 10.8.1.5 that paraphrase the clarifications made by the FCC in Paragraphs 76 and 85 of the *MTE Order* and comply with the requirements set forth in the order. Because a CLEC can opt into these provisions in the FTTH Agreement Qwest has demonstrated that it has a specific and concrete legal obligation to provide access to rights-of-way in MTEs where it has the legal right to do so.

38. ***Terms of and Access to ROW Agreements.*** In the *MTE Order*, the FCC found that "incumbent LECs are using their control over on-premises wiring to frustrate competitive access in multitenant buildings."[37] The FCC has concluded "that incumbent LECs possess market power to the extent their facilities are important to the provision of local telecommunications services in MTEs," and that "[i]n the absence of effective regulation, (the "ILECs") therefore have the ability and incentive to deny reasonable access to these facilities to competing carriers."[38] Thus, it is important to ensure that Qwest enter into right-

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[36] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 99-217, released October 25, 2000,* ¶¶ 76, 85, 87 (MTE Order).
[37] MTE Order ¶ 6.
[38] MTE Order ¶ 11.

of-way agreements that allow it to grant access to CLECs and to ensure that the CLECs have access to those agreements to verify the extent of Qwest's right to grant access.

39. According to the Department's consultant, Clay Deanhardt, the only way to guarantee that Qwest does not restrict access is for Qwest to be contractually bound to include "express permission" or "no-preclusion" clauses in all of its rights-of-way agreements. A "no preclusion" clause would require Qwest to ensure that all of its agreements with building owners do not contain language precluding other CLECs from using the Qwest rights-of-way in the building. An "express permission" clause would require Qwest to ensure that all of its agreements with building owners expressly grant permission for Qwest wholesale customers to use Qwest's rights-of-way when providing service to a tenant in the building. According to Deanhardt, because neither the ADT Agreement nor the FTTH Agreement contain such clauses, Qwest may have opportunity to enter into agreements that preclude CLEC access to rights of way it otherwise controls under the guise of a building owner's express or implied "refusal" to permit Qwest to share those rights-of-way.[39]

40. There may be situations where a building owner does, legitimately, not want Qwest to share those rights-of-way. But protecting building owners in such situations is less important than the public interest in providing some balance for the CLECs against the market dominance of Qwest. The Administrative Law Judges conclude that an "express permission" or "no-preclusion" clause must be required in all ROW agreements in the future to assure the non-discriminatory access required by 47 U.S.C. § 224(f)(1). The ADT and FTTH Agreements do not currently require such provisions.

41. The issues surrounding access to ROW agreements have been debated by Qwest and AT&T in several states. Qwest had denied access to "non-recorded" agreements, ones where Qwest claimed it had no right to assign its access rights to CLECs. Qwest claimed it was protecting the confidentiality rights of the property owners. Consistent with the recommendation of the Facilitator in the multistate proceeding, Qwest agreed to provide CLECs with access to non-recorded MTE agreements under one of two options: consent of the third-party property owner or indemnification.[40] These options appear in Exhibit D to the ADT and FTTH Agreements and the SGAT. In the FTTH Agreement, Qwest has added a new Section 10.8.2.27 regarding the conditions under which it will provide a ROW agreement to a CLEC.

42. AT&T objects to many of the provisions of Section 10.8.2.27 and Exhibit D. In particular, it claims the consent and indemnification requirements would create unreasonable costs and impose significant delays on CLEC access to ROW and provisioning of service using such ROW, which would constitute a

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[39] Ex. 169 at 17 and Ex. 170 at 9.
[40] Ex. 156 at 5-7.

significant barrier to offering the tenants or other customers a competitive alternative.[41]

43. It appears that CLECs can avoid the delay and burden of obtaining property owner consent by signing an indemnification agreement. Therefore, the Exhibit D language is not unreasonable.

44. AT&T's concerns with Section 10.8.2.27 of the FTTH Agreement include inaccurate and vague terminology, consent requirements, no date for providing the CLEC with the agreements, and undue restrictions on use of the agreement. AT&T's concerns with Exhibit D include unclear language, no requirement to provide publicly recorded agreements to the CLEC, consent and indemnification requirements, no requirement to provide CLECs with the non-recorded ROW agreements, the requirement for the CLEC to determine the current owner of the property and obtain their signature and consent on the Access Agreement, the requirement for the CLEC to record the Access Agreement, the indemnification language in Attachment B, as burdensome and duplicative, and the Consent to Disclosure form as unnecessary and objectionable.[42] AT&T's concerns are of some merit, but do not render the agreements inconsistent with the Act.

45. ***45 Day Response Requirement.*** 47 C.F.R. § 1.1403(b) provides, in pertinent part:

> Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

46. In the *Local Competition Reconsideration Order*, the FCC stated:

> Under the procedures adopted in the order, a utility must grant or deny a request for access within 45 days of a written request. If the utility denies the request, it must do so in writing, the reasons given for the denial must relate to the permissible grounds for denying

[41] Ex. 143 at 11-12.
[42] Ex. 144 at 8-9.

> access (e.g., lack of capacity, safety, reliability, or engineering concerns).[43]

In a subsequent proceeding, *In the Matter of Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 FCC Rcd. 9563, June 7, 2000, the FCC stated:

> We have interpreted the Commission's Rules, 47 C.F.R. §1.1403(b), to mean that a pole owner "must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted." We conclude that Respondent is required to act on each permit application submitted by Complainant within 45 days of receiving the request. To the extent that a permit application includes a large number of poles, respondent is required to approve access as the poles are approved, so that complainant is not required to wait until all poles included in a particular permit are approved prior to being granted any access at all. Respondent shall immediately grant access to all poles to which attachment can be made permanently or temporarily, without causing a safety hazard, for which permit applications have been filed with Respondent for longer than 45 days.

47. The ADT Agreement sets forth two steps in the process for submitting a request for access to ROW. The first step is the inquiry review, which is described in Section 10.8.4.1 of the Agreement. The second step is the field verification, which is described in Section 10.8.4.2 of the Agreement. Under normal circumstances, the inquiry review response is provided in 10 days and the field verification response is due in 35 days, adding up to the 45-day response time required by the FCC. Section 10.8.4.1.1 states "this time frame is applicable to the standard inquiry of thirty (30) Utility Holes or fewer. An inquiry which exceeds the standard will have negotiated completion dates." In Section 10.8.4.1.2, Qwest states "this time frame is applicable to the standard inquiry of one hundred (100) poles or fewer. An inquiry which exceeds the standard will have negotiated completion dates." In addition, Section 2.2 of Exhibit D to the ADT Agreement states:

> Qwest is required to respond to each Attachment 1.B. submitted by CLEC within 35 days of receiving the Attachment 1.B. In the event that Qwest believes that circumstances require a longer duration to undertake the activities reasonably required to deny or approve a request, it may petition for relief before the Commission or under the escalation and dispute resolution procedures generally

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[43] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Order on Reconsideration*, CC Docket No. 96-98, FCC 99-266, ¶ 17 (released October 26, 1999).

applicable under the interconnection agreement, if any, between Qwest and CLEC.

In the FTTH Agreement, Qwest has incorporated similar compromise language ordered by the Multistate Facilitator.[44] The language would allow Qwest to petition the Commission for relief from the 45-day response time.[45]

48. AT&T argues that Qwest's agreements improperly extend the time Qwest has to respond to large orders beyond the 45-day response time permitted by the FCC's rules. Qwest argues that the FTTH Agreement's allowance for Commission-approved waiver of the 45-day interval is proper.

49. Contrary to AT&T's assertion, the *Cavalier Telephone* decision indicates some flexibility in addressing the practical problems of dealing with very large orders under a 45-day deadline. It is simply impossible in some cases to examine the capacity, safety, reliability, and engineering issues for every pole or duct within that time period. The approach recommended by the Multistate Facilitator is a reasonable resolution of the problem. Qwest will not be entitled to an automatic waiver of the 45-day interval. Rather, the provision merely provides Qwest with the opportunity to bring to the Commission's attention a large or otherwise unusual request as to which the Commission may or may not grant to Qwest a waiver of the generally applicable interval. The Commission would certainly grant waivers that still required Qwest to approve access in the most expeditious way possible. The waiver request provision in Exhibit D to the FTTH Agreement is consistent with FCC rules and decisions.

50. ***History of unfair restrictions and burdens on CLEC access.*** CLEC Coalition witness Thomas Burns cited instances where Qwest has required its competitors to establish points of interconnection at distant manholes, refusing CLECs access to Manhole 0. Qwest has also required CLECs to make unnecessary facilities splices in order to use Qwest conduit and ducts to enter Qwest central offices. In comparison, Qwest brings its own facilities directly into its central offices without a splice and uses the most direct and efficient route for its own facilities. Qwest has also denied CLECs access to its records and refused to permit facilities visits, if requested by a CLEC to verify circumstances and conditions relied upon by Qwest in refusing service.[46]

51. Qwest responded that many of the incidents were several years old and involved collocation issues, not requests for access to PDROW. Qwest witness Freeberg noted that in each instance there were negotiations and an ultimate resolution near the location initially proposed by the CLEC. He also

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[44] Ex. 144 at 11; Ex. 156 at 19.
[45] FTTH Agreement, Exhibit D, § 2.2.
[46] Ex. 135 at 4-7.

stated Qwest has agreed to allow the use of an entrance facility directly into a central office without a splice (an "Express Facility").[47]

52. The Department asked CLECs to provide information regarding access to Qwest's PDROW. It found two recent examples of Qwest's failure to provide nondiscriminatory access. One involved Jaguar Communications – a small CLEC operating in Owatonna, Minnesota. In that instance, Qwest delayed giving Jaguar access to a manhole and conduit that would have provided Jaguar with the most direct route to bring its telecommunications traffic to Qwest's central office for interconnection. On August 30, 2000, Jaguar submitted several requests, including one for a dual-entrance express fiber entrance facility into Qwest's Owatonna central office. Jaguar was seeking to become the first DSL provider in the area.[48] One entrance facility was in place by January, 2001, which Qwest claims Jaguar could have used to provide DSL. The other was delayed. Jaguar claims it was attempting to obtain a shorter route; Qwest says that the matter was not even discussed again until Qwest raised it and then acted upon it. Qwest began offering DSL later that year, but before the second entrance was provided for Jaguar. Qwest failed to provide the service in a timely manner and cannot blame the CLEC. The incident is a case of Qwest discriminating against a wholesale customer in favor of its retail arm.

53. In the second incident uncovered by the Department, Qwest failed to provide POPP Communications with access to conduit requested by POPP, even though (a) space was available in the conduit, and (b) Qwest's retail arm had access to and actually used the conduit to provide service to POPP.[49]

54. On August 31, 2001, POPP submitted an innerduct inquiry to Qwest.[50] POPP wanted to use one of the two empty innerducts to carry its fiber for an express fiber entrance facility under a parking lot to POPP's collocation in a nearby Qwest central office.[51] The request was on a map and was approved by Qwest account representative, David Cross, before POPP sent it to Qwest. However, it was not sent to the proper Qwest office. Then Qwest mistakenly determined that the route did not exist.[52] On October 29, Qwest's Design Engineer determined that the conduit POPP wanted to use existed and was available for use by POPP.[53] Even after Qwest's decision-makers received this information, however, Qwest again denied POPP the ability to use the empty conduit that provided the most direct route between the two offices.[54] Qwest informed POPP that Qwest would not rent the conduit to POPP because it would

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[47] Tr. 3:8-14.
[48] Ex. 169 at 11.
[49] Ex. 169, WCD-1 at 1.
[50] Ex. 169, WCD-2 at 2.
[51] Tr. 3:89.
[52] Ex. 156 at 13-14.
[53] *Id.* at 4.
[54] *Id.* at 5.

be "unfair" because other CLECs would have to use Manhole 1 as the POI.[55] On November 7, after Qwest received a phone call from Minnesota PUC Staff and 68 days after POPP's initial request, Qwest agreed to let POPP use the available, empty conduit to which Qwest's retail arm always had access.[56] POPP's fiber was pulled through the conduit on December 10.[57]

55. These problems demonstrate that Qwest has been willing to force unnecessary and extended negotiations upon CLECs. Qwest claims those problems have been corrected. The CLEC Coalition has suggested that Qwest be allowed to modify its service offerings to correct the issues it has raised regarding Express Facilities and access to records. The Department argues that Qwest should not be approved until it can demonstrate that it has actually embraced its obligation to meet the requirements of Checklist Item 3 and will provide access to poles, ducts, conduits and rights of way in a nondiscriminatory manner.

56. The several incidents of non-compliance are troublesome, but do not defeat Qwest's evidence that its agreements otherwise demonstrate compliance with the Checklist Item 3 requirements. Qwest has made improvements to correct past failures and is attempting to comply with § 271 requirements. The incidents were violations of existing agreement language, so adding additional language would not have avoided the situations.

57. Because the ADT and FTTH agreements do not require "express permission" or "no exclusion clauses" as discussed in Finding No. 40 above, Qwest's agreements do not provide nondiscriminatory access to its PDROW and do not comply with the Act and FCC orders. That failure may be remedied by adding provisions that require such clauses in ROW agreements.

Checklist Item 7(I): 911 and E911 Access

58. Section 271(c)(2)(B)(vii) requires Qwest to provide nondiscriminatory access to 911 and E911 services. This section requires Qwest to provide competitors access to 911 and E911 services in the same manner that it obtains such access, i.e., at parity.[58] Specifically, the FCC has found that a BOC "must maintain the 911 database entries for competing LECs with the same accuracy and reliability that it maintains the database entries for its own customers."[59] For facilities-based carriers, the BOC must provide "unbundled access to [its] 911 database and 911 interconnection, including the provision of

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[55] *Id.*
[56] *Id.*
[57] Ex. 169, WCD-1 at 5.
[58] *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas,* 15 FCC Rcd 18354, 18524 ¶ 343 (2000) (SWBT Texas Order), citing Ameritech Michigan Order, 12 FCC Rcd at 20679 ¶ 256.
[59] *Id.*

dedicated trunks from the requesting carrier's switching facilities to the 911 control office at parity with what [the BOC] provides to itself."[60]

59. E911 services provide carriers with the ability to aggregate, switch, and transport end user emergency calls to a Public Service Answering Point (PSAP) operated by the government agency legally responsible for public safety. The government agency determines the service specifications and configurations, trunking arrangements, and funding. End users originate emergency calls by dialing 911.[61] Basic 911 service routes all emergency calls to a single PSAP. Enhanced 911 service incorporates the Automatic Number Identification (ANI) feature to forward the end user's telephone to the PSAP; the service then retrieves the end user's name and street address from the Automatic Location Identifier (ALI) database and then forwards it to the PSAP.[62] Qwest provides E911 service using E911 trunking, E911 selective router, and the E911 database.[63] From an end user perspective, the E911 services that CLECs provide, through access to Qwest's E911 services, database, and facilities, are indistinguishable from the E911 services that Qwest provides to its own end user customers.

60. Qwest offers only E911 service (not basic 911) in Minnesota.[64] The ALI database is managed for Qwest by a third party, Intrado, Inc. (formerly SCC Communications Corp). Intrado provides E911 database management services for Qwest and other local exchange carriers.[65] As of July 31, 2001, Qwest had provided 68 facilities-based CLECs in Minnesota with access to E911 service; it was also providing access for 35 reseller CLECs in Minnesota, and ten CLECs using unbundled switching.[66]

61. Qwest's interconnection agreement with Arizona Dial Tone requires Qwest to provide E911 services and functions to CLECs at parity and with the same level of accuracy and reliability available to Qwest.[67] A reseller CLEC or CLEC using unbundled local switching need not purchase or employ any special equipment in order for its end user customers to use E911 service; they use the transport and trunking already in place for Qwest.[68]

62. CLECs with their own switching facilities establish E911 trunks from their switches to Qwest's selective router. Qwest provides CLECs with E911 trunk terminations at the selective router. Facilities-based CLECs may make direct connections to Qwest frames for E911 trunks through either a direct

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[60] *Id.*
[61] Ex. 132 at 5-6.
[62] *Id.* at 6.
[63] *Id.* at 6-7.
[64] Tr. 2:13.
[65] Ex. 132 at 6.
[66] Ex. 132 at 5.
[67] Ex. 148, LAS-7.2, § 10.3.2.1 (Arizona Dialtone agreement).
[68] Ex. 132 at 12.

connection from the CLEC's switch or a direct connection from the CLEC's collocated equipment. Qwest does not require an intermediate frame for CLEC interconnection. CLEC and Qwest emergency calls then use the same selective router and E911 trunking facilities from the selective router to the PSAP. [69]

63. No party contends that Qwest provides E911 trunking in a manner that discriminates against CLECs. Qwest's performance measures for various aspects of E911 trunk installation (OP-3, OP-4, and OP-6A and OP-6B) demonstrate that Qwest provides trunking on a generally timely basis once an order is accepted by the system for order completion.[70] Its performance measures for E911 trunk repair and trouble clearing (MR-5, MR-6, MR-7, MR-8, and MR-10) reflect that CLECs have received results at parity or better than the results for Qwest.[71] In addition, PID OP-5, developed by the ROC, measures monthly average percentage of new 911/E911 trunk installations that are free of trouble reports for 30 calendar days after initial installation. In Minnesota, there were only three trouble reports for new service orders in June 2001 out of 102 E911 orders installed from January to July 2001, compared to 11 trouble reports for 37 Qwest E911 orders in the same time period.[72]

64. The main dispute between the parties relates to the manner in which Qwest handles updates to the E911 database; specifically, updates requested by facilities-based CLECs. The Arizona Dial Tone agreement requires Qwest to provide database entries for CLECs with the same accuracy and reliability that Qwest provides for its own customers.[73] Qwest's contract with Intrado includes the requirement provide database management services to all CLECs and independent companies operating in the Qwest region in a manner that is competitively neutral to, and at parity with, that provided to Qwest.[74]

65. When an end user changes to a new service provider, records are not removed from the ALI database. For reseller CLECs and CLECs using unbundled switching, Qwest sends any changes in telephone number, name, or address to Intrado using the same procedure and at the same time that it provides updates for its own retail customer records. In other words, record updates for Qwest, resellers, and CLECs using unbundled switching are commingled together in the same batch files of completed service orders that Qwest sends to Intrado each evening.[75] For facilities-based CLECs, Qwest sends a disconnect (or "migrate") order to Intrado requesting that the customer record be "unlocked" so the new service provider can make any necessary changes in the record. The unlocked record remains in the database. The CLEC than

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[69] Ex. 132 at 13.
[70] Ex. 132 at 15.
[71] *Id.* at 16.
[72] *Id.* at 15-16, MSB-7.5.
[73] Ex. 148, LAS 7-2, § 10.3.4.1.
[74] Ex. 132 at 9, MSB-7.3.
[75] Ex. 132 at 13.

sends requests directly to Intrado, through independent arrangements made with Intrado, to "lock" the record to the CLEC and make any necessary changes.[76]

66. As evidence of its nondiscriminatory treatment in processing E911 database updates, Qwest offers PID DB-1A, "Time to Update Databases," which measures the average time required to update the E911 database. Because Qwest commingles and processes updates for itself, resellers, and CLECs using unbundled switching at the same time, the ROC determined that this process provides parity by design. In May, June, and July 2001, Qwest updated the E911 database for itself, resellers, and CLECs using unbundled switching, with an aggregate result that averaged 282.87, 215.47, and 142.19 minutes, respectively.[77] This PID does not have a benchmark objective.

67. The Department and OAG/RUD maintain that Qwest fails to prove compliance with Checklist Item 7(I) because the performance measures offered are based on pooled data that do not differentiate between retail vs. wholesale performance and accordingly do not prove nondiscriminatory provisioning of service. They also maintain that these PIDs are inadequate because they do not measure end to end flow of data, but measure only from completion of the service order.

68. The ROC accepted that these performance measures provide "parity by design" because Qwest commingles its own database updates with those of reseller CLECs and CLECs using unbundled switching, and processes them all together in batch files. Facilities-based CLECs provide their updates directly to Intrado; Qwest does not handle their data. Although these performance indicators do not prove beyond doubt that Qwest is providing nondiscriminatory access, they do provide evidence that Qwest does not treat competitors differently in updating its E911 database. Although the record suggests it might be technically possible, although difficult and time-consuming, to differentiate between performance for Qwest retail and that of CLECs (other than facilities-based CLECs), the process used by Qwest provides sufficient "parity by design" to conclude that disaggregation of the data is not necessary in order for Qwest to make a prima facie showing of compliance with this checklist item.

69. Because Qwest has made a prima facie showing of compliance, it is up to the other parties to show that it does not comply. They have advanced the following arguments.

70. ***Delays in Unlocking E911 Records.*** Because PID DB-1A excludes data relating to facilities-based CLECs, the Department and other parties maintain that this performance measure fails to capture a significant problem experienced by those CLECs in making updates to the E911 database.

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[76] *Id.* at 11-12.
[77] Ex. 132 at 10.

The process described above requires Qwest to first send a disconnect order to unlock the database, and next requires the CLEC to send an update message confirming that it has ported the telephone number and providing any other changes to the record, such as a change of address. If Qwest fails to unlock the E911 record, any attempt by Intrado to update the record will fail.[78]

71. Prior to February 25, 2002, Intrado would "cycle" or hold database error reports for 14 days on the assumption that this was an issue of coordination between the service providers and that the update would eventually go through. Error reports relating to these telephone numbers are designated "755" errors. After 14 days, the error report would be forwarded to the submitting carrier for resolution. At that point, the error is considered a "760" error.[79] A CLEC would then check to determine whether there were any errors on its side and whether the number had been ported. If no problems were found by the CLEC, it would contact Qwest to attempt to determine why the record was still locked.[80] The failure to unlock the record does not mean that a CLEC customer would be unable to make 911 calls, but it might mean that a change in address would not be processed into the database, so the PSAP would have inaccurate information as to the location of the incoming call.

72. CLECs have reported many instances of E911 records in Qwest's database remaining locked for lengthy periods of time.[81] AT&T maintains that Qwest failed to send the unlock message on time for approximately 1,500 telephone numbers in Minnesota during 2001. Although one third of those were cleared by Qwest in a reconciliation process that began in October 2001, as of January 29, 2002, another 984 were still waiting to be unlocked because they were ported after the reconciliation process began.[82] AT&T's Broadband division reported that, as of February 21, 2002, 467 telephone numbers were experiencing unlocking delays in Minnesota.[83] Four other CLECs besides AT&T reported significant problems with unlocking E911 database records to the Department.[84]

73. Qwest contends that in response to these problems it has changed the procedures for updating the database. As of February 25, 2002, it has instructed Intrado to use a new unlocking standard developed by the National Emergency Number Association (NENA).[85] Under this standard, if the new service provider's database update is unsuccessful because of a locked record, Intrado will access the Local Number Portability (LNP) database to verify that the new service provider has made the port activation. If the service provider has

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[78] Ex. 143 at 18.
[79] Ex. 134 at 4.
[80] Tr. 2:146.
[81] Ex. 105, TLM-2.
[82] Ex. 144 at 17-18.
[83] *Id.* at 18.
[84] Ex. 106 at 17.
[85] Tr. 2:17-18.

activated the port subscription in the LNP database, Intrado will unlock the record and process the order to update the E911 database.[86]

74. At the time of the hearing this revised process had been in place for approximately one week.[87] Although Qwest disputes AT&T's numbers, it is clear that this is not an isolated problem but is a systemic one; Qwest has adversely influenced the timeliness of its competitors' ability to update the E911 database, and those delays are not reflected in the PIDs developed by the ROC. In addition, it is a problem that could impact public safety. There is insufficient evidence in this record to show that Qwest has responded appropriately or effectively to the problem of unlocking records in the E911 database. Consequently, the evidence is insufficient to show that Qwest currently complies with checklist item 7(I).[88]

75. ***Pricing Under the Intrado Contract.*** As noted above, Intrado is the third party responsible for maintaining Qwest's E911 database. Qwest included in the record those portions of its contract with Intrado requiring database updates to be at parity with Qwest, but did not submit the pricing schedule. Its witness during the hearing did not know whether the contract required Intrado to use the same baseline pricing schedule for all carriers.[89] The Department contends that without disclosing the pricing terms of its contract with Intrado, Qwest cannot demonstrate that access to E911 services are provided at parity. Qwest's response is that Intrado might properly charge volume-based rates to CLECs, but that any differences in rates are immaterial because Qwest and CLECs are permitted to recover their costs of providing E911 services directly from the PSAP and Minnesota Department of Administration.[90] Consequently, even if Intrado's rates for CLECs are different, this is not a difference that affects CLECs competitively, and these facts do not provide evidence that Qwest is treating CLECs in a discriminatory manner.

76. ***Lack of Assistance with Competitors' E911 Plans.*** The Department also contends that Qwest fails to provide nondiscriminatory access to E911 services because it has failed to provide two CLECs with access to facilities and information necessary to meet complete their 911 plan documents, as required by Minn. R. 7812.0550, subp. 1-2. One CLEC, NOS Communications, Inc., informed the Department that its entry into the local market was delayed by Qwest's delays in providing needed information.[91] Another CLEC, Jaguar Communications, Inc., maintained that it took more than one year, from April 2000 to April 2001, to obtain the required plan information

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[86] Ex. 133 at 9-10.
[87] Tr. 2:30.
[88] *Cf.* Ameritech Michigan Order, 12 FCC Rcd at ¶¶ 260-79 (denying § 271 authority in part because of Ameritech Michigan's failure to ensure the accuracy of competitors' end user data in the E911 database).
[89] Tr. 2:28.
[90] Ex. 133 at 10; Tr. 2:22.
[91] Ex. 105 at 37; Ex. 105 TLM-2.

because of inattention by and turnover among Qwest account managers.[92] Qwest maintains that, beginning in April 2001, it created a "Circle of Support" organization for CLECs that includes a trouble resolution process and a dedicated service manager responsible for providing support to other service managers for E911 service issues.[93] It appears that Qwest has responded appropriately and effectively to these problems.

77. ***Contract Language/ E911 and PS/ALI.*** Several parties contend that neither the Arizona Dial Tone nor FTTH interconnection agreements contain contract language that is adequate to ensure that Qwest will provide nondiscriminatory access to E911 service. The contract language provides "E911 functions provided to CLEC shall be at the same level of accuracy and reliability as for such support and services that Qwest provides to its end users for such similar functionality."[94] In addition, several parties maintain that the interconnection agreements do not require Qwest to provide Private Switch/Automatic Location Identification (PS/ALI) service, and AT&T contends that Qwest has refused to provide this service to CLECs in Minnesota even though it provides the service to its own customers.[95] PS/ALI is a service used to provide private branch exchanges (PBX) and some Centrex/Centron end users with the location features that are available to single line phones. Normally, when an office worker in a high rise building dials 911, the PSAP will only know that the call is coming from the particular building. PS/ALI permits the PSAP to "look behind" a PBX to determine the extension or floor from which a 911 call has been placed.[96]

78. Qwest concedes that the contract language is not clear.[97] It has agreed to clarify the language to state that it will provide nondiscriminatory access to all 911/E911 features, functions, and services that Qwest provides to its end users.[98] In addition, Qwest maintains that it is willing to add contract language for PS/ALI to any CLEC's interconnection agreement and to its SGAT. Quest maintains it is now offering PS/ALI service to all Minnesota CLECs on its product catalog website (as of February 15, 2002) and that it will provide the service even without a formal contract amendment.[99] Qwest should be permitted to make these language changes and to rely on the changed agreements to demonstrate that it offers the services on a nondiscriminatory basis.

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[92] Ex. 105, TLM-3.
[93] Ex. 133 at 26-27.
[94] Ex. 148, LAS-7.2, § 10.3.2.1.
[95] Ex. 143 at 16-17.
[96] *Id.*
[97] Tr. 2:34-35.
[98] Ex 133 at 6.
[99] Ex. 133 at 6-8. Qwest also agreed, in response to a criticism from WorldCom, that it would provide direct trunking between the CLEC PBX customer and the Qwest selective router, and that the CLEC need not obtain the PS/ALI software from Qwest, but may obtain it directly from Intrado. Tr. 2:61-62; Tr. 3:37. Qwest also agreed to remove the last sentence of section 10.3.6.3, relating to indemnification, from the Arizona Dial Tone agreement and its SGAT. Ex. 133 at 26.

79. ***Joint Provisioning of Facilities.*** The CLEC Coalition filed testimony maintaining that Qwest requires CLECs to obtain 911 interconnection trunks from Qwest, whereas it will allow incumbent LECs to jointly provide facilities.[100] Qwest maintains that the Arizona Dial Tone agreement allows CLECs to use facilities provided by the CLEC, Qwest, or a third party carrier. The language provides that "[e]ach party will be responsible for its portion of the build to the Mid-Span meet POI."[101] Nonetheless, Qwest has agreed to amend its SGAT, as requested by the CLEC coalition, to expressly state that "facilities needed for 911 trunks can be provided by the CLEC, Qwest, or a third party carrier. Qwest will jointly provide such facilities on a meet point basis, upon request, as described in Section 7.1.2.3."[102]

80. ***Disconnection of AT&T 911 trunks.*** In September 2001, AT&T converted its primary 911 route from Centralized Automatic Message Accounting (CAMA) to Signaling System 7 (SS7). Testing at cutover indicated that the conversion was successful.[103] In October AT&T technicians discovered that one of two 911 trunks had been disconnected in the Qwest office. After contacting Qwest, the service was restored within four hours. The next day, the same trunk was disconnected again, and service was again restored within four hours. It is not clear whether any 911 calls from AT&T end users were blocked during the time the trunk was disconnected, or how long the trunk was disconnected.[104] Qwest maintains that these circuits were appropriately marked as high-priority circuits. It contends the error occurred because AT&T made multiple changes in the service orders converting the trunks to SS7 and that Qwest's technician inadvertently failed to check for the most current version of the design work orders, two days in a row. A supervisor has reviewed the procedures for working on 911 circuits with the technician. This appears to have been an isolated incident that Qwest responded to appropriately, and it does not indicate that Qwest treats CLEC 911 circuits differently than its own.

Checklist Items 7(II) and (III): OS/DA

81. Section 271(c)(2)(B)(vii)(II) and (III) require Qwest to provide nondiscriminatory access to directory assistance services to allow other carriers' customers to obtain telephone numbers and operator call completion services. Section 251(b)(3) of the Act imposes on each LEC the duty to permit all competing providers to have nondiscriminatory access to operator services, directory assistance, and directory listings, with no unreasonable dialing delays.

82. The FCC has concluded that "nondiscriminatory access" to operator services is the ability of a telephone service customer, regardless of the identity of his or her local service provider, to connect to a local operator by

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[100] Ex. 135 at 10.
[101] Ex. 148, LAS-7.2, § 7.1.2.3
[102] Ex. 133 at 24.
[103] Ex. 143 at 19-20.
[104] Ex. 133 at 22.

dialing "0" or "0" plus the desired telephone number.[105] In addition, "nondiscriminatory access to directory assistance and directory listings" means that customers of all telecommunications service providers should be able to access each LEC's directory assistance services and obtain a directory listing on a nondiscriminatory basis, notwithstanding the identity of a requesting customer's local telephone service provider, or the identity of the telephone service provider for a customer whose directory listing is requested.[106]

83. Competing carriers may provide operator services and directory assistance (OS/DA) by either reselling the BOC's services or by using their own personnel and facilities to provide these services. FCC rules require BOCs to permit competitive LECs wishing to resell the BOC's operator services and directory assistance to request the BOC to brand their calls.[107] Competing carriers wishing to provide operator services or directory assistance using their own facilities and personnel must be able to obtain directory listings either by obtaining directory information on a "read only" or "per dip" basis from the BOC's directory assistance database, or by creating their own directory assistance database by obtaining the subscriber listing information in the BOC's database.[108]

84. The FCC originally concluded that BOCs must provide OS/DA on an unbundled basis pursuant to sections 251 and 252. In the *UNE Remand Order*, the FCC concluded that OS/DA must be provided on an unbundled basis only where the incumbent LEC does not provide the requesting telecommunications carrier with customized routing or a compatible signaling protocol.[109] Checklist item obligations that do not fall within a BOC's obligations to provide unbundled network elements are not subject to the requirements of sections 251 and 252, including the requirement that rates be based on forward-looking economic costs. Checklist item obligations that do not fall within a BOC's UNE obligations, however, still must be provided in accordance with sections 201(b) and 202(a), which require that rates and conditions be just and reasonable, and not unreasonably discriminatory.[110]

85. Qwest provides OS/DA services to 36 reseller CLECs and 11 UNE-P CLECs in Minnesota. It provides directory assistance trunks to seven facilities-based CLECs and operator service trunks to 17 facilities-based CLECs in Minnesota. One CLEC has purchased the directory assistance database.[111]

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[105] Bell Atlantic New York Order ¶ 352.
[106] *Id.*, citing 47 C.F.R. § 51.217(c)(3).
[107] *Id.* ¶ 353, citing 47 C.F.R. § 51.217(d); Local Competition Second Report and Order, 11 FCC Rcd at 19463 ¶ 148.
[108] *Id.*, citing 47 C.F.R. § 51.217 (C)(3)(ii); Local Competition Second Report and Order, 11 FCC Rcd at 19460 ¶¶ 141-44.
[109] Local Competition Third Report and Order ¶¶ 441, 462 (UNE Remand Order).
[110] *Id.* ¶ 470-73.
[111] Tr. 2:82..

86. Reseller CLECs and CLECs that use UNE-P elements or unbundled switching obtain access to Qwest's OS/DA services using the same facilities and the same configurations that Qwest uses to provide OS/DA do its own end users. The OS/DA traffic of these CLECs is automatically routed to Qwest's OS/DA platforms as part of the underlying functionality of Qwest's switching facilities.[112] In addition, OS/DA calls originated by end users of these CLECs are commingled with calls originated by Qwest end user customers and are delivered to Qwest's OS/DA platforms over the same shared trunks that Qwest uses for its end user traffic. CLEC end user customers dial the same numbers as Qwest customers for access to OS/DA--0 or 0 plus for OS, and 411, 1-411, or 555-1212 for DA.[113] The Arizona Dial Tone agreement requires Qwest to permit CLEC end users to dial the same numbers for these services as Qwest end users.[114]

87. CLECs that use their own switching facilities may access Qwest's OS/DA services by establishing dedicated transport from their end office switches to Qwest's OS/DA platforms. The CLEC may self-provision the transport, obtain it from a third party, or purchase unbundled transport from Qwest. These CLECs have the option of allowing their end user customers to dial the same numbers to access OS/DA services that Qwest end users dial, or selecting different numbers by which their end users may access Qwest's OS/DA services.[115] In addition, these CLECs may provide OS/DA services using their own or a third party's platform by routing their OS/DA traffic from their end office switching facilities to their alternate platforms. This configuration would not involve Qwest unless the CLEC chooses to purchase unbundled dedicated transport from Qwest.[116]

88. Qwest maintains that it offers customized routing that would allow reseller CLECs and CLECs that purchase UNE-P combinations or stand-alone unbundled switching to provide access to their own, or to a third party's OS/DA services. Customized routing would involve programming Qwest's switches and the lines of CLEC end users to route OS/DA calls to the platforms of the alternate OS/DA provider over the CLEC's dedicated transport facilities.[117] The Arizona Dial Tone agreement makes customized routing available either by using the same line class codes used by Qwest or by establishing new line class codes. The agreement provides that all custom routing involving the development of new

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[112] Ex. 148 at 8.
[113] *Id.* at 9.
[114] Ex. 148, LAS-7.2 at § §10.5.2.8 and 10.7.2.13. During the hearing, Qwest agreed to modify § 10.6.2.5 of the Arizona Dial Tone Agreement, concerning use of the directory assistance database, as requested by WorldCom. See Tr. 2:190; Ex. 50.
[115] Ex. 148 at 9.
[116] *Id.* at 10.
[117] Ex. 148 at 10.

line class codes, or any other type of custom routing, is to be priced on an "ICB," or individual case basis.[118]

89. The operator services provided by Qwest to CLEC end users are identical to the services provided to Qwest retail customers. The services include local assistance, intraLATA toll assistance, emergency assistance, busy line verification, and busy line interrupt. The directory services are also identical for both CLEC and Qwest end users. Directory assistance services include the provision of local end user names, addresses, and telephone numbers to requesting callers; where available, the provision of access to Qwest national directory assistance services; and, where available, the completion of local or intraLATA calls to requested numbers.[119] In addition, Qwest handles OS/DA calls on a first-come, first served basis, without regard to whether calls are originated by CLEC or Qwest end users. Incoming calls are placed in a queue based on the order in which they reach the platforms and are fed automatically to open operators, who have no ability to influence the type of calls that are fed to them from the queue. This handling process applies to calls delivered over shared Qwest trunks and to calls delivered over dedicated CLEC trunks.[120]

90. Qwest has offered two performance measures as evidence that it provides nondiscriminatory access to OS/DA services. These PIDs, developed in the ROC workshops, are OS-1 and DA-1, "Speed of Answer," which measure the average time required for OS/DA personnel to answer calls. In July 2001, calls to Qwest's operator services were answered in an average of 9.07 seconds and calls to Qwest's directory assistance services were answered in an average of 9.0 seconds.[121] These performance measures passed the audit by Liberty Consulting Group in September 2001.

91. Finally, Qwest maintains that it offers branding of OS/DA calls for CLECs, although no CLEC has made such a request, and that it offers access to the DA database on either a "per dip" basis (which Qwest calls Directory Assistance Database Service) or on a bulk electronic download basis (called Directory Assistance List Service).[122] The Arizona Dial Tone Agreement requires the provision of these services in accordance with 47 C.F.R. §51.217(d) and § 51.217(c)(3)(ii).[123]

92. Qwest provides OS/DA services to facilities-based CLECs at "market-based" rates and to reseller CLECs at the wholesale discounted rates required by the PUC. The wholesale discount rate in Minnesota is 17.66%.[124]

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[118] Ex. 148, LAS-7.2 at § 9.12.2, LAS-7.2A (Minnesota prices).
[119] Ex. 148 at 11-12.
[120] *Id.* at 13-14.
[121] *Id.* at 15, LAS-7.4
[122] *Id.* at 16-22.
[123] Ex. 148, LAS-7.2 at §§ 10.5, 10.7.
[124] Ex. 148 at 23, LAS-7.2A.

93. The Department and OAG/RUD maintain that Qwest fails to prove compliance with Checklist Item 7(I) because the performance measures offered are based on pooled data that do not differentiate between retail vs. wholesale performance and accordingly do not prove nondiscriminatory provisioning of service.

94. The ROC accepted that these performance measures provide "parity by design" because Qwest commingles its own OS/DA calls with those of any CLECs using its platforms. Although these performance indicators do not prove beyond doubt that Qwest is providing nondiscriminatory access, they do provide evidence that Qwest does not treat competitors differently. The process used by Qwest provides sufficient "parity by design" to conclude that disaggregation of the data is not necessary in order for Qwest to make a prima facie showing of compliance with this checklist item.

95. Because Qwest has made a prima facie showing of compliance, it is up to the other parties to show that it does not comply. They have advanced the following arguments.

96. ***Customized Routing.*** The Department, Worldcom, and the OAG/RUD maintain that Qwest does not provide customized routing that would enable a CLEC to provision directory assistance or operator services and that therefore those services must remain available as unbundled network elements and be priced at TELRIC rates, as opposed to market rates. Qwest maintains that it provides custom routing and that its market-based rates are reasonable. Qwest and the Department stipulated, with the concurrence of the other parties, that the issue of what pricing standard would apply to these services would be considered in this docket. If the ALJ rules that costs are necessary to evaluate or establish prices for the services, those costs will be determined in the pricing docket (No. 1375).[125]

97. Customized routing permits requesting carriers to designate the particular outgoing trunks associated with unbundled switching provided by the incumbent, which will carry certain classes of traffic originating from the requesting provider's customers. This feature would allow the requesting carrier to specify that OS/DA traffic from its customers be routed over designated trunks which terminate at the requesting carrier's OS/DA platform or a third party's OS/DA platform.[126] To the extent that incumbent LECs do not accommodate technologies used for customized routing, such as Feature Group D signaling, they must offer OS/DA as an unbundled network element.[127]

98. Qwest acknowledges that it is not currently providing customized routing by any method to any CLEC in Minnesota, nor is it providing customized

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[125] Eleventh Prehearing Order ¶¶ 1-3 (Feb. 21, 2002).
[126] UNE Remand Order ¶441 n. 867.
[127] *See* UNE Remand Order ¶ 463.

routing to any CLEC in its 14-state territory.[128] As noted above, the agreement with Arizona Dialtone reflects what Qwest calls "standard" custom routing through development of new line class codes to route OS/DA calls to dedicated trunks that the requesting provider must order from Qwest, and the agreement prices the service on an "ICB" basis. Qwest does not commit to providing the service in any standard interval, maintaining that all requests for customized routing should be treated on an ICB basis.[129] Qwest has developed what it calls a "standard" customized routing nonrecurring charge that it has filed in the UNE Pricing Docket, No. 1375. The project plan for "standard" customized routing calls for establishment of a due date within 20 days of the effective date of service request, and for implementation of one new line class code at one wire center in 60 days.[130]

99. Worldcom maintains that the most efficient way to provide OS/DA from its own platform is to route OS/DA traffic to its existing Feature Group D trunks, as opposed to local interconnection trunks that it would have to purchase.[131] In Colorado, Worldcom negotiated an amendment to its interconnection agreement with Qwest that requires Qwest to provide customized routing over Feature Group D trunks.[132] During the hearing, Qwest's witness made clear that Qwest would not provide customized routing to Feature Group D trunks unless an interconnection agreement required it.[133] Qwest would not take a position on whether it was technically feasible or not to route calls in this manner "because we have never received from WorldCom a service inquiry, which is the method for ordering that service."[134]

100. The FCC addressed customized routing in the BellSouth Louisiana II case. [135] There, BellSouth proffered two methods of customized routing: AIN and line class codes. Because BellSouth did not offer customized routing through AIN at the time of its application, the FCC concluded BellSouth could not rely on it to show compliance with requirement of customized routing. The FCC concluded that BellSouth's use of line class codes would be an acceptable interim method of providing customized routing, but that BellSouth did not demonstrate that it could provide it in a nondiscriminatory manner because of the inability of CLECs to order it efficiently and without manual processing by BellSouth.[136] The FCC specifically addressed the argument that BellSouth would not provide customized routing using Feature Group D signaling. Because MCI could not demonstrate that it had actually requested this method of customized

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[128] Tr. 3:54-55.
[129] Ex. 114 at 19-20; Tr. II:198-99.
[130] Tr. III:47, 50.
[131] Tr. II:198-99.
[132] Ex. 154, Ex. B.
[133] Tr. 2:200-01, 203-04.
[134] Tr. 2:201.
[135] BellSouth Louisiana II Order, 13 FCC Rcd at ¶ 221.
[136] *Id.* at ¶¶ 222-25.

routing, the FCC found the record inconclusive. Nonetheless, the FCC concluded that:

> . . . MCI may have otherwise raised a legitimate concern. If a competing carrier requests Feature Group D signaling and it is technically feasible for the incumbent LEC to offer it, the incumbent LEC's failure to provide it would constitute a violation of section 251(c)(3) of the Act. Our rules require incumbent LECs, including BOCs, to make network modifications to the extent necessary to accommodate interconnection or access to network elements.[137]

101. The Michigan Public Service Commission has rejected an argument similar to the one advanced by Qwest in this proceeding. There, it found that:

> Ameritech Michigan has interpreted the customized routing conditions of the UNE Remand Order as requiring less of it than the FCC intended. The justification that the FCC provided for changing its approach was that competitive OS/DA had become widely available on a national basis and could be readily accessed if the ILEC provided appropriate customized routing arrangements. However, the FCC did not suggest that an ILEC could arbitrarily implement any form of customized routing it desired, without regard to whether that arrangement provided meaningful access to competitive OS/DA alternatives. The FCC emphasized instead that "customized routing is necessary to access alternative sources of OS/DA for competitors not deploying their own switches," and that "[l]ack of a customized routing solution that enables competitors to route traffic to alternative OS/DA providers would therefore effectively preclude competitive LECs from using such alternative providers."
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> This concern is also apparent in the FCC's discussion of the substantial cost of reconciling WorldCom's Feature Group D signaling with other systems used by ILECs, a difficulty that WorldCom raises in this case. SBC had taken the position in the UNE Remand case that customized routing of Feature Group D was not technically feasible for all end-office switches. The FCC concluded that it would "require incumbent LECs, to the extent they have not accommodated technologies used for customized routing, to offer OS/DA as an unbundled network element." The significance of the point, in this Commission's view, is that the FCC did not regard technical issues as problems for the CLECs alone to address entirely at their own expense. Instead, the FCC directed

[137] *Id.* at ¶ 226.

both parties to attempt to devise technical solutions and, failing that, it required the ILEC to make OS/DA available as a UNE:

> The Commission finds that Ameritech Michigan must continue to offer OS/DA as a UNE at TSLRIC-based rates. The obligation to provide unbundled OS/DA will continue in effect until Ameritech Michigan provides reasonable accommodations for the problems presented by dedicated end-office trunking and other technological issues that inflate the CLECs' cost of obtaining access to competitive OS/DA services. When Ameritech Michigan believes that it meets the requirements relating to providing access to competitive OS/DA services, it may file an application for authorization to remove OS/DA from its list of UNEs. However, it may not remove OS/DA from UNE status without prior Commission authorization.[138]

102. Although Qwest made a prima facie case showing that it provides OS/DA service on a nondiscriminatory basis, its opponents have demonstrated that Qwest fails to provide customized routing as contemplated by the FCC. First, there is no real evidence that a competitive wholesale market for OS/DA exists in Minnesota, because Qwest is not providing customized routing to any CLEC in Minnesota. Qwest's "offer" to provide this service appears to be no more than a paper promise, as opposed to a demonstration of present compliance.

103. Second, Qwest's opponents have demonstrated that Qwest has not accommodated technologies used for customized routing as required by the FCC, and therefore OS/DA must be offered as unbundled network elements.[139] Even without evidence of a specific request for customized routing, the record is clear that Qwest is not capable of furnishing it in quantities that competitors may reasonably demand and at an acceptable level of quality. For customized routing through line class codes, which the FCC has indicated would be acceptable on an interim basis, Qwest has no standard pricing and no standard service interval. No CLEC is likely to order the service on this basis, particularly when Qwest will not even engage in testing without "clear evidence" that the CLEC is going to order the service.[140] Although it has committed to provide routing over Feature Group D trunks in Colorado, it will not commit to providing it in Minnesota, and it will not even take a position as to whether it is technically feasible to do so unless a CLEC first orders it, again without knowing the cost or how long it would take. Qwest's position puts the cart before the horse, and is self-serving and anti-competitive. No CLEC can be expected to order a service without some assurance and likelihood that it will work. There may be some method of

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[138] *In the Matter of the Application of Ameritech Michigan for Approval of a Shared Transport Cost Study and Resolution*, Case No. U-12622, Opinion and Order at 10-11 (March 19, 2001) (citations omitted).
[139] *See* UNE Remand Order ¶ 463.
[140] Tr. 2:203.

ensuring that the CLEC participates in the cost of testing new services, even if it does not order the service, but Qwest's position is too extreme.

104. Because Qwest does not provide customized routing, it cannot charge market-based rates for OS/DA services. Because Qwest charges market-based rates in Minnesota for OS/DA services, it is not in compliance with checklist items 7(II) and (III). This deficiency can be remedied by pricing OS/DA as unbundled network elements. Until Qwest begins providing more reasonable accommodations to the technological problems presented by customized routing, OS/DA should remain unbundled network elements and should be priced as such in the UNE pricing docket.

Checklist Item 8: White Pages Directory Listings

105. Section 271(c)(2)(B)(viii) of the 1996 Act requires Qwest to provide white pages directory listings for customers of other carriers' telephone exchange service. Section 251(b)(3) obligates all LECs to permit competitive providers of telephone exchange service and telephone toll service to have nondiscriminatory access to directory listings.[141]

106. A BOC satisfies the requirements of checklist item 8 by demonstrating that it (1) provided nondiscriminatory appearance and integration of white page directory listings to competitive LECs' customers; and (2) provided white page listings for competitors' customers with the same accuracy and reliability that it provides its own customers.[142] The term "white pages" refers to the local alphabetical directory that includes the residential and business listings of the customers of the local exchange provider. The term "directory listing" includes, at a minimum, the subscriber's name, address, telephone number, or any combination thereof.[143]

107. Qwest maintains that it provides nondiscriminatory access to white pages listings as demonstrated by its agreement with Arizona Dial Tone. That agreement, at section 10.4.2.24, states that any arrangement for the publication of white pages directory listings with an affiliate, including QwestDex, Qwest's official directory publisher, requires the affiliate to publish a CLEC's directory listings such that the CLEC's directory listings are nondiscriminatory in appearance and integration, and have the same accuracy and reliability as Qwest's end user listings.[144] White pages directory listings for Qwest and CLEC end users appear in the same font, size, and typeface, with no separate classification or distinguishing characteristics.[145] Listings for Qwest and CLEC

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[141] *See* 47 U.S.C. § 271(c)(2)(B)(viii); 47 U.S.C. § 251(b)(3).
[142] *See* BellSouth Louisiana II Order, 13 FCC Rcd at 20748 ¶ 255.
[143] Bell Atlantic New York Order ¶ 358.
[144] Ex. 113 at 6-7.
[145] *Id.*, citing Arizona Dial Tone Agreement, Ex. 148, LAS-7.2, § 10.4.2.8-.10.

end users are integrated alphabetically and are indistinguishable from Qwest's listings.[146]

108. Qwest's white pages listings service includes placing and updating the names, addresses, and telephone numbers of CLEC end user customers in Qwest's listings databases consistent with the CLEC's instructions, and furnishing listings to Dex and third-party directory publishers on a nondiscriminatory basis for use in publishing local directories, consistent with the CLEC's instructions. Qwest offers primary listings for each main telephone number at no charge to CLECs.[147] Premium and privacy listings are sold at retail rates to Qwest retail customers, and at retail rates minus the wholesale/resale discount to CLECs.[148]

109. The Arizona Dial Tone agreement requires that Qwest's processes for publication of white pages directory listings make no distinction between CLEC and Qwest subscribers and also requires that CLEC listings are provided with the same accuracy and reliability as for Qwest subscribers.[149] The agreement requires that the directory publisher distribute white pages directories and recycling services to CLEC end users at parity with Qwest end users (upon establishment of new service, during annual mass distribution, and upon end user request).[150]

110. As of July 31, 2001, Qwest included 164,316 listings for Minnesota facilities-based CLECs and reseller CLECs in its database.[151]

111. CLECs are responsible for preparing their listing requests and sending them to Qwest to update the listing database. CLECs can prepare standard listings forms and submit them to Qwest either by facsimile or electronically through the EDI or IMA/GUI interfaces. Requests submitted by facilities-based CLECs through the EDI or IMA/GUI are mechanically added to the database. For reseller CLECs and Qwest retail, the listings service requests are fed into the service order processor, and the service order processor mechanically updates the database. Listings submitted by facsimile are processed manually by Qwest listings personnel and released into the service order processor and/or listings database.[152] Once processed, all updates for each day are commingled regardless of source, loaded into files, and submitted to the directory assistance and directory publishing databases in nightly batch files.[153]

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[146] Ex. 13 at 8.
[147] Ex. 113 at 7.
[148] Ex. 14 at 24.
[149] Ex. 113 at 9-10; Arizona Dial Tone Agreement, Ex. 148, LAS-7.2, § 10.4.2.1.
[150] Ex. 113 at 17.
[151] Ex. 113 at 10; *see also* Tr. 1:136-38 (Qwest included more than 200,000 listings for 58 CLECs in Minnesota).
[152] Ex. 113 at 12. During testing by the ROC, Qwest changed its procedures to eliminate manual retyping of CLEC updates. Tr. 1:149.
[153] *Id.* at 13.

112. Any errors in listings identified by the IMA-EDI, the IMA-GUI, the listings database, or the service order processor are corrected, if possible, by Qwest listings personnel. If Qwest cannot correct the listing it is returned to the submitting carrier for correction.[154] Qwest also provides CLECs with monthly verification proofs, which show all changes to the white pages and directory assistance databases during the prior month.

113. Qwest has provided in-person listings training to CLECs at various locations throughout its region (including Minneapolis) at no charge. Qwest states that it is willing to repeat these training sessions in additional locations if demand exists.[155] Qwest also provides training manuals to CLECs at no charge, through its website.

114. Qwest has offered two performance indicators developed in the ROC workshops as evidence that it provides access to white pages listings on a nondiscriminatory basis. The first indicator, DB-1C-1, "Time to Update Database," measures the average amount of time it takes to update the listings database. In July 2001, Qwest completed updates in an average of 0.07 seconds.[156] The second indicator, DB-2C-1, "Percentage of Accurate Database Updates," measures the percentage of directory listings database updates completed without errors. In July 2001, Qwest completed 94.32% of listings updates without error.[157] The DB-1 performance results show speed of updates for all provider types, including Qwest retail, reseller CLECs, facilities-based CLECs, ILECs, and unknown providers. The DB-2 performance results show accuracy of updates for Qwest retail, reseller CLECs, and facilities-based CLECs. Liberty Consulting Group has reported that these PIDs accurately and reliably report actual Qwest performance.[158] In addition, another independent third-party auditor, KPMG Consulting, determined that Qwest exceeds the benchmark of 95% in updating accurately and in a timely manner the listings database.[159]

115. WorldCom filed direct testimony (Bennett Affidavit) alleging that Qwest's provision of access to white pages listings was discriminatory. Its concerns were resolved in Qwest's rebuttal testimony (Ex. 114), in which Qwest offered to make a variety of changes to the language of any interconnection agreement and to make those changes available to Minnesota CLECs.[160]

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[154] Ex. 113 at 15.
[155] Ex. 113 at 14.
[156] Ex. 113, LAS-8.3.
[157] *Id.*
[158] Ex. 100, MSB-10.5 at 2-3, 121-27.
[159] Ex. 114 at 8-9.
[160] Qwest agreed to make the language changes identified in Ex. 114 at p. 25 (concerning provision of CLEC listings to directory publishers), 26 (deletion of section 10.4.2.6), and p. 27 (concerning POAs) in the Arizona Dialtone Agreement.

116. The Department and OAG/RUD maintain that Qwest fails to prove compliance with Checklist Item 8 because the performance measures offered are based on pooled data that do not differentiate between retail vs. wholesale performance and accordingly do not prove nondiscriminatory provisioning of service. They also maintain that these PIDs are inadequate because they do not measure end to end flow of data, but measure only from completion of the service order.

117. The ROC accepted that these performance measures provide "parity by design" because Qwest commingles its own database updates with those of CLECs and processes them all together in batch files. Although these performance indicators do not prove beyond doubt that Qwest is providing nondiscriminatory access, they do provide evidence that Qwest does not treat competitors differently in updating its directory listings database. Although the record suggests it might be technically possible, although difficult and time-consuming, to differentiate between performance for Qwest retail and that of CLECs (other than facilities-based CLECs), the process used by Qwest provides sufficient "parity by design" to conclude that disaggregation of the data is not necessary in order for Qwest to make a prima facie showing of compliance with this checklist item.

118. Because Qwest has made a prima facie showing of compliance, it is up to the other parties to show that it does not comply. The Department contends that Qwest's witness lacks foundation to provide any meaningful testimony about Qwest's processes because she has no operational responsibility for the databases. The Department did not object to the witness's testimony when it was offered and is in no position to challenge foundation now. The witness was sufficiently knowledgeable about the process Qwest uses to update its database.

119. The Department also contends that its evidence of problems experienced by US Link, and the difference between the percentage of account-specific white pages problems for Qwest (nine problems identified for Qwest retail) vs. CLECs (seven problems identified), were unanswered by Qwest. There is no basis in the record for concluding that these were systemic as opposed to isolated problems, and they do not prove that Qwest discriminated against competitors in providing access to white pages listings.

120. Finally, Qwest and the Department stipulated, with the concurrence of the other parties, that the issue of what pricing standard would apply to these services would be considered in this docket. If the ALJ determines that costs are necessary to evaluate or establish prices for those services, the prices are to be determined in the pricing docket (No. 1375). As noted above, Qwest charges CLECs the retail rate minus the wholesale discount as its "market-based rate" for premium and privacy white page directory listings. White page listings are not an unbundled network element, and the Act does not require that they be priced at a forward-looking TELRIC rate. The Department maintains that Qwest has failed

to prove that its pricing of white pages listings is just, reasonable, and not unreasonably discriminatory because Qwest provided no evidence of its costs or of any market research or market studies to support its market rate. Qwest maintains that by using the Commission-approved wholesale discount rate, it has proved the reasonableness of its rate.

121. Qwest's use of the Commission-approved wholesale discount rate to price white pages listings is just, reasonable, and nondiscriminatory. The record demonstrates that Qwest meets the requirements of Checklist Item 8, subject to completion and consideration of the results of any OSS testing that may relate to this item.

Checklist Item 9: Numbering Administration

122. The North American Numbering Plan (NANP) is the numbering plan for the public switched telephone network in the United States and its territories, Canada, Bermuda, and some Caribbean nations. NANP numbers are made up of three components, totaling ten digits in length. The first three digits represent the numbering plan area, commonly referred to as the area code. The second three digits represent the central office--or NXX--code. The final four digits represent the line number within the NXX code. In order to provide local exchange telephone service, facilities-based carriers must have NXX codes assigned to their switch for the provision of telephone numbers to their subscribers.[161] The 1996 Act directed the FCC to "create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis."[162]

123. Section 271(c)(2)(B)(ix) requires Qwest to provide nondiscriminatory access to telephone numbers for assignment to other carriers' telephone exchange service customers, until the date by which telecommunications numbering administration, guidelines, plan, or rules are established. After that, Qwest must comply with such guidelines, plan or rules.[163]

124. When numbering administration responsibilities have been transferred to an independent third-party administrator, the FCC has required a BOC to demonstrate that it adheres to industry number administration guidelines and Commission rules, including provisions that require accurate reporting of data to the Code Administrator.[164]

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[161] Ex. 127 at 4.
[162] 47 U.S.C. § 251(e)(1).
[163] *See* 47 U.S.C. § 271(c)(2)(B)(ix).
[164] Bell Atlantic New York Order, 15 FCC Rcd 3953, 3962.

125. Qwest stopped performing any numbering administration or assignment functions on September 1, 1998, when the FCC transferred those functions to Lockheed-Martin IMS and subsequently to NeuStar, Inc. (Neustar).[165]

126. Qwest's interconnection agreement with Arizona Dial Tone requires Qwest to comply with the industry guidelines and FCC rules regarding numbering administration, including the accurate reporting of data to NeuStar. After NeuStar assigns a new NXX code to a carrier, all carriers, including Qwest, must program their switches to recognize the new NXX code and properly route calls to the telephone numbers within the new code. This programming must be completed before the activation date for the code. The routing information, rating information, and effective dates for new NXX codes are established in the national Local Exchange Routing Guide (LERG). Each carrier is responsible for providing accurate and complete information to the LERG for NXX codes assigned to them.[166]

127. Qwest has processes in place to ensure that all NXX codes and routing information are programmed into Qwest's switches in a nondiscriminatory and timely manner to meet the activation dates published in the LERG. Qwest provides documentation for CLECs regarding the industry's numbering administration and assignment processes and Qwest's methods and procedures for NXX code activations and repair processes on its website.[167]

128. Qwest has two performance measures for numbering administration: PID NP-1A, "NXX Code Activation," which measures the percentage of NXX codes in the reporting period that are loaded and tested prior to the LERG effective date; and PID NP-1B, "NXX Code Activations Delayed," which measures the percentage of NXX codes activated in the reporting period that are delayed beyond the LERG date due to Qwest-caused interconnection facility delays.[168] From January through July 2001, Qwest has met 100% of its commitments for activation of NXX codes in Minnesota. From March through July 2001, none of the NXX codes activated in Minnesota were delayed because of Qwest-caused interconnection facility delays.[169]

129. On September 25, 2001, Liberty Consulting Group, the consulting firm retained by the ROC to audit Qwest's performance measures, issued its Final Report. It found that all of the PIDs for Checklist Item 9 correctly measured Qwest's performance and that Qwest was accurately reporting its results.[170]

130. Qwest worked with CLECs in the Section 271 workshops in Arizona, Colorado, Oregon, Washington, and in the Multi-State proceeding

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[165] Ex. 127 at 5-6.
[166] *Id.* at 8.
[167] *Id.* at 8.
[168] Ex. 127, MSB-9.2.
[169] Ex. 127, MSB-9.3
[170] Ex. 127 at 9.

involving state commissions from Idaho, Iowa, Montana, New Mexico, North Dakota, Utah, and Wyoming. In these workshops, Qwest made several concessions regarding this checklist item, and Qwest agrees to make the same concessions in Minnesota.[171]

131. No party to this proceeding contends that Qwest fails to comply with Checklist Item 9. Information provided by CLECs to the Department suggests that Qwest provides NXX code activation to CLECs in a manner that is at parity with that which Qwest provides itself. In addition, NeuStar informed the Department that Qwest is following its guidelines and that no significant inconsistencies have been identified in the data that Qwest has provided to NeuStar.[172]

132. The record demonstrates that Qwest complies with all numbering administration rules, regulations, and guidelines applicable to it. Qwest meets the requirements of Checklist Item 9, subject to completion and consideration of the results of any OSS testing that may relate to this Item.

Checklist Item 10: Databases and Associated Signaling

133. Section 271(c)(2)(B)(x) requires Qwest to provide nondiscriminatory access to databases and associated signaling necessary for call routing and completion.[173] In order to meet this checklist item, Qwest must demonstrate that it provides requesting carriers with nondiscriminatory access to (1) signaling networks, including signaling links and signaling transfer points; (2) certain call-related databases necessary for call routing and completion, or in the alternative, a means of physical access to the signaling transfer point linked to the unbundled database; and (3) Service Management Systems (SMS). They must also design, create, test, and deploy Advanced Intelligent Network (AIN) based services at the SMS through a Service Creation Environment (SCE).[174]

134. In the *Local Competition First Report and Order*, the FCC defined call-related databases as databases, other than operations support systems, that are used in signaling networks for billing and collection or the transmission, routing, or other provision of telecommunications service. At that time the FCC identified call-related databases as "including but not limited to: the Line Information Database (LIDB), the Toll Free Calling database, the Local Number Portability database, and the Advanced Intelligent Network databases.[175] In its *First Report and Order*, the FCC noted that it was not technically feasible to access call-related databases in a manner other than by connection at the STP

[171] Ex. 127 at 11.
[172] Ex. 126 at 3.
[173] *See* 47 U.S.C. § 271(c)(2)(B)(x).
[174] BellSouth Louisiana II Order, 13 FCC Rcd at 20753 ¶ 267; id., 13 FCC Rcd at 20755-56 ¶ 272.
[175] *Local Competition First Report and Order*, 11 FCC Rcd at 15741 n. 1126; UNE Remand Order, 15 FCC Rcd at 3875 ¶ 403.

directly linked to the call-related database.[176] Because it was not technically feasible to unbundle the SCP from its associated STP, the FCC required access to call-related databases through interconnection at the STP and declined to require direct access to call-related databases.[177]

135. In the *UNE Remand Order*, the FCC clarified that the definition of call-related databases "includes, but is not limited to, the [CNAM] database, as well as the 911 and E911 databases."[178] The FCC determined that lack of access to call-related databases on an unbundled basis would materially impair the ability of a requesting carrier to provide the services it seeks to offer in the local telecommunications market, and that there were no alternatives of comparable quality and ubiquity available to requesting carriers, as a practical, economic, and operational matter. It also concluded that access to call-related databases, such as LIDB and CNAM, encourages efficient network architecture deployment and promotes the ability of new entrants and established competitors to provide service in the local exchange market.[179] Consequently, the FCC reaffirmed its determination that LECs must provide nondiscriminatory access to call-related databases, including the LIDB and CNAM, again by means of physical access at the STP linked to the unbundled database.[180] The FCC did not consider any alternate methods of access, such as direct access through download of the database.

136. Based on this analysis, FCC rules now require LECs to unbundle call-related databases, and further provide that, "[f]or purposes of switch query and database response through a signaling network, an incumbent LEC shall provide access to its call-related databases, including CNAM, 911, E911, LIDB, Toll Free calling, AIN, and downstream number portability.[181]

137. Qwest's signaling network consists of signaling links, signal transfer points, call-related databases, and the service management system. Qwest utilizes an SS7 signaling network, which is a common channel signaling network. It carries signaling and voice information on separate facilities. It is a packet-switched network that allows call control information to be transported on a dedicated, high-speed data network that is separate from the voice communication network. It facilitates signaling and communication among Qwest end office switches, Qwest tandem switches, interexchange carrier switches, CLEC switches, and other local exchange carrier switches. It also facilitates signaling and communication between these switches and various call-related databases associated with the signaling network.[182]

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[176] *Id.*, 11 FCC Rcd at ¶ 485.
[177] *Id.*
[178] UNE Remand Order ¶ 410.
[179] UNE Remand Order ¶¶ 410, 411.
[180] *Id.* ¶ 410.
[181] *See* 47 C.F.R. §319(e)(2)(i).
[182] Ex. 100 at 7-8.

138. Qwest maintains that reseller CLECs and CLECs using unbundled local switching have exactly the same access to Qwest's signaling network that Qwest uses to provide services to its own retail customers. CLECs that purchase unbundled switching from Qwest obtain access to the signaling network in the same manner, and using the same facilities, equipment, and procedures, as Qwest uses to provide such access to itself. CLECs that use their own switching facilities can obtain access to Qwest's signaling network by self-provisioning or purchasing unbundled signaling links to facilitate signaling among their own switches, Qwest end office and tandem switches, the switches of other carriers connected to the SS7 network, and call-related databases. CLECs that use their own switching facilities can obtain access to Qwest's STPs by interconnecting their switches directly to Qwest's STPs or interconnecting their STPs with Qwest's STPs. CLECs may also interconnect with Qwest's signaling network through a third-party signaling network provider. In all events, a CLEC's call routing and database queries are handled in the same manner as are Qwest's. In interconnecting with Qwest's signaling network, facilities-based CLECs may use direct connections to interconnect to Qwest cross-connect frames. Qwest does not require an intermediate frame for CLEC signaling interconnection.[183]

139. Qwest maintains that it provides nondiscriminatory, unbundled access to all its call-related databases, STPs, and SMS. Reseller CLECs have the same access to Qwest databases that Qwest provides to its own retail customers. Carriers purchasing unbundled switching obtain access to Qwest's signaling network as part of the switching UNE and therefore obtain the ability to query Qwest's databases via the SS7 network in the same manner and over the same facilities as Qwest. CLECs that use their own switching facilities are able to query the databases in the same manner as Qwest, via the SS7 network. Qwest maintains that its SS7 network and databases automatically handle all queries in the same manner and using the same facilities, equipment, and procedures, regardless of whether a query originates on a CLEC network or on Qwest's network. The SS7 network commingles all database queries, regardless of where they originated, and the databases process queries on a first-come, first-served basis.[184] There are six facilities-based CLECs using Qwest's LIDB and CNAM databases; five using the toll-free calling database; 11 using the local number portability database; and 34 using the E911 database.[185] There are no CLECs using Qwest's AIN database.[186]

140. The performance measure Qwest has offered as evidence of nondiscriminatory access to its databases is DB-1B, the time to update the LIDB/CNAM databases.[187] This performance measure was audited by the Liberty

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[183] *Id.* at 8-9.
[184] *Id.* at 11.
[185] Tr. 1:11.
[186] Tr. 1:34.
[187] The toll-free calling and local number portability database are both updated by service providers through national independent third parties (Database Services Management, Inc.

Consulting Group and found to be ready for release in March 2001. In May through July 2001, Qwest completed updates to the LIDB in an average of 3.48, 3.12, and 3.55 seconds, respectively.[188] Because the results for Qwest and others are combined in this performance measure, there is no benchmark objective.[189]

141. Qwest's service orders and those of resellers and CLECs using unbundled switching all flow through the service order systems to the Line Validation Administration System (LVAS), the system that updates the LIDB. Service orders for Qwest, resellers, and CLECs using unbundled switching are entered into and processed through the same service order processing systems (SOPs); the completed orders are then processed through the same extract program for formatting the records and are then sent, commingled, in a batch file to update the database.[190]

142. Facilities-based CLECs can perform additions, changes and deletions through a dial-up Interconnect Mediated Access (IMA) interface to load information into LVAS, which then loads and updates the customer information in the LIDB/CNAM database in the same batch files that contain updates for Qwest, reseller CLECs, and CLECs that use unbundled local switching.[191] Facilities-based CLECs can also send the updates in a formatted electronic file for Qwest to load into LVAS, or they can send the updates by facsimile for Qwest to enter by use of a Graphical User Interface.[192] Qwest does not alter or change the content of the updates for facilities-based CLECs.[193]

143. All updates to the database are processed through LVAS, and Qwest does not charge for use of LVAS to update customer records. Facilities-based CLECs are charged once for formatting their customer record information to load into the LVAS system.[194]

144. The Department and OAG/RUD maintain that Qwest fails to prove compliance with Checklist Item 10 because the performance measures offered are based on pooled data that do not differentiate between retail vs. wholesale performance and accordingly do not prove nondiscriminatory provisioning of

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(DSMI) and the North American Numbering Plan Administrator, NeuStar). In addition, performance measures for AIN have not been developed because no CLECs are using Qwest's AIN. Performance measures relating to updates of the 911/E911 databases are addressed in Checklist Item 7.

[188] Ex. 100 at 14.

[189] *Id.*

[190] Ex. 101 at 28.

[191] Ex. 101 at 21-22.

[192] *Id.* at 28.

[193] *Id.* at 26.

[194] WorldCom initially maintained that Qwest unfairly discriminated in its pricing of LVAS updates. This dispute was resolved during the hearing when Qwest agreed to include clarifying language from its website in its Minnesota interconnection agreements. Tr. 1:17, 118; WorldCom Brief p. 3, n.4.

service. They also maintain that these PIDs are inadequate because they do not measure end to end flow of data, but measure only from completion of the service order.

145. Qwest maintains that there is no method of determining whether the time for updating the database is different for records entered by CLECs as compared to Qwest's own records. It appears that, in the case of some facilities-based CLECs, Qwest is correct. Those CLECs may update the system directly through the IMA/GUI or by formatted electronic file, and there is no evidence to suggest that Qwest can or should be responsible for this data.

146. That is not the case, however, for updates made by service order (as done by Qwest, resellers, and CLECs using unbundled switching). Although Qwest has not attempted to determine whether there is a difference in the time for processing these updates, its justification is not that it is technically infeasible, but rather that it would require some amount of investigation to determine whether an error was attributable to a CLEC or to itself.[195]

147. The ROC accepted that these performance measures provide "parity by design" because Qwest commingles its own database updates with those of reseller CLECs and those using unbundled switching and processes them all together in batch files. Although these performance indicators do not prove beyond doubt that Qwest is providing nondiscriminatory access, they do provide evidence that Qwest does not treat competitors differently in updating its directory listings database. Although the record suggests it might be technically possible, although difficult and time-consuming, to differentiate between performance for Qwest retail and that of CLECs (other than facilities-based CLECs), the process used by Qwest provides sufficient "parity by design" to conclude that disaggregation of the data is not necessary in order for Qwest to make a prima facie showing that its processes for updating the database do not discriminate against competitors.

148. Because Qwest has made a prima facie showing of compliance, it is up to the other parties to show that it does not comply. They advance the following arguments.

149. ***Bulk Download of CNAM Database.*** Worldcom maintains that Qwest fails to comply with Checklist Item 10 because it refuses to provide access to its CNAM database through electronic download, as opposed to "per query" access via the SS7 signaling system. Worldcom maintains that because the CNAM database is a UNE, Qwest is obligated to provide nondiscriminatory access, and Worldcom should be able to access the entire database in the same manner as Qwest. It argues that limiting access to a per-query basis gives Qwest unfair advantage over costs, service equality, and provision of new and

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[195] *Id.* at 28.

innovative services.[196] It also contends that, since the FCC rules were promulgated, it has become technically feasible to provide access through electronic download.

150. Qwest does not dispute that it is technically feasible to provide access through electronic download.[197] It maintains, however, that it is not obligated to provide such access, because FCC rules provide only for access through the signaling network. For access through the signaling network, Qwest charges a recurring charge on a per-query basis, and a nonrecurring charge to activate the query service.[198] Qwest contends that the unbundled network element is essentially defined by its method of access, as "CNAM access through the STP," and that before it can be required to provide access by another means, the Commission must undertake an analysis of whether unbundling the network element is "necessary" and whether failure to do so would "impair" a CLEC's ability to compete. Based on this argument, Qwest submitted pages of testimony disputing Worldcom's contentions that it could potentially offer less expensive, more efficient, and more innovative services if it had access to the CNAM database through electronic download.

151. The FCC rules do not preclude a CLEC from obtaining access through electronic download; rather, they require access through a signaling network "for purposes of switch query and database response."[199] The rules are clear, contrary to Qwest's argument, that the database itself is the UNE: "An incumbent LEC shall provide nondiscriminatory access . . . to . . . call-related databases . . . on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service."[200] The FCC has already performed the "necessary/impair" analysis and concluded, in no uncertain terms, that lack of access to call-related databases on an unbundled basis would materially impair the ability of a requesting carrier to provide the services it seeks to offer in the local telecommunications market, and that there are no alternatives of comparable quality and ubiquity available to requesting carriers.[201]

152. In determining which method is to be used for obtaining interconnection and access to an unbundled network element, an incumbent LEC that denies a request for a particular method of obtaining interconnection or access must prove to the state commission that the requested method is not technically feasible.[202] Qwest concedes that it is technically feasible to provide access in this manner. Qwest accordingly should be required to provide access to the CNAM database by electronic download before the Commission

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[196] Ex. 112 at 16.
[197] Tr. 1:55, 69 (Qwest can provide a bulk download to a CLEC).
[198] Ex. 112 at 14.
[199] 47 C.F.R. § 51.319(e)(2)(i).
[200] *Id.*; *see also* Tr. 1:50 (CNAM database is a UNE).
[201] UNE Remand Order ¶ 410.
[202] 47 C.F.R. § 51.321(d).

determines that it complies with Checklist Item 10.[203] In other words, Qwest's failure to comply with this checklist item can be remedied by requiring Qwest to provide access to the CNAM database by electronic download. Qwest's refusal to provide the database by bulk download is discriminatory in that it allows Qwest to control the type of service that can be derived from the database and conversely precludes CLECs from using the database to develop new services; and it requires CLECs to pay each time the database is queried, whereas Qwest, as the owner of the database, does not "charge" itself for that information every time a call is terminated.

153. Requiring that Qwest provide the CNAM database by bulk download is not, as Qwest argues, the creation of a "new UNE" or a "redefinition" or "removal" of a UNE established by the FCC. The database is and always has been the UNE, and it is now technically feasible to require access by bulk download as opposed to access through the SS7 system.

154. Qwest has articulated some privacy concerns that would relate to any new services that WorldCom might offer using the CNAM database, in that the privacy indicator in the CNAM database indicates only whether customers want their name and phone number to be blocked from a caller ID display. This differs from the directory assistance database, which contains information indicating whether customers want their names and telephone numbers published in a directory.[204] WorldCom is subject to the same privacy and confidentiality regulations as is Qwest under § 222 of the Act. As long as WorldCom has the privacy indicator associated with the CNAM record, it will be able to block release of the caller-ID information at the switch, the same way Qwest would. In addition, Qwest is free to omit from the CNAM database the listings stored by other CLECs, unless WorldCom can demonstrate that it has obtained permission from those CLECs to obtain the information.

155. ***AIN Platform.*** Qwest uses its AIN database to provide N11 services, such as public health and community services, nonemergency 911 calls, road and traffic conditions, and telecommunications relay services.[205] No CLECs in Minnesota or anywhere in Qwest's region are currently using the AIN database.[206]

156. One CLEC (Allegiance Telecom) reported to the Department that it had requested access to Qwest's AIN database in connection with provisioning

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[203] State commissions in Michigan and Georgia have required LECs to provide access to the CNAM database by bulk download. The Michigan Public Service Commission denied Ameritech Michigan's application for § 271 approval, in part based on Ameritech Michigan's failure to offer CNAM in a downloadable format. *See In the Matter, on the Commission's Own Motion, to Consider Ameritech Michigan's Compliance with the Competitive Checklist in Section 271 of the Federal Telecommunications Act of 1996*, No. U-12320, December 21, 2001.
[204] Tr. 1:59, 73-74.
[205] Tr. 1:38-39.
[206] Tr. 1:11

711 and 511 access, but was informed that Qwest had no plan to provide such access for the N11 product.[207] The Department maintains that this incident, together with the fact that no CLECs are using the AIN database, may provide evidence that Qwest is refusing to provide nondiscriminatory access to CLECs.

157. Qwest clarified that Allegiance was not seeking access to the AIN database, but to the N11 service that Qwest created through the AIN database.[208] Although Qwest is obligated to provide access to the AIN database under the Act, the services provided over AIN platforms are proprietary and need not be unbundled.[209] At the time of the hearing, Qwest was negotiating a licensing agreement that would allow Allegiance to use the N11 service.[210] This incident does not demonstrate that Qwest is improperly refusing CLECs access to its AIN database.

Checklist Item 12: Local Dialing Parity

158. Section 271(c)(2)(B)(xii) requires Qwest to provide nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of § 251(b)(3). Section 251(b)(3) imposes upon all LECs the duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service with no unreasonable dialing delays. Dialing parity is defined as the ability of a person that is not an affiliate of a LEC to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation.[211]

159. The customers of competing carriers must be able to dial the same number of digits the BOC's customers dial to complete a local telephone call. Moreover, customers of competing carriers must not otherwise suffer inferior quality service, such as unreasonable dialing delays, compared to the BOC's customers.[212]

160. Qwest is required to provide dialing parity pursuant to its interconnection agreement with Arizona Dial Tone.[213]

161. With respect to intraLATA toll dialing parity (1 + equal access dialing), the Minnesota PUC ordered the implementation of the FCC's dialing parity rules for intraLATA toll calls by February 16, 1996. Qwest implemented intraLATA toll dialing parity in all of its switches in Minnesota using the "full 2-PIC" subscription method for intra- and interLATA presubscribed carriers. All of

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[207] Ex. 103.
[208] Tr. 1:39, 41.
[209] UNE Remand Order ¶ 409.
[210] Tr. 1:39-40.
[211] *See* 47 U.S.C. § 153(15).
[212] *See* 47 C.F.R. §§ 51.205, 51.207.
[213] Ex. 148, LAS-7.2, § 14.

CONCLUSIONS

1. The Administrative Law Judges and Commission have jurisdiction in this matter under 47 U.S.C. § 271(d)(2)(B) and Minn. Stat. §§ 14.50, 237.02, and 237.081, 237.16, and 237.462.

2. Except as noted in the Findings, and excluding pricing issues to be considered in Docket 1375, Qwest has demonstrated by a preponderance of the evidence that it meets the competitive checklist requirements of 47 U.S.C. § 271(c)(2)(B)(iii), (vii)-(x), and (xii).

3. Qwest may demonstrate compliance with the foregoing requirements by modifying its interconnection agreements to correct the deficiencies noted in the Findings and by making the other corrections it has agreed to with the parties. Qwest may demonstrate compliance with Checklist Item 7(I) only by supplementing the record, within the time period provided by the Commission for filing exceptions, with additional data that would allow the Commission to conclude that Qwest's adoption of the draft NENA standard has effectively resolved the problems relating to unlocking of E911 database records.

Based upon the foregoing Conclusions, the Administrative Law Judges make the following:

RECOMMENDATIONS

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

1. Adopting the foregoing Findings and Conclusions.

2. Allowing Qwest to file amended interconnection agreements correcting the deficiencies noted and to supplement the record concerning its performance in addressing problems relating to unlocking of E911 database records.

3. Reporting its Findings and Conclusions to the Federal Communications Commission.

Dated May 8, 2002

STEVE M. MIHALCHICK
KATHLEEN A. SHEEHY
Administrative Law Judges