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AT:TS Response

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Intervenor

07/01/02 - Midcontinent's Post Hearing Brief;
07/01/02 - AT&T's Brief Regarding Public Interest;
07/01/02 - AT&T's Brief Regarding Qwest's Change Management Process;
07/01/02 - Response Brief of AT&T Regarding Paper Workshop Issues;
07/01/02 - AT&T's Responsive Post-Hearing Brief to Qwest's Post-Hearing Brief in Support of the QPAP and Request for Additional Supplementation of the Record;
07/01/02 - AT&T's Response to Qwest's Opening Post-Hearing Brief on Emerging Services;
07/01/02 - AT&T's Brief Regarding Qwest's Interconnection Obligations;
07/01/02 - AT&T's Brief on Checklist Items 2, 5 and 6 and Section 272 Compliance;
07/01/02 - Response Brief of AT&T Regarding Checklist Item 4 - Unbundled Loops and Checklist Item 11 - Local Number Portability;
07/02/02 - Intervenor Black Hills FiberCom's Response to Qwest's Post-Hearing Brief;
07/03/02 - AT&T's Comments on the ROC OSS Final Report;
07/03/02 - Qwest's Verified Comments;
07/03/02 - Request for Confidential Treatment;
07/03/02 - Staff's Comments;
07/10/02 - Midcontinent's Joinder in Staff's Position on Public Interest;
07/15/02 - Transcript of Hearing held 7/11/02;
07/17/02 - Qwest's Overview Reply Brief;
07/17/02 - Qwest's Post-Hearing Reply Brief on Compliance with the 14-Point Competitive Checklist;
07/17/02 - Qwest's Reply Brief in Support of the QPAP;
07/17/02 - Qwest's Post-Hearing Reply Brief on General Terms and Conditions, Section 272, and Track A;
07/17/02 - Qwest's Post-Hearing Reply Brief on the Public Interest;
07/17/02 - Qwest's Post-Hearing Reply Brief Regarding Change Management;
07/17/02 - Qwest's Exhibit 92;
07/17/02 - Qwest's Exhibit 93;
07/17/02 - Certificate of Service;
07/22/02 - Motion for Withdrawal of Counsel (Gregory J. Bernard);
07/22/02 - Request for Confidential Treatment of Information;
08/12/02 - Qwest Performance Results - Regional and South Dakota - July 2001 - June 2002;
09/19/02 - Procedural History; Order Regarding Checklist Items 3, 7, 8, 9, 10 and 12;
09/19/02 - Order Regarding Checklist Items 1, 11, 13 and 14;
09/25/02 - Qwest's Notice of Updated Statement of Generally Available Terms and Conditions;
09/27/02 - AT&T's Motion to Reopen and Supplement the Record;
09/30/02 - Qwest's Request for Acceptance of PO-20 for Inclusion in the QPAP;
09/30/02 - Memorandum in Support of Qwest's Request for Acceptance of PO-20 for Inclusion in the QPAP;
10/07/02 - Certificate of Service;
10/10/02 - AT&T and WorldCom's Comments on Qwest's Proposed PO-20 Measurement;
10/10/02 - Opposition of Qwest to AT&T's Motion to Reopen and Supplement the Record;
10/16/02 - AT&T's Notice of Supplemental Authority Regarding PO-20;
10/24/02 - Notice of Supplemental Authority Denying AT&T's Motion to Reopen the Record;
10/25/02 - Notice of Supplemental Authority Denying AT&T's Motion to Reopen the Record;
11/12/02 - Order Regarding General Terms and Conditions and Track A;
11/12/02 - Order Regarding Checklist Items 2, 4, 5, and 6;
11/18/02 - Qwest's Notice of Updated Statement of Generally Available Terms

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	Docket No. TC01-165

AT&T'S RESPONSE TO QWEST CORPORATION'S OPENING POST-HEARING BRIEF ON EMERGING SERVICES

AT&T hereby submits its response to "Qwest Corporation's Opening Post-Hearing Brief on Emerging Services." AT&T notes that it filed its position on these issues in its initial comments. In reviewing Qwest's Post Hearing Brief, there is no need to reiterate its position on a majority of these issues. Instead, AT&T will focus on clarifying issues that have been mischaracterized in Qwest Corporation's Opening Post-Hearing Brief on Emerging Services.

A. (C) DARK FIBER (Whether Qwest May Impose a Requirement of a Significant Amount of Local Exchange Traffic on Dark Fiber Combinations)

In its statement "dark fiber is not a UNE unto itself, but rather a flavor of transport and loop" with a citation from the FCC UNE Remand Order, Qwest implies that the FCC indicated that dark fiber need not be unbundled.

The FCC was clear in the UNE remand order that CLECs should have access to dark fiber. In modifying the loop and dedicated transport definition, the FCC defined "dark fiber" as follows.

> Dark fiber is fiber that has not been activated through electronics that "light" it and thereby render it capable of carrying communications services.[1] Dark fiber is deployed, unlit fiber optic cable that connects two points within the incumbent LEC's network. As discussed above, dark or "unlit" fiber, unlike "lit" fiber does not have electronics on either end of the dark fiber segment to energize it to transmit a

[1] UNE Remand Order at ¶174

telecommunications service. Thus, dark fiber is fiber, which has not been activated through a connection to the electronics that "light" it and render it capable of carrying telecommunications services. To provide additional capacity, new electronics are attached to previously "lit" fiber or previously "dark" fiber.[2]

The test that Qwest has mandated for all special and switched dark fiber found in the Supplemental Order Clarification, relates to an enhanced extended link (EEL).[3] In that Order, the FCC indicated that an EEL is a combination of unbundled loop and transport elements.

First, even if the fiber were not dark, the restriction is only supposed to relate to EELs, which could be used in place of special and switched access. There is no FCC restriction on the use of loops and transport used independently or for loop and transport combinations that are combined by the CLEC at a collocation. The Qwest restriction is grossly overbroad including all dark fiber, which is neither a loop nor transport and is certainly not an EEL. Dark Fiber is not a substitute for special or switched access.

Second, the fiber is dark. As such, as explained in the ICA and SGAT definition, the CLEC has to light the fiber, not Qwest. Accordingly, dark fiber, while dark, can never be an EEL since it is not transport. AT&T would note that is why dark fiber as an EEL was never discussed by the FCC in the 1) UNE Remand Order, 2) UNE Supplemental Order or 3) UNE Supplemental Order Clarification.

It is for these reasons that AT&T has argued that Qwest is significantly and inappropriately limiting the CLECs ability to access dark fiber by creating a partially inapplicable and inappropriately burdensome test.

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[2] *Id.* at ¶25.

[3] *See Supplemental Order Clarification, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183 (rel. June 2, 2000).

B. Subloop Unbundling

In its brief, Qwest argues that the issue is just one of definitions.[4] Qwest admittedly limits the definition of the NID to the demarcation point. The Federal Communications Commission does not. In fact, the FCC redefined the NID to "include all features, functions, and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism."[5] The FCC specifically redefined the NID to include any means of interconnection of customer premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device used for that purpose.[6]

The definition is essential because the FCC created a separate distinct section regarding access to the NID in the UNE Remand Order.[7] In doing so, the FCC made clear that unencumbered access to the NID is technically feasible and particularly important because denial of access "would materially diminish a competitor's ability to provide the services it seeks to offer,"[8] and "would materially raise entry costs, delay broad facilities-based entry and materially limit the scope of the competitor's service offerings."[9] Accordingly, the FCC indicated that "an incumbent LEC must permit a requesting carrier to connect its own loop facilities to the inside wire of the premises through the incumbent LEC's NID."[10]

AT&T needs liberal and unfettered access to the NID to obtain the inside wire. In its MTE Order, the FCC found that "incumbent LECs are using their control over on-

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[4] *See Qwest Brief* at p.27.
[5] *Id.* at ¶ 233.
[6] *Id.*
[7] *Compare Id.* at ¶ 202 *et. seq.* with *Id.* at 230 *et. seq.*
[8] *Id.* at ¶ 237.
[9] *Id.*
[10] *Id.*

premises wiring to frustrate competitive access in multi-tenant buildings."[11] Further, the FCC found that "incumbent LECs possess market power to the extent their facilities are important to the provision of local telecommunications services in MTEs."[12] Finally, the FCC recognized 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."[13]

Under the current SGAT, the CLECs have to 1) wait for upwards of ten days for Qwest to let the CLEC know if Qwest or the building owner owns the internal customer premises wiring,[14] 2) create an inventory for Qwest of the terminal,[15] 3) submit a manually typed LSR for each inside wire,[16] 5) pay Qwest an unknown time and materials charge "for Qwest to complete the inventory of the CLEC's facilities within the MTE such that Subloop orders can be submitted and processed (note that various states have either stricken this charge),[17] and 6) pay Qwest a recurring charge to use the inside wire (AT&T does not dispute that a TELRIC reasonable charge is appropriate for the use of the inside wire).

As AT&T argued in its comments, because Qwest has instituted so many parameters on access, Qwest is significantly limiting access to the internal customer premises wiring, through the NID, in order to frustrate the facility based CLECs abilities to effectively compete with Qwest. Thus, this is hardly an issue of definitions; it is a

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[11] Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, FCC 00-366, ¶ 6 (Rel. Oct. 25, 2000) ("MTE Order").
[12] *MTE Order* at ¶ 11.
[13] *Id.*
[14] *See* SGAT §9.3.5.4.1.
[15] *See* SGAT §9.3.3.5.
[16] *See* SGAT §9.3.5.4.4.
[17] *See* SGAT §9.3.6.4.1.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	)))))	Docket No. TC01-165

AT&T'S BRIEF REGARDING QWEST'S INTERCONNECTION OBLIGATIONS

AT&T Communications of the Midwest, Inc. ("AT&T") hereby submits this Brief regarding Qwest Corporation's ("Qwest's") interconnection obligations under Checklist Item 1.

INTRODUCTION

Timely, efficient interconnection is critical, not only to competitive local exchange carriers ("CLECs"), but to competition itself. If interconnection is difficult to achieve and more costly than it should be, competitors will either not interconnect or engage in only limited interconnection. In either case, competition suffers because it is diminished or destroyed.

Although no one can promise competition will arrive and succeed, the regulatory environment and Qwest's Statement of Generally Available Terms ("SGAT") may certainly encourage or discourage competitors from trying to compete. Therefore, AT&T recommends that the South Dakota Commission reject Qwest's positions in relation to

the following interconnection issues because Qwest's position and its SGAT undermine the "concrete and specific legal obligation to furnish the item upon request."[1]

Thus, for each item discussed below, Qwest has failed show that the terms of its SGAT or interconnection agreements obligate it to provide the item in a manner that complies with the statute and with the FCC's rules, policies, and precedents regarding that item.

DISCUSSION

I. INTERCONNECTION UNDER THE LAW

A. Legal Requirements of Interconnection Generally.

As noted in Mr. Wilson's Affidavit, interconnection is the physical linking of two networks for the mutual exchange of traffic.[2] Under the law, Qwest must provide interconnection at any technically feasible point within its network that is at least equal in quality to that provided by Qwest to itself or others on rates, terms and conditions that are just, reasonable and nondiscriminatory. Importantly, Qwest must provide interconnection in a manner no less efficient than the way in which it provides comparable function to its own retail operations.[3]

Finally, the FCC has declared that CLECs may "choose *any* method of technically feasible interconnection at a particular *point on the incumbent LEC's network*. Technically feasible methods also include, but are not limited to, physical and virtual collocation and meet point arrangements."[4] As noted earlier, interconnection is the

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[1] *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InraLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404 (Rel. Dec. 22, 1999) at ¶ 52 ("***FCC 271 BANY Order***").

[2] 47 CFR § 51.5 (definition of interconnection).

[3] *FCC 271 BANY Order* at ¶ 65

[4] *FCC 271 BANY Order* at ¶ 66 (emphasis added).

physical linking of two networks for the mutual exchange of traffic. And the point of interconnection or POI is the *location* where the parties mutually hand off their traffic.

The traffic-originating carrier may bring its traffic to the POI for interconnection in a variety of ways. It may provide the facilities itself, lease interconnection facilities from a third party or lease interconnection facilities from Qwest. The interconnection facilities, whether leased or otherwise self-provisioned, are part of the originating party's network and the POI is still the point at which the two networks are interconnected for the mutual exchange of traffic, and each carrier is responsible for delivering its originating traffic to the POI. The facilities that bring the traffic to the POI are interconnection facilities.

II. Analysis of CLEC Interconnection Needs and Costs Generally.

1. <u>CLEC Interconnection Needs Generally</u>.

CLECs, such as AT&T, enter a local telecommunications market with few or no customers. As a result they are faced with the considerable challenge of how and where to profitably deploy transport facilities and switching systems while considering the relatively low density of customers and the traffic volumes anticipated. As a general matter, Regulators should not expect CLECs to deploy new local telephony networks that duplicate or mirror the architecture of the old incumbent networks. Rather, CLEC networks will take advantage of new technological advancements and substantial decreases in the costs of, for example, high-capacity fiber-optic facility systems. Although the CLEC and Qwest networks are similar in the sense that the two networks serve comparable geographic areas, a key distinction between the networks is that Qwest deploys tandem switches to interconnect multiple end office switches spread throughout

the geographic area and CLECs, such as AT&T, deploy a single switch combined with longer transport on the end-user side of the switch.[5]

In any event, the Act and the FCC clearly contemplate that the CLEC many employ the type of interconnection method that best suits the needs of the nascent competitor. Consequently, costs are a chief concern to such competitors.

2. **Interconnection Costs Generally.**

The costs of interconnection and who should bear them are determined by the location of the POI and the interconnection facilities themselves. Each carrier is responsible for delivering its originating traffic to the POI, and the costs of such delivery are identified generally as the "origination costs." From the POI to the terminating customer, the other carrier must assume operational responsibility and take the traffic to the designated end user while the originating carrier pays the terminating carrier[6] for the costs of that carriage. The costs associated with the terminating side of the POI are generally known as "transport and termination" costs. The transport and termination costs are paid pursuant to reciprocal compensation obligations.[7]

Reciprocal compensation is broken down into two parts: (a) the transport portion, which is the transmission and any necessary tandem switching from the POI to the terminating carrier's end office that serves the called party; and (b) the termination portion, which involves the switching of the traffic at the terminating carriers end office switch or equivalent facility and delivery of that traffic to the called party's premises.[8]

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[5] *See generally*, Kenneth Wilson Affidavits regarding interconnection and reciprocal compensation.
[6] The FCC defines "termination" as the "switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent Facility, and delivery of such traffic to the called party's premises." *First Report and Order* at ¶ 1057.
[7] 47 U.S.C. § 251(b)(5); *see also*, 47 CFR § 51.703.
[8] 47 CFR § 51.701(c) & (d).

For the transport portion, carriers may select Direct Trunk Transport or common transport. As noted in Mr. Freeberg's Affidavit, tandem switch transport applies between the Qwest tandem switch and the end office subtending the tandem and associated with the called party's loop.

To reiterate, the location of the POI is important in the context of reciprocal compensation because it determines where the transport and termination costs begin for the originating carrier. Turning to the costs associated with interconnection facilities themselves, those are generally dedicated one-way or two-way facilities when leased from Qwest or other RBOCs, and with respect to the costs of such facilities the FCC has determined that:

> The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.[9]

Furthermore, the FCC's rules related to the general rate structure of dedicated facilities require:

> (b) The costs of dedicated facilities shall be recovered through flat-rated charges.
>
> (c) The costs of shared facilities shall be recovered in a manner that efficiently apportions costs among users. Costs of shared facilities may be apportioned either through usage-sensitive charges or capacity-based flat-rated charges, if the state commission finds that such rate reasonably reflect the cost imposed by the various users.[10]

The most frequently overlooked competitive advantage that the RBOCs possess, is how a traditional local telephone network should look and operate. Regulators should not expect or require AT&T or any other CLEC to deploy new telephony networks that

[9] 47 CFR § 51.709(b).
[10] 47 CFR § 51.507(b) & (c).

duplicate the architecture of the RBOCs networks. Such a mandate would be economically disastrous for CLECs and would severely hinder the development of competition in South Dakota. Even Qwest, if it were to rebuild its network from a clean slate, would likely not deploy the same network architecture today. Rather, it would develop an architecture that takes advantage of the costs and benefits of the latest switching and transport technology. Yet Qwest, in its interconnection proposals is asking the Commission to apply the traditional local telephony paradigm in determining how emerging CLEC networks should be interconnected.

The Commission should avoid relying upon the traditional local telephony paradigm and instead enforce those policies and rules that accommodate the substantially different strategies, network designs and economic constraints of AT&T and other CLECs in order to promote the development of a healthy, efficient competitive environment. Thus, the Commission should ensure that Qwest allows the maximum flexibility in designing and obtaining technically feasible interconnection facilities. At the heart of the interconnection issues presented here, it is important from an engineering standpoint that CLECs receive timely, efficient and properly priced interconnection facilities. The discussion below, will reveal the roadblocks that Qwest has placed in the path of such interconnection.

C. Analysis of Qwest's SGAT Sections in South Dakota.

For purposes of this Brief AT&T will address specific SGAT sections. Because AT&T does not re-address all disputed issues here, it should not be taken as an indication that AT&T waives or otherwise concedes the disputed issues in this proceeding.

1. SGAT § 7.1.2.1 - Entrance Facilities

Qwest's SGAT provides the terms and conditions for interconnection in Section 7. Section 7 expressly provides three methods of interconnection that are available and

allegedly compliant with the Act.[11] The three methods are: (1) interconnection through something called "entrance facilities;" (2) interconnection using mid-span meets, and (3) interconnection at collocation points. Conspicuously missing from these methods is the opportunity for CLECs to obtain dedicated trunks to the CLEC-selected point of interconnection ("POI") on Qwest's network. In fact and despite Mr. Freeberg's testimony, it would appear from the actual contracts themselves provide only these three methods. While AT&T is not attempting to force Qwest to remove its "entrance facility" option, it is important to AT&T and other CLECs that they be able to obtain the dedicated trunk transport standard for leasing the interconnection facility from Qwest to interconnect to the CLEC-selected POI on Qwest's network.

As it stands in Qwest's current SGAT, § 7.1.2.1 states:

> 7.1.2.1 Qwest-provided Facility. Interconnection may be accomplished through the provision of a DS1 or DS3 entrance facility. *An entrance facility extends from the Qwest Serving Wire Center to CLEC's switch location or POI determined by CLEC. Entrance facilities may not extend beyond the area served by the Qwest Serving Wire Center.* The rates for entrance facilities are provided in Exhibit A. Qwest's Private Line Transport service is available as an alternative to entrance facilities, when CLEC uses such Private Line Transport service for multiple services. Entrance facilities may be used for Interconnection with Unbundled Network Elements.[12]

[11] While the SGAT and ICAs state other technically feasible methods are available, it generally fails to list the primary means of obtaining an interconnection trunk to the POI selected by the CLEC. AT&T's experience has been that if the contract is not express, Qwest will engage in delay tactics and other subterfuge to prevent the CLEC from obtaining the most efficient and timely interconnect or other needed service.

[12] Emphasis Added to highlight the offending provisions.

What this provision means is that Qwest provides dedicated interconnection trunks as limited[13] "entrance facilities, [which] are high speed digital loops."[14] From Qwest's perspective the entrance facility is a "transport system … that has one end at a CLEC's switch location or point of interconnect ("POI") and the other end at the [closest] Qwest serving wire center."[15] Thus, Qwest tells the CLECs that their POI will be at the CLEC switch or somewhere on the CLEC network, when "entrance facilities" are the chosen method of interconnection. Nowhere in the SGAT may a CLEC obtain leased dedicated trunks to the CLEC-selected POI *on Qwest's network* (*e.g.*, POI at the Qwest tandem switch). Beyond the entrance facility, when that is the method of interconnection chosen, Qwest's SGAT offers only interoffice transport, an unbundled network element, to carry the calls wherever the CLEC apparently wants its calls to go on the Qwest network. Furthermore, Qwest's Exhibit A purports to charge CLECs DS-1 and DS-3 loop rates for the entrance facility even though that facility is on Qwest's side of the POI where the POI resides on the CLEC network.

Looking again at the SGAT provision above, it also offers—as an alternative to entrance facilities—Private Line Transport, which is a retail offering in Qwest's retail tariffs. Thus, the private line, much like the entrance facility and Direct Trunk Transport combination would act as an interconnection facility except that it would cost more because Qwest demands that CLECs pay the Qwest retail price of Private Line Transport.

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[13] While the term "entrance facility" has been employed to describe interconnection, its definition, as contained in commission-approved interconnection agreements, is different than the one proposed by Qwest in its recent SGAT and the SGAT utterly disallows the use of dedicated trunks to the point of interconnection chosen by the CLEC.

[14] SGAT at §§ 7.1.2 & 7.1.2.1; Rebuttal Testimony of Thomas Freeberg at p. 23 (from various preceding workshops).

[15] WA Tr. at p. 1266; 10/25/00 OR Tr. at p. 485-88.

The problem with Qwest's SGAT and interconnection options is that the Telecommunications Act of 1996 makes clear that the CLEC may choose the POI in Qwest's network. Section 251(c)(2) states in pertinent part that Qwest has:

> [t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—
>
> > (A) for the transmission and routing of telephone exchange service and exchange access;
> > (B) at *any technically feasible point within the carrier's network* ...

The FCC has determined that CLECs may "choose any method of technically feasible interconnection at a particular point *on the incumbent LEC's network*. Technically feasible methods also include, but are not limited to, physical and virtual collocation and meet point arrangements."[16]

Despite these Orders and the federal statute, Qwest's SGAT does not expressly allow CLECs to obtain a POI on Qwest's network because there is no way for the CLEC to obtain the dedicated trunk necessary to reach such POI. The entrance facility option places the POI back on the CLEC network.

In contrast, AT&T and other CLECs have, for some time and in accordance with the Act, designated their chosen points of interconnection, and paid for interconnection trunks that run from their points of presence ("POP") or switches to the designated POI *in the Qwest network* via leased direct trunks.

The CLEC should be able to order cost based Direct Trunked Transport from the CLEC switch, directly to the Qwest switch at the end of the trunk, whether that switch is a Qwest tandem or a Qwest end office. The Direct Trunked Transport should run

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[16] *FCC 2nd BellSouth Order* at ¶ 66 (emphasis added).

continuously, without need for any entrance facilities or other costs to the POI that the CLEC chooses at the Qwest switch, whether a tandem or directly to an end office. The CLEC should not be required to order an additional entrance facility, which only serves to raise the cost of interconnection. Direct Trunked Transport is a mileage based interconnection facility where mileage should be calculated from the CLEC switch to the Qwest switch, without the addition of a loop charge. These trunks are carrier to carrier and Qwest should cease treating CLECs as if they were end users or long distance carriers that are required to pay access charges.

Therefore, AT&T notes that § 7.1.2.1 (with a conforming change in § 7.3.2.1.1) must be changed to make § 7.1.2.1 compliant with the law. To allow CLECs needed network efficiency and flexibility, along with the cost savings that brings, AT&T proposes the following language to bring Qwest's SGAT (and ultimately its ICAs) into express compliance with the law:

> 7.1.2.1 Qwest-provided Facility. Interconnection may be accomplished, at CLEC's option, through the provision of a DS1 or DS3 entrance facility, Direct Trunked Transport, or both. Such a facility extends from a CLEC-determined point on the CLEC's network to a CLEC-determined POI in Qwest's network. The rates for such facilities are provided in Exhibit A. Qwest's Private Line Transport service is available as an alternative to other Qwest-provided facilities, when CLEC uses such Private Line Transport service for multiple services. Qwest-provided facilities may be used for Interconnection with Unbundled Network Elements.
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> **********
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> 7.3.2.1.1 Direct Trunked Transport (DTT) extends from a CLEC-determined point on the CLEC's network to a CLEC-determined POI in Qwest's network. The applicable rates are described in Exhibit A. DTT facilities are provided as dedicated DS3, DS1 or DS0 facilities.

2. SGAT § 7.2.2.1.5 – Qwest's 50 Mile Limitation on Direct Trunked Transport

In Qwest's SGAT and its testimony, Qwest creates considerable confusion regarding Direct Trunk Transport ("DTT"). Qwest further confuses DTT by employing SGAT § 7.2.2.1.5. All the confusion necessarily leads to the conclusion that Qwest is not complying with its interconnection obligations under the Act.

For example, in his reciprocal compensation testimony, Mr. Freeberg from Qwest defines DTT as:

> Direct Trunked Transport is a reciprocal compensation charge for Qwest's provision of an uninterrupted path between the switches of two different carriers. Direct trunks can link a Qwest end office to another Qwest end office or to a CLEC end office. Direct Trunked Transport extends from a Qwest Serving Wire Center near the carriers' point of interconnection to the terminating call's tandem or end office switch. Switching is not generally performed at a Qwest Serving Wire Center.[17]

In contrast, in his interconnection testimony Mr. Freeberg—throughout the many workshops—stated that DTT was that part of transport that CLECs employ between the entrance facility, which is a "transport system … that has one end at a CLEC's switch location and the other end at the [closest] Qwest serving wire center,"[18] and the Qwest tandem switch or directly to a Qwest's end office without traversing a tandem. Furthermore, Qwest insisted during these workshops that CLECs could not obtain DTT to interconnect their switch directly to Qwest's switch. In fact, CLECs, under the terms of the South Dakota SGAT, must purchase entrance facilities plus DTT to interconnect; there exists no DTT option to interconnect a CLEC switch directly to a Qwest switch in the interconnection sections of the SGAT and ICAs.

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[17] Affidavit of Thomas R. Freeberg dated October 24, 2001 at p 8.
[18] WA Tr. at p. 1266; 10/25/00 OR Tr. at p. 485-88.

Under § 7.2.2.1.5 of the SGAT, Qwest proposes to arbitrarily limit the DTT it will construct to 50 miles while the CLEC must construct the remainder. This makes absolutely no sense since the DTT under consideration, by Qwest's own "interconnection" definition, is the DTT needed between two Qwest switches inside its own network. Qwest has steadfastly maintained that the CLEC must order entrance facilities, not DTT to connect the CLEC switch to the Qwest network.[19] As a consequence, it is difficult to understand why Qwest would require CLECs to build facilities between Qwest switches in the Qwest network as this 50-mile limit contemplates, since DTT is always between Qwest switches. In fact with respect to this limitation, throughout the previous workshops, Qwest generally attempted to justify its 50-mile limitation by providing an extreme and unsubstantiated hypothetical of a CLEC that might demand hundreds of miles of Direct Trunk Transport.[20]

Nevertheless, the Act clearly states that it is Qwest's obligation to: "provide ... interconnection with the local exchange carrier's network ... for the transmission and routing of telephone exchange service and exchange access."[21] According to the FCC, "[s]ection 251(c)(2) lowers barriers to competitive entry for carriers that have not deployed ubiquitous networks by permitting them to select the points in an incumbent LEC's network at which they wish to deliver traffic. Moreover, because competing carriers must compensate incumbent LECs for the additional costs incurred by providing

[19] *See e.g.*, Affidavit of Thomas R. Freeberg dated October 24, 2001 at pp. 6, 9 & 10.
[20] 12/18/00 Multi-state Tr. at p. 111.
[21] 47 U.S.C. § 251(c)(2)(A).

interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect."[22]

Simply put, Qwest's 50-mile limitation on DTT violates the Act and the FCC's pronouncements. Moreover, Qwest has never presented even a single real case wherein it was required to construct such extremely long Direct Trunk Transport, nor has it presented even a shred of evidence that it would not recover the costs to do so. Thus, the South Dakota Commission should reject Qwest's attempt to artificially limit its legal obligations by finding that Qwest's § 7.2.2.5.1 from its SGAT and ICAs inappropriately limits and burdens the CLECs interconnection rights.

3. SGAT § 7.2.2.8.13 – Qwest's Ability to "Snatch-Back" Trunks that CLECs have Purchased

Despite Qwest's modification[23] to this SGAT section, the dispute remains and involves Qwest's unwarranted belief that once it installs for a CLEC various interconnection trunks, it has a unilateral right to determine that the CLEC is underutilizing its trunks and snatch various trunks back from the CLEC regardless of the CLEC's needs or plans for the trunks it holds and pays for. Economically it makes little sense for CLECs to install, maintain and pay for a vast number of underutilized trunks to Qwest end offices as such policies cost the CLEC just as much in switch terminations as it does Qwest. The motive for Qwest's desire to snatch-back trunks must be judged in

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[22] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 & 95-185, First Report and Order, FCC 96-325 (Rel. Aug. 8, 1996) at ¶ 209 ("*First Report and Order*").

[23] Qwest's modified provision now has Qwest consulting with the CLEC on reasons why the CLEC may want to keep the underutilized trunks, but Qwest still has the authority to reject the CLECs reasoning and take back trunks.

that light. Furthermore, Qwest's policies regarding end office trunking rather than tandem trunking have created the need for more trunks than CLECs would otherwise have ordered and therefore, it creates a "Catch 22" for the CLECs' efficient trunk utilization.

CLECs are in the best position to judge and project their future needs for interconnection trunks. They should determine if it is appropriate to return underutilized trunks to Qwest. Qwest should not be allowed to make such a decision unilaterally. Thus, AT&T requests that the Commissions find Qwest's SGAT § 7.2.2.8.13 (even as modified) violates its interconnection obligations by placing CLECs in threat of losing their trunks based upon a utilization standard to which Qwest itself is not held.[24]

Moreover and as discussed in the previous section, Qwest is not managing its overall trunk average utilization to 50%. This means that in a given month a very large number of trunks use less than 50% utilization. This would be in violation of the utilization rule that Qwest wants to impose upon the CLECs. If Qwest needs additional trunk capacity, it should apply this rule to itself.

In addition, it is much easier for Qwest to internally manage and resize Qwest network trunks than it is for CLECs to order trunks from Qwest, get them forcibly down-sized by Qwest, and then need to re-acquire the trunks again to accommodate growth. Furthermore, whenever a CLEC orders a trunk from Qwest, Qwest charges a sizeable nonrecurring cost to the CLEC. So, it is expensive for the CLEC to have Qwest down-size a trunk and then augment it, and it is beneficial to Qwest to demand down-sizing for the revenue involved.

[24] See Ken Wilson Affidavit on Interconnection and workshop transcripts.

In its SGAT Qwest places itself as overseer of the CLEC's trunk utilization. SGAT § 7.2.2.8.13 gives Qwest the right to unilaterally determine that the CLEC isn't using its trunks according to Qwest's utilization demands and then allows Qwest to take back the trunks that Qwest wants. This gives Qwest unprecedented power to interfere in the business of the CLEC regardless of what the CLECs projected plans or needs for the trunks are. Furthermore, there is nothing in this section that requires Qwest to return the money the CLEC has paid for installing the trunks or use its own trunks at the same utilization rates it demands of the CLECS. As the evidence from other proceedings shows, Qwest's own trunk utilization on any given trunk may well be below the standard to which it holds CLECs. Thus, Qwest is discriminating against CLECs and not provided parity of treatment.

4. SGAT § 7.3.1.1.2 Qwest Policies Prevent Efficient Use of Facilities for Interconnection.

Qwest effectively prevents the efficient use of spare private line facilities for interconnection trunks by charging the CLEC private line rates for the interconnection trunks. CLECs buy special access or private line facilities from Qwest to reach end user customers. These same facilities can be used to transport interconnection trunks. There is no difference in the technology used to transport the two types of traffic or any other technical reason that the facilities cannot be shared. Proportional pricing can be used to appropriately charge the CLEC for the two types of traffic. SGAT § 7.3.1.1.2 effectively prevents the CLEC from using existing spare private line transport facilities for interconnection trunks by charging private line rates for the complete facility, including those trunks that should otherwise be billed under the reciprocal compensation requirements for interconnection purposes.

Similarly, CLECs lease special access facilities, such as DS3 or OCn, from Qwest to transport end user traffic directly to the CLEC wire center. These facilities are also called private line facilities. The same facilities can be used to haul interconnection trunks from the CLEC switch to the Qwest switch. If a CLEC has an existing DS3 from Qwest to the CLEC office that is half full, it makes no sense to require the CLEC to order a second DS3 facility to haul a few interconnection trunks. Yet that is exactly the effect of § 7.3.1.1.2 in the Qwest SGAT. Qwest will allow the CLEC to use the private line facility for interconnection, but they charge for the facility as if it were completely private line and refuse to subject the interconnection traffic to reciprocal compensation.

Qwest's only argument against charging appropriate rates is, in reality, that it could not charge the CLEC as much money. AT&T and other CLECs are willing to pay the proportional price for what is used for private line and what is used for interconnection. Since there is no mixing of traffic, each trunk on the facility carries one of the other traffic type and can be charged proportionately. Qwest has been required to do this in Washington, though they have yet to propose compliant language.

Qwest cannot meet its interconnection obligations by forcing CLECs to build duplicate networks for private line and interconnection traffic, where CLECs would have to pay much higher rates to carry local interconnection traffic if it efficiently used its private line or access line trunks. Qwest should be forced to allow this efficient use of facilities before they are permitted to enter the long distance market themselves, where they will have no such restrictions. So, for example, if a CLEC employs 8 of the 28 circuits in a DS-3 to carry local traffic, it should pay for those circuits based upon

TELRIC pricing. The remaining circuits should be priced at whatever the tariff dictates (e.g., private line tariff or special access tariff).

CONCLUSION

For the reasons stated above, AT&T requests that the South Dakota Commission either order Qwest to amend its SGAT in accordance with the discussions herein or not recommend Qwest receive § 271 approval at the FCC.

Respectfully submitted this 1st day of July, 2002.

AT&T COMMUNICATIONS
OF THE MIDWEST, INC.

By: _____

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	**Docket No. TC01-165**

AT&T BRIEF ON CHECKLIST ITEMS 2, 5, AND 6 AND SECTION 272 COMPLIANCE

AT&T Communications of the Midwest, Inc. ("AT&T"), provides the following brief on Checklist items 2 (unbundled network elements), 5 (transport), and 6 (switching), and Section 272. AT&T continues to adhere to the positions stated in its verified comments on these issues submitted on March 18, 2002. While AT&T did not present a witness at the hearings to sponsor these comments, they continue to reflect AT&T's positions on the legal issues presented to the Commission for resolution. To the extent that those comments are not already a part of the record in this proceeding, AT&T attaches those comments as Exhibits A and B to this brief and incorporates the legal analysis and arguments as though fully set forth herein.

Also attached to this brief as Exhibits C, D, E, and F are recent orders from the New Mexico, Utah, and Washington commissions that address issues raised in AT&T's comments and resolve many of those issues in the same or similar manner to the resolutions AT&T has proposed that this Commission adopt. The orders speak for themselves and therefore AT&T provides no additional comment on them other than to urge the Commission to withhold any recommendation that the FCC approve Qwest's

Section 271 application until Qwest makes the changes to its Statement of Generally Available Terms and operations in South Dakota that AT&T has proposed.

Respectfully submitted on July 1, 2002.

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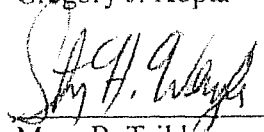

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EXHIBIT A

Exhibit A

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INVESTIGATION INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	Docket No. TC 01-165

AT&T'S VERIFIED COMMENTS ON

CHECKLIST ITEMS 2, 5 AND 6

MARCH 18, 2002

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AT&T Communications of the Midwest, Inc. ("AT&T") hereby files its verified comments on disputed issues regarding Checklist Items 2 (as it relates to combination of network elements), 5 (local transport) and 6 (local switching).

I. INTRODUCTION

The Telecommunications Act of 1996[1] was signed into law on February 8, 1996. The 1996 Act imposes a number of obligations on incumbent local exchange carriers ("ILECs"). One of these obligations is the duty to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory."[2] "To obtain the authority to provide in-region interLATA services, the regional Bell operating company ("RBOC" or "BOC") must demonstrate that it is in compliance with § 251(c)(3) and § 271 of the 1996 Act, more specifically for the purposes of these comments, §§ 271(c)(b)(ii), (v) and (vi).[3]

Subparagraph (ii) requires the RBOC to demonstrate that it is either providing or generally offering to provide "[n]ondiscriminatory access to network elements in accordance with the requirements of §§ 251(c)(3) and 252(d)(1)." Subparagraph (v) requires the RBOC to demonstrate that it is either providing or generally offering to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching other services." Subparagraph (vi) requires the RBOC to demonstrate that it is either providing or generally offering to provide "[l]ocal switching unbundled from transport, local loop transmission or other services."

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[1] Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 *et seq.* ("1996 Act" or "Act").
[2] 47 U.S.C. § 252(c)(3).
[3] 47 U.S.C. § 271(c)(B)(ii)(v) and (vi).

The Federal Communications Commission ("FCC") has concluded "that a BOC 'provides' a checklist item if it actually furnishes the item at rates and on terms and conditions that comply with the Act or, where no competitor is actually using the item, if a BOC makes the checklist item available as both a legal and a practical matter. To be 'providing' a checklist item, a BOC must have 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."[4] "The phrase 'generally offers to provide such access or interconnection' requires a BOC to make the checklist available as both a legal and practical matter."[5] If the BOC claims it is generally offering an item, "the BOC must have a concrete and specific legal obligation to furnish the item upon request pursuant to its SGAT."[6]

The FCC has determined that the BOC must provide local transport and local switching as unbundled network elements under § 251(c)(3), independent of its obligation under § 271 to unbundle local transport and local switching.[7]

The FCC has defined the scope of the ILECs' obligation to provide nondiscriminatory access to unbundled network elements under § 251(c)(3):

> [A]n incumbent LEC could potentially act in a nondiscriminatory manner in providing access or elements to all requesting carriers, while providing preferential access or elements to itself. Accordingly, we conclude that the phrase "nondiscriminatory access" in § 251(c)(3) means at least two things: first, the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element *must be equal between all carriers requesting access to that element*; second, where technically feasible, *the access*

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[4] *Application of Ameritech Michigan Pursuant to § 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (rel. Aug. 19, 1997), ¶ 110 ("*Ameritech Michigan Order*").

[5] *Application of BellSouth Corporation, et al. Pursuant to § 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order, FCC 97-418 (rel. Dec. 24, 1997), ¶ 81 ("*BellSouth South Carolina Order*").

[6] *Id.*

[7] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, FCC 99-238 (rel. Nov. 5, 1999), ¶¶ 253 and 323 ("*UNE Remand Order*").

and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides to itself.[8]

> The duty to provide unbundled network elements on "terms, and conditions that are just, reasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself. We also conclude that, because § 251(c)(3) includes the terms "just" and "reasonable" this duty encompasses more than the obligation to treat carriers equally. Interpreting these terms in light of the 1996 Act's goal of promoting local exchange competition, and the benefits inherent in such competition, *we conclude that these terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete.*[9]

The Commission, when reviewing Qwest Corporation's ("Qwest's") Statement of Generally Available Terms and Conditions ("SGAT") and interconnection agreements, must determine whether Qwest has a concrete and specific legal obligation to provide the checklist items on a nondiscriminatory basis. The terms and conditions must be equal to the terms and conditions under which Qwest provisions elements to itself, and such terms and conditions must also provide CLECs with a meaningful opportunity to compete. The Commission should conclude that Qwest has failed to satisfy these requirements with respect to Checklist items 2, 5, and 6.

II. ARGUMENTS

A. The Provisioning and Combination of Unbundled Network Elements

Qwest is prohibited from separating network elements that are already combined in its network.[10] The Ninth U.S. Circuit Court of Appeals, moreover, has upheld provisions in

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[8] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), ¶ 312 (footnotes omitted) (emphasis added) ("*Local Competition Order*"). *See also UNE Remand Order*, ¶¶ 490-491.

[9] *Id.*, ¶ 315 (footnotes omitted) (emphasis added).

[10] 47 C.F.R. § 51.315(b).

interconnection agreements requiring Qwest to combine network elements on behalf of CLECs.[11] Qwest has also stated that it will voluntarily combine network elements on behalf of CLECs. The Commission thus must determine whether the provision of network elements in combinations by Qwest is nondiscriminatory, "allows requesting carriers to combine such elements in order to provide such telecommunication service,"[12] and provides CLECs a meaningful opportunity to compete.[13] Qwest's proposed provisions fail to satisfy this standard in several material respects.

1. Qwest is obligated to build network elements on a nondiscriminatory basis for CLECs (CL2-13; UNE-C-8; EEL-5)

Qwest does not believe it has an obligation to build UNEs. The SGAT states that Qwest will provide CLECs access to UNEs "provided that facilities are available."[14] In the section of the SGAT regarding construction, it is clear that Qwest will not build UNEs unless it believes, based on "an individual financial assessment," that it is in *Qwest's* interests to do so.[15] It is AT&T's position that Qwest must build UNEs for CLECs under the same terms and conditions that Qwest would build network elements for itself (or its retail customers) at cost-based rates.[16]

The FCC has stated that,

> "[t]he duty to provide unbundled network elements on "terms, and conditions that are just, unreasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself."[17]

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[11] *U S WEST v. MFS*, 193 F.3d 744, 758-759 (9th Cir. 1999); *MCI v. U S WEST*, 204 F.3d 1262, 1267 (9th Cir. 2000).
[12] 47 U.S.C. § 251(c)(3).
[13] *See* AT&T's Multistate Comments (WS3-ATT-KLW-1) at 11-16 for a complete discussion of Qwest's legal obligations to provide UNE combinations.
[14] SGAT §§ 9.23.1.4, 9.23.1.5, 9.23.1.6 and 9.23.3.7.2.12.8. There are other sections that incorporate the notion that Qwest does not have to build UNEs, for example, SGAT §§ 9.1.2.1 and 9.19
[15] SGAT § 9.19. There is no reasonableness standard. Multistate Workshop 3 Transcript at 259 (March 27, 2001).
[16] For example, there should not be a situation where unbundled loops or transport are not "available" for a CLEC but the facilities are available as retail services.
[17] *Local Competition Order*, ¶ 315. In an accompanying footnote, the FCC stated that "[t]he term 'provisioning' includes installation." *Id.*, n. 684. Note that the FCC discusses "terms and conditions," not rates. Although, as between CLECs, rates must be nondiscriminatory, with respect to rates charged to all CLECs, the rates must be cost-based pursuant to § 252(d).

The FCCs rules also require that the ILEC provision network elements to CLECs on terms and conditions no less favorable than the terms and conditions under which the ILEC provides such elements to itself.[18]

In its *Local Competition Order*, the FCC does not explicitly state that ILECs do not have to build network elements, except for unbundled interoffice facilities.

> Rural Telephone Coalition contends that incumbent LECs should not be required to construct new facilities to accommodate new entrants. We have considered the economic impact of our rules in this section on small incumbent LECs. In this section, for example, we expressly limit the provision of unbundled interoffice facilities to existing incumbent LEC facilities. We also note that § 251(f) of the 1996 Act provide relief for certain small LECs from our regulations under § 251.[19]

In its order, the FCC recognized the economic impact on small ILECs of having to build transport. It explicitly held all ILECs need not build transport; however, it made clear that for all other network elements, § 251(f) provides the relief for *rural* ILECs from any economic impact imposed on the *rural* ILECs as a result of having to build network elements for CLECs.[20] Therefore, although it explicitly limited an ILECs obligation to provide interoffice facilities to existing facilities, the FCC made no explicit limitations for the other network elements, whether for rural or non-rural ILECs, and no such limitation can be inferred.

Furthermore, the FCC has held that the ILECs have an obligation to replace UNEs that are being provided to CLECs.[21] An obligation to replace UNEs is essentially the same as an obligation to build UNEs. Finally, the FCCs rules also require that the ILEC provision network

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[18] 47 C.F.R. § 313(b).

[19] *Local Competition Order*, ¶ 451. The FCC did not unbundle dark fiber in the *Local Competition Order*, so no inference can be made that the ILEC does not have to light dark fiber based on the FCC's language in paragraph 451. *Id.*, ¶ 450. *See also, UNE Remand Order*, ¶ 324. In the *UNE Remand Order*, the FCC discusses the lack of any obligation on the ILEC's part to build point-to-point interoffice facilities that the ILEC has not deployed for its own use. Once again, it cannot be inferred that the ILEC has no obligation to light dark fiber that is already in place.

[20] Section 251(f) applies only to rural ILECs; therefore, ILECs such as Qwest cannot seek exemption from it obligation to build under § 251(f).

[21] *Local Competition Order*, ¶ 268; 47 C.F.R. § 51.309(c). Qwest has argued it need not replace UNEs. This position is in conflict with the FCC order and rule. The Commissions should affirm that Qwest must replace UNEs.

elements to CLECs on terms and conditions no less favorable than the terms and conditions under which the ILEC provides such elements to itself.[22]

Qwest proposes to flout these requirements. Qwest proposes to have the authority to refuse to build a facility as a UNE for a CLEC when Qwest would build that same facility to enable Qwest to provide the same service to the same retail customer that the CLEC proposes to serve.[23] Qwest also proposes to be able to refuse to build a facility as a UNE under SGAT § 9.19 and agree to build it for the CLEC if the CLEC orders the facility as a retail service.[24] Qwest is willing to commit to building facilities for CLECs as UNEs only if Qwest has an obligation to build under its provider-of-last-resort obligations.[25] This offer is limited to DS0 loops.[26] Qwest's proposed limitations do not comply with the Act and the FCCs rules.

An ILEC must build network elements for CLECs (except point-to-point interoffice facilities) under the same terms and conditions that the ILEC would build the facilities for itself or its retail customers, at cost-based rates under § 252(d). Any other holding would be discriminatory and prevent the CLECs from having a meaningful opportunity to compete,[27] allowing Qwest to deny a CLECs request for a UNE and then build the network element for

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[22] 47 C.F.R. § 313(b).
[23] TR 225-226 (March 27, 2001).
[24] TR 226-227 (March 27, 2001).
[25] TR 212 (March 27, 2001); WS3-QWE-KAS-18. Qwest has provided language that provides an inclusive list of the incremental steps Qwest will take to make facilities available. TR 31-32 (March 28, 2001); SGAT § 9.1.2.1.2. However, this list represents only minor modifications and does not go far enough. For example, Qwest will not upgrade electronics to make network capacity available.
[26] TR 218 (March 27, 2001).
[27] *Local Competition Order*, ¶ 315. Qwest relies on language in an Eighth Circuit opinion, that an ILEC's obligation requires that it provide access only to its "existing network -- not to a yet unbuilt superior one." *Iowa Utils Bd. v. FCC*, 130 F.3d 753, 813 (8th Cir. 1998). Qwest's reliance on this language is misplaced. The Eighth Circuit in this portion of its decision was reviewing the FCC's rules that required ILECs to provide *superior* interconnection and access to network elements. It struck down these rules (47 C.F.R. §§ 51.305(a)(4) and 51.311(c). Any discussion of these rules and decision to vacate these rules cannot be extended to an ILEC's duties under § 251(c)(3) or other rules not vacated by the Eighth Circuit.

itself to provide the service to the same customer.[28] If Qwest refuses to build a network element for a CLEC and subsequently provides the service to the same customer, Qwest has discriminated against the CLEC because Qwest built the facility on terms and conditions that should have been offered to the CLEC.[29] The Commission, therefore, should require Qwest to construct facilities for CLECs as UNEs at cost-based rates under the same terms and conditions that Qwest constructs such facilities for its retail customers.

Consistent with this requirement, Qwest should be required to light unused dark fiber or augment electronics to provide UNEs, including UNE transport, to CLECs. Qwest alleges it does not have to light unused dark fiber and make it available as dedicated transport or replace the electronics to expand the existing capacity to make UDIT available[30] because it has no obligation to build UNEs. Qwest has taken the FCC statement that it does not have to build dedicated transport to extremes. The *Local Competition Order* and the *UNE Remand Order* do not provide any basis for the argument that the ILEC need not add electronics to dark fiber or change out the electronics to increase capacity of existing facilities.[31]

First, the FCC has determined that dark fiber is dedicated transport.[32] The FCC has held that dark fiber is no different than unused copper capacity that is "dormant until carriers put it into service."[33] The FCC also noted that dark fiber "is physically connected to the incumbent's network and is easily called into service."[34]

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[28] This is the likely result of Qwest's position. An end-user customer that is advised by a CLEC that facilities are not available is going to try to obtain the facilities from another carrier. If Qwest will not build the facilities for any CLEC, the customer will eventually wind up at Qwest, leaving Qwest to build the facilities on any terms it wishes.
[29] Once again, it should be noted that Qwest is fully compensated under § 252(c) for its costs. Arguably, its profits may not be as high as those it receives under its retail tariffs.
[30] Multistate Workshop 3 Transcript at 33 (March 28, 2001). Dedicated transport includes the necessary electronics. *UNE Remand Order*, ¶ 323.
[31] *See* n. 20, *supra*.
[32] *UNE Remand Order*, ¶ 325.
[33] *Id.* *See* also, ¶ 327.
[34] *UNE Remand Order*, ¶ 328.

Qwest has not made any arguments that it need not provide unused copper capacity. Similarly, if the dark fiber is in place, Qwest should not be permitted to claim that it does not have to do what is necessary to call that dark fiber into service to meet orders for dedicated transport. Furthermore, the rates for dedicated transport include the costs of the electronics, so Qwest is being compensated for lighting the fiber.

The FCC also has stated that ILECs must make reasonable modifications to provide access to UNEs. Lighting the dark fiber or replacing the electronics are reasonable accommodations. The FCC has "conclude[d] that the obligation imposed by §§ 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements."[35] The FCC noted that "to the extent incumbent LECs incur costs to provide interconnection or access under §§ 251(c)(2) or 251(c)(3), incumbent LECs may recover such costs from requesting carriers."[36]

Qwest may not discriminate against the CLECs. It must provide interoffice facilities on nondiscriminatory terms and conditions.[37] The FCC prohibited the ILECs from providing preferential treatment to themselves.[38] Qwest is going to light the fiber for itself at some point to provide dedicated transport to itself or its customers. Dark fiber is not going to remain dark indefinitely. Qwest will also increase the capacity of the electronics for its own use (but will not do so for the CLECs). Qwest, then, cannot argue it will never light dark fiber or replace electronics to make dedicated transport available to the CLECs. This would be a clear violation of the nondiscrimination provision of § 251(c)(3) of the Act and the FCC rules.[39]

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[35] *Local Competition Order*, ¶ 198. *See also* ¶ 202.
[36] *Local Competition Order*, ¶ 200. In fact, the costs to light the dark fiber are included in the rates for dedicated transport and no construction charges are necessary.
[37] *Local Competition Order*, ¶ 312.
[38] *Id.*
[39] 47 C.F.R. §§ 51.307 and 51.311.

It is entirely consistent with the FCCs rules to require Qwest to call dark fiber into service, add the necessary electronics and provide the dedicated transport requested by the CLEC. This is what Qwest must do if it needs to provide dedicated transport to its own customers. To find that Qwest does not have to add electronics to unused dark fiber to provide dedicated transport to CLECs would ignore that facilities are, in fact, in place and would allow Qwest to inventory and retain dark fiber entirely for its own use, thereby undermining its obligation under § 251(c)(3) to provide dedicated transport. The same situation occurs if Qwest need not replace electronics to increase capacity. To hold otherwise would be discriminatory and a violation of § 251(c)(3) of the Act and the FCCs rules.

Accordingly, the language "provided that facilities are available" should be stricken from SGAT §§ 9.23.1.4, 9.23.1.5, 9.23.1.6 and 9.23.3.7.2.12.8. Furthermore, SGAT § 9.19 should be amended. The first sentence of this section should be amended to read: "Qwest will conduct an ~~individual financial~~ assessment of any request which requires construction of network capacity, facilities, or space for access to or use of unbundled loops." The Commissions should also make clear that under § 9.1.2 of the SGAT and related provisions, Qwest is obligated to build UNEs, except dedicated transport, on a nondiscriminatory basis at cost-based rates under § 252(d).

2. The SGAT should be amended to remove any prohibition on connecting UNEs to finished services, except where expressly permitted by the FCC.

The SGAT at § 9.23.1.2.2 contains a section that prohibits CLECs from connecting UNEs to finished services, without going through a collocation. No such general limitation exists in the FCC orders or rules. In fact, the words "finished service" are not contained in the FCC orders or rules. The limitation should be removed. In addition, § 9.1.5 states that Qwest

may not restrict CLECs' use of UNEs or combinations of UNEs except as permitted by Existing Rules.[40]

The FCC was clear that the ILEC could not place any restrictions on the use of UNEs.

> An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.[41]

Section 251(c)(3) also allows access to UNEs at any technically feasible point[42] using any technically feasible method.[43] The FCC has held that "the use of the term 'feasible' implies that interconnecting or providing access to an ILEC network element may be feasible at a particular point even if such interconnection or access requires a novel use of, or some modification to, incumbent LEC equipment."[44]

Qwest has not provided any evidence that accessing UNEs by connecting the UNE to a finished service is not technically feasible.[45] In fact, the SGAT acknowledges connecting finished services to UNEs is technically feasible by requiring such connection be done in a CLEC's collocation.[46] This requirement simply adds unnecessary expense and denies CLECs a meaningful opportunity to compete.

Qwest's restriction requires CLECs to construct separate networks, private line/special access and network elements, because Qwest's restriction on connecting UNEs to finished services precludes a CLEC from aggregating traffic on the same trunk groups.[47] This is

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[40] It is Qwest's position that the FCC's Existing Rules prohibit CLECs from connecting UNEs to finished services.
[41] 47 C.F.R. § 51.309(a).
[42] *See also* 47 C.F.R. § 51.307(a).
[43] *Id.*, § 51.321(a).
[44] *Local Competition Order*, ¶ 202.
[45] The ILEC has the burden to prove a method of accessing UNEs is not technically feasible. *See Id.*, § 51.321(d).
[46] SGAT § 9.23.1.2.2. *See also* SGAT § 9.6.2.1.
[47] Multistate Exhibit WS3-ATT-KLW-2, 3, and 4; Multistate Workshop 3 Transcript at 36-39 & 41-42 (March 28, 2001).

inefficient, expensive and allows Qwest to control market entry by the CLECs by delaying the provisioning of facilities or allowing UNE capacity to be unavailable. Qwest's restrictions simply make it more difficult for the CLECs to meaningfully compete with Qwest.

The FCC has identified two instances where a UNE combination cannot be connected to tariff services. One instance is the loop-transport combination, or the EEL, discussed in the *Supplemental Order Clarification*.[48] All three safe harbor provisions identified in paragraph 22 of the *Supplemental Order Clarification* address loop-transport combinations. In a discussion in paragraph 28 of that order, the FCC rejected a suggestion that it "eliminate the prohibition on 'commingling' (*i.e.*, combining loops or loop-transport combinations with tariff special access services) in the local usage options discussed above."[49] However, once again, this "prohibition" does not extend to all UNEs, but is limited to connecting loop-transport combinations and loops to special access services.

The FCC also noted in paragraph 28 that it would address this issue in its Public Notice issued in early 2001. The Public Notice was issued on January 24, 2001.[50] Once again, the FCCs discussion addresses only loop-transport and loops and asks whether special access circuits converted to UNE combinations may remain connected to existing access circuits without regard to the nature of the traffic carried over the access circuits.[51] As is the case with the *Supplemental Order Clarification*, nowhere in the Public Notice is there any suggestion that there is a general prohibition on connecting UNEs to tariff services, nor does the FCC seek comment on the connection of UNEs to tariff services generally. Therefore, the FCCs rule 51.309(a) prohibits

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[48] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, FCC 00-183 (rel. June 2, 2000), ¶ 22. ("*Supplemental Order Clarification*").
[49] The 3 local use options are contained in paragraph 22 of *Supplemental Order Clarification*. It is worth noting that the FCC does not discuss loops at all in paragraph 22.
[50] Public Notice, DA 01-169, Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service, (rel. Jan. 24, 2001).
[51] *Id.*, at 3.

any general restriction in the SGAT, or any interpretation of § 9.1.5 of the SGAT, that *all* UNEs cannot be connected to tariff or finished services.

Sections 9.6.2.1 and 9.23.1.2.2 should be amended to make it clear that UNEs can be directly connected to finished services, except where specifically prohibited by the FCC. Qwest's interpretation of SGAT § 9.1.5 should be similarly limited.

3. SGAT § 9.23.3.17 - Qwest's desire to take unfair advantage of misdirected CLEC customer contact is anticompetitive and constitutes a violation of § 271 of the Act.

SGAT § 9.23.3.17 deals with customers that, in error, call the wrong carrier with questions about service or maintenance and repair. Under the terms of its SGAT, Qwest maintains that it ought to be allowed to turn these misdirected calls into solicitation opportunities for itself. As grounds for this anticompetitive conduct, Qwest has claimed that the U. S. Constitution grants Qwest an unfettered right to interfere with the relationship between the CLEC and its end user customer.[52]

Fortunately, the U. S. Constitution provides no such right. Rather, the U. S. Supreme Court has clearly stated that freedom of speech is not without bounds.[53] In particular, for commercial speech -- which is precisely the speech Qwest employs, its attempt to snatch CLEC customers via erroneous or misdirected calls -- enjoys only "a limited measure of protection."[54] In fact, the Supreme Court has held:

> We have always been careful to distinguish commercial speech from speech at the First Amendment's core. '[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First

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[52] Multistate Workshop 3 Transcript at 16 (March 27, 2001).

[53] *Florida Bar v. Went For It, Inc.*, 51 U.S. 618, 623, 115 S.Ct. 2371, 2375 (1995); *see also Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 646, 101 S. Ct. 2559, 2564 (1981)("the First Amendment does not guarantee the right to communicate one's views at all times and places...").

[54] *Id.*; *Central Hudson Gas & Electric Corp. v. Public Utilities Comm'n of New York*, 447 U.S. 557, 562, 100 S.Ct. 2343, 2350 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 770, 96 S.Ct. 1817, m 1830 (1976).

Amendment values' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'"[55]

Generally, commercial speech is protected if, and only if, it concerns lawful activity or is not misleading.[56] Even if the speech falls into these categories, it may still be subject to governmental regulation where, as here, the government has a substantial interest in support of its regulation and that the proposed restriction is narrowly tailored to materially advance that interest.[57]

By legislative mandate, a substantial interest exists here (*e.g.*, opening the local markets to competition and preventing anticompetitive behavior that threatens such competition).[58] Moreover, the CLECs are only asking that the limitation be narrowly drawn to apply to misdirected or erroneous calls, which Qwest's representatives can quickly discern by asking the customer the purpose of his or her call (most likely, the customer will volunteer this information in his or her first sentence or so). Such questioning is within reason and easily incorporated into the representative's existing scripts.[59] Similarly, the law in most states prohibits Qwest from engaging in tortuous interference with contracts (such as the contract between the CLEC and its end-user customer) and such prohibition does not constitute a violation of First Amendment rights governing commercial speech.[60]

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[55] *Florida Bar*, 115 S.Ct. at 2375.
[56] *Id.*
[57] *Florida Bar*, 115 S.Ct. at 2375; *Central Hudson*, 100 S.Ct. at 2350 ("The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.").
[58] 47 U.S.C. §§ 251 & 253.
[59] Most companies such as Qwest provide computer-available scripts for their representatives to follow while on the phone with customers.
[60] Qwest representatives receiving a misdirected call and their interfering with the caller's intent to reach his or her CLEC provider causing the caller to terminate any portion of the contractual relationship with the CLEC have committed tortuous interference with the CLEC's contract or business expectancy with its end user customer.

Finally, § 222 of the Act mandates the protection of customer information and restricts its use by carriers to the purpose for which it was intended.[61] In particular, §§ 222(a) and (b) provide, in pertinent part:

> (a) In General.—Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications service
> ...
>
> (b) Confidentiality of Carrier Information.—A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

When Qwest inadvertently receives information about a CLECs customer service, maintenance or repair, such information is proprietary to the CLEC. How Qwest obtains such information, either through carrier-to-carrier exchanges or by a misdirected call, is irrelevant. The information is to be used by Qwest only for the purpose intended, in this case, to reach the CLEC for service, maintenance or repair. Any use by Qwest of such information for its own marketing purposes is prohibited.

Based upon this supporting law, AT&T asks that the Commissions protect nascent competition by not allowing Qwest to abuse its unique position as the dominant reseller controlling the underlying service provided in the resale context. Qwest should therefore be expressly prohibited in its SGAT from using the misdirected CLEC end-user calls as a sales opportunity. AT&T proposed adding the words "seeking such information" at the end of the SGAT § 9.23.3.17.[62] This is clearly a narrowly drawn restriction that safeguards the very

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[61] 47 U.S.C. § 222 (a) & (b).
[62] Multistate Workshop 3 Transcript at 12 (March 27, 2001).

important legislative goal of encouraging the growth of competition in the local telecommunications market.

4. The SGAT does not contain language that permits adequate testing of Qwest and CLEC interfaces and systems

a. The Need for Testing Language Generally

The SGAT presently does not contain any language on testing of Qwest and CLEC operations support systems ("OSS") and interfaces. In response to concerns raised by AT&T regarding the lack of testing language and the failure of Qwest to provide a test environment that mirrors the production environment, Qwest proposed language to be included in the SGAT. AT&T also proposed testing language that is more comprehensive than Qwest's proposal and makes changes to the language proposed by Qwest.[63]

A fundamental question is whether there needs to be any language in the SGAT that explains the test options available to the CLEC to test Qwest and its OSS and interfaces. AT&T believes this goes without saying. It is absolutely essential to any contractual relationship between Qwest and a CLEC that the parties know the scope of Qwest's obligation to provide testing. AT&T's inability to reach agreement with Qwest on a comprehensive test in Minnesota after months of negotiation supports the need for test language. Otherwise, parties are at the mercy of Qwest. Even with the test language in AT&T's Minnesota interconnection agreement, Qwest had been unwilling to come to agreement on the terms of the test.[64] However, what is clear is that the test in the Minnesota agreement language provided AT&T with a specific contractual right that is

[63] Attached as Exhibit A (Multistate Exhibit WS3-ATT-MFH-2).
[64] Multistate Workshop 3 Transcript at 7 (March 28, 2001)

could enforce by filing a complaint at the Minnesota Commission. Without contract language, any complaint would have been very difficult to pursue.

It is crucial that the SGAT *clearly* spell out Qwest's obligation to provide for testing.[65] AT&T recommends that the Commissions adopt AT&T's proposed language.

b. Stand-Alone Test Environment

The FCC has made it clear that the ILEC must provide a test environment that mirrors the production environment.

> Competing carriers need access to a stable testing environment to certify that their OSS will be capable of interacting smoothly and effectively with Bell Atlantic's OSS as modified. In addition, *prior to issuing a new software release or upgrade, the BOC must provide a testing environment that mirrors the production environment in order for competing carriers to test the new release.* If competing carriers are not given the opportunity to test new releases in a stable environment prior to implementation, they may be unable to process orders accurately and unable to provision new customer services without delays.[66]

Qwest calls this environment the "stand-alone test environment" in its proposed language. The *Bell Atlantic New York Order* also made it clear that the stand-alone test environment must be available "prior to issuing a new software release or upgrade"[67] Qwest has proposed language in other jurisdictions to make clear it would provide the stand-alone test environment for new software releases or upgrades prior to implementing such release.[68] This new language must be adopted to conform any testing language finally adopted to the requirement in the *Bell Atlantic New York Order*.

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[65] This is essentially the basis of AT&T's amendments to Qwest's proposal -- to make the test language that Qwest proposed clearer.

[66] *Application by Bell Atlantic New York for Authorization Under § 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. Dec. 22, 1999), ¶ 109 (footnotes omitted) ("*Bell Atlantic New York Order*").

[67] *Bell Atlantic New York Order*, ¶ 109.

[68] Qwest added a new § 12.2.9.4.2: "For a new software release or upgrade, Qwest will provide CLEC the stand alone testing environment as set forth in § 12.3.9.3.2, prior to implementing that release or upgrade in the production environment."

It is AT&T's position that a stand-alone test environment is necessary to meet checklist item 2, should be incorporated in the SGAT and the Commissions should reject any finding of compliance with checklist item 2 until a stand-alone test environment is, in fact, available.[69] Language in the SGAT (a paper promise) is insufficient.

c. **Comprehensive Production Testing.**

Qwest's proposed language fails to provide for testing by the CLEC in a comprehensive manner. Qwest's language provides for connectivity testing, a stand-alone testing environment, interoperability testing and controlled production. Each of these testing proposals has a specific, limited application and do not permit CLECs to test whether the Qwest systems and interfaces, and CLEC systems and interfaces built to Qwest's specifications, work as contemplated in a commercial setting in commercial volumes. Qwest's proposed language does not permit this type of testing.[70]

Connectivity testing "establishe[s] the ability of the trading partners to send and receive EDI data effectively. This test verifies the communications between the trading partners."[71] The stand-alone test environment allows CLECs to process preorder and order test accounts in a predetermined environment that mirrors the production environment.[72] "Interoperability testing verifies CLECs ability to send correct EDI transactions through the EDI/IMA system edits successfully."[73] Controlled production essentially allows the CLEC to place a *limited* number of actual orders using valid

[69] Due to the lack of commercial usage, to obtain a finding of compliance with checklist item 2, the stand-alone test environment should also be tested by the independent third-party as part of the OSS test.
[70] Multistate Workshop 3 Transcript at 23 (March 28, 2001).
[71] Multistate Exhibit WS3-QWE-KAS-17 (Stewart), § 12.2.9.3.1.
[72] *Id.*, § 12.2.9.3.2.
[73] *Id.*, § 12.2.9.3.3.

account and order data that are provisioned.[74] Generally, the CLEC must find a small number of "friendlies" to use as guinea pigs. Only controlled production testing allows end-to-end testing; however, this testing is very limited and requires the use of live customers.[75] The CLEC must, therefore, find customers willing to put their telephone service at risk.

None of Qwest's testing environments provide a robust test environment to really put the CLECs and Qwest's processes through the ringer to verify that the preordering, ordering, billing, provisioning and maintenance and repair processes will work to allow large scale market entry.[76] AT&T's proposal allows for such testing.[77] AT&T's testing proposal is not unique. First, language in AT&T's Minnesota interconnection agreement with Qwest provides for such testing. Second, a number of RBOCs in other jurisdictions -- New York, Massachusetts, Pennsylvania, Virginia and Georgia -- are participating with AT&T in the same kind of test that AT&T seeks to conduct with Qwest.[78]

Qwest has limited its controlled production testing to few customers. Qwest offers no capability to allow CLECs to mass test Qwest's UNE-P or UNE offerings. Under AT&T's proposal, 1000 lines could be used to test AT&T's and Qwest's interfaces and OSS. Lines are installed to test equipment, eliminating the need for a significant number of friendlies. The test equipment would essentially make calls, monitor changes

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[74] *Id.*, § 12.2.9.3.4.

[75] "What other CLECs have done over the last few years is placed a limited number of orders and hand-paddled them through to make sure that things work as expected between the CLEC and Qwest." Ms. Nancy Lubamersky, Qwest, Multistate Workshop 3 Transcript at 25 (March 28, 2001). This is hardly the kind of testing a CLEC should have to stake its future on.

[76] Multistate Exhibit WS3-ATT-MFH-2 (Hydock), § 12.2.9.3.5; Multistate Workshop 3 Transcript at 6 (March 28, 2001).

[77] Multistate Workshop 3 Transcript at 7-8 & 15 (March 28, 2001); WS3-ATT-MFH-1 (Hydock), ¶ 9.

[78] "As there are no natural standards dealing with CLEC-ILEC OSS interfaces, AT&T needs to establish and test its own interfaces for each ILEC or sub-ILEC entity that has a unique set of business rules for the OSS functions." Multistate Exhibit WS3-ATT-MFH-1 (Hydock), ¶ 9; Multistate Workshop 3 Transcript at 6 March 28, 2001).

to features and functions and swap service back and forth from AT&T to Qwest and Qwest to AT&T. Qwest would render actual bills with call detail.[79]

Qwest alleges that the Regional Oversight Committee ("ROC") test is sufficient.[80] However, the FCC has recognized that carrier-to-carrier testing is appropriate and relevant.[81] The testing proposed by AT&T is common in the industry.[82] Furthermore, the ROC test does not test AT&T's interfaces and OSS that have been built on Qwest's documentation.[83] AT&T should be able to do carrier-to-carrier testing before it enters the marketplace. Qwest wants the CLECs to enter the marketplace under its restrictive test environment.

CLECs should not be placed in the position of having to use its new customers as test subjects. If market entry is to be successful and occurs in any significant volumes, the CLEC should not have to risk loss of its goodwill and damage to its reputation due to problems that could have been uncovered by the testing AT&T proposes, before large-scale market entry. Accordingly, the Commission should adopt a method for testing as proposed by AT&T, including AT&T's testing language.

B. Local Switching - Checklist Item 6

1. Qwest should be required to provide AIN-based switch features

Qwest currently provides features through the use of software located in the switch or on its Advanced Intelligence Network ("AIN") platform. Qwest claims it does not have to make AIN features available to the CLECs, based on the FCCs *UNE Remand Order*.[84] It is AT&T's

[79] Multistate Exhibit WS3-ATT-MFH-1 (Hydock).
[80] Multistate Workshop 3 Transcript at 11 (March 28, 2001).
[81] *Bell Atlantic New York Order*, ¶ 89.
[82] Multistate Workshop 3 Transcript at 15 & 24 (March 28, 2001).
[83] *Id.* at 9.
[84] *Id.* at 37 (March 26, 2001). Qwest relies on language in paragraph 419.

position that Qwest reads the FCCs order too broadly and that the FCC disregarded its own standards for determining whether a network element is proprietary or necessary.

The FCC has made it clear that the ILEC must provide all features, functions and capabilities of the switch as part of the local switching element.[85] This "includes all vertical features that the switch is capable of providing, including custom calling, CLASS features, and Centrex, as well as any technically feasible customized routing functions."[86] "Vertical switching features, such as call waiting, are provided through operations of hardware and software comprising the 'facility' that is the switch, and thus are 'features' and 'functions' of the switch."[87] In its *UNE Remand Order*, the FCC reaffirmed its definition of unbundled local switching.[88] The FCC found that the CLECs would be impaired if the ILEC did not provide the unbundled switch with all the features.

The FCC has ordered ILECs to "provide a requesting carrier the same access to design, create, test and deploy AIN-based services at the SMS, through a SCE, that the incumbent LEC provides to itself."[89] In its order, the FCC concluded that AIN service software qualifies as a proprietary network element and should be evaluated under the "necessary" standard because AIN software is often the subject of patent protection[90] and may be a trade secret. Ameritech had claimed that its Privacy Manager "is currently a trade secret because it has independent economic value, is not generally known by or readily discernable to Ameritech's competitors, and has been the subject of reasonable security measures."[91]

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[85] *Local Competition Order*, ¶ 412.
[86] *Id.*
[87] *Id.*, ¶ 413.
[88] *UNE Remand Order*, ¶ 244; 47 C.F.R. § 319(c)(1(iii).
[89] *UNE Remand Order*, ¶ 412.
[90] *Id.*, ¶ 409. *See also id.*, n. 82.
[91] *Id.*, ¶ 409. Ameritech's Privacy Manager is the only AIN feature specifically discussed by the FCC.

On remand from the Supreme Court's decision upholding much of the FCC's jurisdiction but finding that the FCC did not properly articulate a necessary and impair standard, in its *UNE Remand Order*, the FCC established the necessary and impair standards. It should be noted that the necessary standard is applicable only if there is an initial finding that the element is proprietary, as defined by the FCC.

The FCC defined proprietary, adopting "a limited definition of the phrase 'proprietary in nature' that tracks the intellectual property categories of patents, copyrights and trade secrets."[92]

> We find that if an incumbent LEC can demonstrate that it has invested resources (time, material, or personnel) to develop proprietary information or network elements that are protected by patent, copyright, or trade secret law, the product of such investment is "proprietary in nature" within the meaning of § 251(d)(2)(A).[93]

The FCC identified a number of exceptions:

> The second circumstance is where an incumbent LEC cannot demonstrate that the information or functionality that it claims is proprietary differentiates its service from its competitors' services, or is otherwise competitively significant.[94] Information or functionalities that do not distinguish an incumbent LECs service from that of its competitors are unlikely to be the focus of an incumbent LECs efforts to innovate, and therefore do not require the high level of protection normally afforded to proprietary elements under the "necessary" standard. The third circumstance is where we find that lack of access to the proprietary element would jeopardize the goal of the 1996 Act to bring rapid competition to the greatest number of customers. In such a circumstance, we may find that the incumbent LECs asserted proprietary interest is outweighed by the benefits of facilitating more rapid deployment of competition for the greatest number of consumers.[95]

If an element is found to be proprietary, and none of the three circumstances apply, the next step is to determine whether an element is "necessary".

> We conclude that a proprietary network element is "necessary" within the meaning of § 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning

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[92] *Id.*, ¶ 34.
[93] *Id.*, ¶ 35.
[94] *Id.*, ¶ 37 (footnotes omitted).
[95] *Id.*, ¶ 37.

> by a request carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer. We agree with NTIA that the proper focus of the "necessary" standard is whether access to the incumbent LECs proprietary element is absolutely required for the competitor's provision of its intended service. We find, therefore, that an incumbent LEC must provide access to proprietary element, if withholding access to the element would prevent a competitor from providing the service it seeks to offer. In other words, we conclude that an incumbent LECs proprietary network element would only be available to a competitor if the competitor is unable to offer service, without access to the element, because not practical, economic, and operational alternative is available either by self-provisioning or from other sources.[96]

If the element is not "necessary," the ILEC need not offer it.

Reviewing the FCCs order, it is apparent that the FCC did not conduct an analysis consistent with its own standards. Although the FCC noted that several of the BOCs had patented AIN service software,[97] and one ILEC claimed *one* of its AIN services was a trade secret,[98] the FCC did not analyze the AIN service software provided by the ILECs under the definition of proprietary. Furthermore, when analyzing whether the AIN service software is necessary, the FCC based its decision solely on to the fact that the AIN databases, SCE, SMS and ITPs are available to requesting carriers, concluding that because the CLECs have access to these facilities, the CLECs are not precluded from offering AIN service without access to the AIN service software.[99] Once again, the FCC ignored its own standard -- whether "the competitor is unable to offer service, without access to the element, because no practical, economic, and operational alternative is available, either by self-provisioning or from other sources."

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[96] *Id.*, ¶ 44 (emphasis in original).
[97] *Id.*, ¶ 409.
[98] *Id.*
[99] *Id.*, ¶ 419.

Simply stated, the FCC failed to conduct the fact-based analysis required by its own standards, instead relying on the simple fact that it had unbundled access to the AIN database and related facilities. The FCC should have determined whether:

- the AIN service software "differentiates its services from its competitors services or is otherwise competitively significant;"[100]
- "lack of access would jeopardize the goal of the 1996 Act to bring rapid competition to the greatest number of customers;"[101]
- as a practical, economic and operational matter, CLECs are precluded from providing the service it seeks to offer;[102]

a. Qwest has not demonstrated that its AIN features differentiate it from its competitors or is otherwise competitively significant

The FCCs discussion of AIN service software focused on Privacy Manager, a service provided by Ameritech that Ameritech held patents on and claimed was a trade secret.[103] The FCC described Privacy Manager in its order.[104] Privacy Manager is very similar to Qwest's Caller ID with Privacy+.[105] It does not appear that Qwest's service appears in any way unique to warrant a finding that it should be classified as proprietary. It appears to be no different than any other switch feature that Qwest is required to provide CLECs.

b. Lack of access to AIN features would jeopardize the goal of the 1996 Act to bring rapid competition to the greatest number of customers

The FCC has stated that use of UNEs by a CLEC to provide telecommunication

[100] *Id.*, ¶ 37.
[101] *Id.*
[102] *Id.*, ¶ 44.
[103] *Id.*, ¶ 41. Qwest also claims its AIN features are covered by patents.
[104] *Id.*, n. 799.
[105] Caller ID with Privacy+ is generally located in § 5.4.3 of Qwest's tariffs.

service is a permitted means of entry under the Act.[106] This position was affirmed by the Eighth Circuit[107] and the U. S. Supreme Court.[108]

The implications of not providing AIN features must be clearly understood -- when a customer that has an AIN service, for example, Caller ID with Privacy+, switches to a CLEC that wants to provide service using UNE-P, the AIN feature will be lost.[109] The CLEC will not be able to provide the service by using UNE-P, unless the CLEC develops the same software independently and without violating Qwest's patent,[110] or purchases the software from a third-party, *if available*,[111] and loads it into the AIN platform. The FCC without any basis, assumes this is an easy process or AIN features are available from third parties.

For the CLECs to recreate those features in AIN software would be incredibly difficult, burdensome and costly.[112] "Typically, the development cycle for features of this nature is at least two years."[113] It also raises the "chicken-or-the-egg" issue -- can the CLEC expend time and money before it enters a market or must it wait until the CLEC has enough customers to justify the cost? The problem is, will the CLECs get enough customers to justify the expense if it cannot provide the AIN features in the first place?

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[106] *Local Competition Order*, ¶¶ 328-341.
[107] *Iowa Utils Bd. v. FCC*, 120 F.2d. 815 (8th Cir. 1998).
[108] *AT&T v. Iowa Utils Bd.*, 119 S.Ct. 721, 736 (1999).
[109] Multistate Workshop 3 Transcript at 40-41 (March 26, 2001). The only option is to provide the service through resale, unless the CLEC chooses to develop AIN software.
[110] CLECs must create functionally equivalent AIN features that do not infringe on Qwest's patent because Qwest will not waive any patent infringement. *Id.* at 56.
[111] Qwest does not use any off-the-shelf AIN features. *Id.* at 47. There is no evidence that the AIN service software is available from a third-party vendor. *Id.* at 67-68. Furthermore, the current AIN features cannot be provided by switch-based features, as there are no functionally equivalent switched-based features. *Id.* at 42, 44, 63 and 65.
[112] *Id.* at 41, 60 & 70. Qwest agrees AIN features "take a lot of time and money to develop." *Id.* at 44.
[113] *Id.* at 41.

It is AT&T's position that the FCCs third circumstance has been met -- "lack of access to the proprietary element would jeopardize the goal of the 1996 Act to bring rapid competition to the greatest number of customers."[114]

c. <u>As a practical, economic and operational matter, CLECs are precluded from providing the service it seeks to offer</u>

The FCC did not look at the practical, economic and operational concerns regarding availability of AIN software, believing that if it made the AIN database available, the CLECs could enter its own AIN service software.

It simply is impractical for a CLEC to have to provide its own AIN service software to enter a market. The CLEC would either have to write its own software or purchase it, assuming it is available. This is not practical for a new market entrant. As pointed out, this is burdensome, expensive and time-consuming, and would take several years to accomplish. As an economic matter, there is an expense of having to write AIN service software or buy it, if available, and download it before a CLEC can hope to acquire customers that may be served by AIN service software. From an operational perspective, the FCC required the ILECs to provide proprietary routing tables, finding that it would jeopardize the goal of the Act because "[r]equiring requesting carriers to engage in the *potentially* lengthy process of compiling traffic studies and populating routing tables with data in the incumbent LECs unbundled switch would frustrate a requesting carrier's ability to use unbundled local circuit switching to serve customers quickly."[115] The same operational issues are raised by having to populate the AIN service

[114] *UNE Remand Order*, ¶ 37.
[115] *UNE Remand Order*, ¶ 251 (emphasis added). This also supports AT&T's contention that lack of AIN features would frustrate the goal of bringing about rapid competition to the greatest number of customers.

software -- writing or obtaining the software and downloading it into the AIN platform could take years.

When properly analyzed based on the standards established by the FCC, the proper conclusion is that Qwest should be required to make its AIN service software available to CLECs that are using UNEs to provide telecommunications services.

2. Qwest is obligated to provide EELs in wire centers in density zone 1 if unbundled local switching is not available.

The FCC has determined that unbundled local switching is a UNE that ILECs must make available.[116] The FCC did "find, however, that an exception to this rule is required under certain market circumstances. We find that, where incumbent LECs have provided nondiscriminatory, cost-based access to combinations of loop and transport unbundled network elements, known as the enhanced extended link ("EEL"), requesting carriers are not impaired without access to unbundled switching for end users with four or more lines within density zone 1 in the top 50 metropolitan statistical areas ("MSAs")."[117]

Qwest argues that it does not have to provide unbundled switching if it *offers* the EEL in density zone 1 wire centers, whether or not an EEL is *available* from Qwest.[118] The FCC order, however, is not susceptible to such an interpretation. If an EEL is ordered by a CLEC and it cannot be provisioned by Qwest, Qwest must make the unbundled switching element available.[119]

The basis of the switching exemption is the *availability* of the EEL.[120] Indeed, that is the very essence of the FCCs conclusion.

> Our conclusion that competitors are not impaired in certain circumstances without access to unbundled switching in density zone 1 in the top 50 MDAs also is

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[116] *Id.*, ¶ 253.
[117] *Id.*, ¶¶ 253 & 278.
[118] Multistate Workshop 3 Transcript at 87 (March 26, 2001).
[119] *Id.* at 88-89.
[120] *UNE Remand Order*, ¶ 288.

> predicated upon the *availability* of the enhanced extended link (EEL). As noted in § VI(B) [at paragraph 15] above, the EEL *allows* requesting carriers to serve a customer by extending the customers loop from the end office serving that customer to a different end office in which the competitor is already collocated. The EEL therefore allows requesting carriers to aggregate loops at fewer collocation locations and increase their efficiencies by transporting aggregated loops over efficient-high capacity facilities to their central switching location.[121]

The FCCs order is straightforward -- instead of attaching loops to an unbundled switching element or CLEC switches in multiple wire centers, the CLEC can use a loop and transport combination to transport the customer's traffic to one CLEC switch or a collocation in one central office. However, if the EEL is not available, the CLEC must either collocate in each central office served by the loops or use unbundled switching.

The FCC has stated that the CLEC is not impaired if it has to purchase its own circuit switch in density zone 1 switch *if the EEL is available*: "We therefore find that the cost of purchasing a circuit switch does not impair a requesting carriers ability to provide services it seeks to offer in density zone 1, *in certain circumstances*."[122] That circumstance is if the EEL is available. If it is not, the cost to the CLEC of purchasing multiple switches in zone 1 *does* impair a CLEC. The ILEC must make unbundled switching available to the CLEC in zone if Qwest cannot provide an EEL ordered by the CLEC. Otherwise, the CLEC would be impaired because it would not have the EEL or unbundled switching in density zone 1.

Qwest is not relieved if its obligation to unbundle switching in wire centers in density zone 1 even if the Commission, unlike other state commissions, does not adopt AT&T's position. Qwest must make unbundled switching available in the wire centers in density zone 1 for customers with 3 lines or less, regardless of whether the EEL is made available.[123] If after

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[121] *Id.* (emphasis added). Available "1. Accessible for use: at hand." *Riverside Webster's II New College Dictionary*, Houghton Mifflin Company, 1995. The definition of "available" means more than offer conditionally.
[122] *Id.*, ¶ 287 (emphasis added).
[123] Multistate Workshop 3 Transcript at 89-91 (March 26, 2001).

determining that an EEL is not available to serve a CLEC request, Qwest can simply make the unbundled switching element available to serve that customer.

Qwest is not in compliance with checklist item 6 if Qwest does not make unbundled switching available if an EEL is not available. If unbundled switching is not made available to the CLECs when an EEL is not available, the FCCs order is negated. The Commission should adopt language that makes clear that unbundled switching should be made available when Qwest cannot make an EEL available to a CLEC.

3. Qwest incorrectly claims customers should be counted on a wire-center basis, not a location basis

The FCC has held that unbundled switching is a network element; however, it made an exception, finding that the ILECs do not have to provide unbundled local switching to customers with 4 or more lines in density zone 1 wire centers if the ILEC makes the EEL available.[124] The SGAT is ambiguous regarding how lines should actually be counted, whether on per-wire center or per-location basis. The FCC provides no clarity. However it appears that Qwest will count the total number of lines a customer has in a wire center.[125] It is AT&T's position that the line count should be done on a location-by-location basis.[126]

As an initial matter, when evaluating whether to provide service to a customer, the question a CLEC must ask is whether unbundled switching is available to serve a customer located in a density zone 1 wire center. From a practical perspective, a CLEC should be able to determine this by looking at the number of lines serving the customer at the business location.

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[124] *UNE Remand Order*, ¶ 253.

[125] Multistate Workshop 3 Transcript at 93 & 95 (March 26, 2001). Qwest does not elaborate how this would be done in reality, nor is it spelled out in the SGAT.

[126] *Id.*

The FCC noted that 3 lines or less "captures a significant portion of the mass market."[127] This market was identified as residential and small business market.[128] This analysis is not definitive. A location that has 3 lines or less is a small business. Qwest would argue that an end user customer with multiple locations in density zone 1, all locations having 3 or less lines is not a small business. Since the FCCs order is of little help, the result is how best to implement the FCC requirement.

A location analysis is the easiest for the CLEC to implement. A CLEC can determine how many lines are at a location. A CLEC cannot always determine if an end user customer at a location has multiple locations.[129] The information may not be available to the CLEC. This information is in the possession of Qwest. Furthermore, Qwest has made no process available for the CLEC to obtain the information from Qwest.

The SGAT language as proposed is ambiguous and is far from clear how the CLECs are to implement Qwest's proposal. It also is clear that the SGAT does not state explicitly how Qwest will implement its proposal. The more practical way to implement the "3 lines or less exception" to Qwest's obligation to provide the unbundled local switching network element is on a location basis.

4. Qwest is required to provide switch interfaces at the GR-303/TR-008 level

AT&T has requested that Qwest provide access to unbundled local switching using GR-303/TR-008 interfaces. Generally, Qwest has declined, arguing it is not obligated to provide such an interface[130] and based on operational concerns.[131] The issue of whether Qwest must make

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[127] *UNE Remand Order*, ¶ 293.
[128] *Id.*, ¶¶ 293-294.
[129] Multistate Workshop 3 Transcript at 98 (March 26, 2001).
[130] *Id.* at 138-39 (March 28, 2001).
[131] *Id.* at 104-07 (March 26, 2001).

access to unbundled switching available at the GR-303/TR-008 level is one of technical feasibility, of which security of the network is a sub-issue.

The FCC addressed the issue of technical feasibility in its *Local Interconnection Order*. Section 251(c)(3) of Act requires ILECs to provide access to unbundled network elements at any "technically feasible point." The FCC has "conclude[d] that the obligations imposed by §§ 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network element."[132] The FCC also concluded "that the 1996 Act bars consideration of costs in determining 'technically feasible' points of interconnection or access.[133] The FCC concluded that it was the intent of Congress to "obligate the incumbent to accommodate the new entrant's network architecture..."[134] "Consistent with that intent, the incumbent must accept the novel use of, and modification to, its network facilities to accommodate the interconnector or to provide access to unbundled elements."[135]

The FCC did conclude "that *legitimate* threats to network reliability and security must be considered in evaluating the technical feasibility of interconnection or access to the incumbent LEC networks."[136] However, the ILEC has the burden of proving to the state commission "with clear and convincing evidence, that specific and *significant adverse impacts* would result from the requested interconnection or access."[137] This is a very high hurdle for the ILEC to clear. Qwest has not cleared this hurdle.

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[132] *Local Interconnection Order*, ¶ 198.
[133] *Id.*, ¶ 199.
[134] *Id.*, ¶ 202.
[135] *Id.*
[136] *Id.*, ¶ 203 (emphasis added).
[137] *Id.* (emphasis added).

Qwest takes the position it was not obligated to provide access to the switch at the GR-303 level.[138] AT&T clarified its request that the CLEC be permitted to provide its own compatible remote terminal and then lease transport from Qwest or provide its own transport from the remote terminal back to Qwest's switch. The transport would interface with the switch with its own GR-303 signal.[139]

There are no issues that prevent Qwest having to provide access at the GR-303 level, as proposed by AT&T.[140] More importantly, Qwest has failed to demonstrate by clear and convincing proof that significant adverse impacts to the network would result from AT&T's proposal. AT&T's request should be approved.[141]

C. Local Transport - Checklist Item 5

1. The SGAT violates the Act because it fails to permit CLECs to lease the in-region facilities of Qwest Corp.'s affiliates pursuant to Sections 251 and 252 of the Act

In moving for approval of the merger of Qwest Communications International, Inc. ("QCI") and U S WEST, Inc., ("U S WEST") the parent corporations of Qwest Communications Corporation ("QCC"), LCI International Telecom Corp., USLD Communications, Inc., and U S WEST Communications, Inc., now known as Qwest Corp. ("USWC"), QCI and U S WEST represented to various Commissions that the proposed merger would create a stronger competitor and provide significant value for shareholders, employees, and customers because, among other things:

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[138] Multistate Workshop 3 Transcript at 151 (March 28, 2001).
[139] *Id.* at 107 (March 26, 2001); *id.* at 166-68 (March 28, 2001). AT&T also responded to Qwest's operational concerns, but those concerns are less problematic under AT&T's remote terminal/GR303 proposal. *Id.* at 110-12 (March 26, 2001).
[140] *Id.* at 178-80 (March 28, 2001).
[141] In Washington, Qwest proposed general parameters for meeting AT&T's request, demonstrating the technical feasibility of AT&T's request. In a workshop in another jurisdiction, Qwest proposed SGAT language acceptable to AT&T. If this language is adopted in South Dakota, this issue would be closed for AT&T.

- The combination of QCI and U S WEST would enable them to achieve gross revenue synergies of more than $12 billion and net financial and operational synergies of approximately $10.5 billion to $11 billion. They expected the synergies to be comprised of (1) incremental revenues as the combined company expands its local, data, Internet Protocol and long-distance service; (2) operating cost savings in areas such as network operations and maintenance, sales and marketing, billing and customer and back office support; and (3) capital savings through elimination of duplication in the companies' planned network build outs and in other infrastructure and back-office areas.

- The combination would accelerate strategic development and enable them to grow faster than each could grow alone and would increase revenues and profits faster than each would accomplish alone. In particular, they expected it to accelerate the delivery of Internet-based broadband communications services provided by QCI to the large customer base of U S WEST and bring together complimentary assets, resources and expertise and the network infra-structure, applications, services and customer distribution channels of their companies and the combination of customer bases, assets, resources and expertise in a timely manner will permit each to compete more effectively in their rapidly consolidating industries.

- They believe worldwide broadband end-to-end infrastructure, expanded range of products and services, access to each other's customers, people and process and combined use of distribution and operating systems will create growth for the combined company and that, as a large company with global scale and scope,

> multiple capabilities, end-to-end broadband connectivity, and a full suite of data, voice and video products and services, they can successfully compete in the telecommunications industry in the long term.[142]

In this proceeding, Qwest maintains that it has no obligation to unbundle the dark fiber facilities owned by the companies affiliated with Qwest, including its affiliated CLECs.[143] AT&T disagrees with this position. Under the Act, Qwest affiliates that have facilities in the Qwest region must make those facilities available on a resale basis to CLECs, consistent with §§ 251 and 252.

Section 251(c)(3) obligates incumbent local exchange carriers ("ILECs") to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. Section 252(d)(1) additionally requires ILEC rates for unbundled network elements to be based on cost, to be nondiscriminatory and to include a reasonable profit.

Section 251(h) defines an incumbent local exchange carrier as,

> [W]ith respect to an area, the local exchange carrier that (A) on February 8, 1996, provided telephone exchange service in such area and (B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to § 69.601(b)); or (ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

Qwest and its affiliates are "successors and assigns" of USWC and are therefore "ILECs" as defined by the Act.[144] Undoubtedly, Qwest will argue that its parent and its affiliates are not

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[142] *Id.*, Verified Joint Application, dated August 19, 1999.
[143] Multistate Workshop Transcript at 60-66 (Jan. 18, 2001).
[144] Although this issue is briefed specifically as an impasse issue with regard to Qwest's SGAT provisions relating to dark fiber and dedicated transport, this argument applies to all SGAT provisions that Qwest intends to use to satisfy its ILEC obligations under the Act.

"successors and assigns" as those terms are used in the Act. The Commission should reject this argument.

In the SBC/Merger docket, the FCC determined that under § 251(h), an entity may become an incumbent LEC by being a successor or assign of a LEC that, as of February 8, 1996, was providing local exchange service in a particular area and was a member of NECA, even if that entity was not itself providing local exchange service in the area or a member of NECA as of that date. The FCC held, "this interpretation of 'successor and assign' is not only more consistent with the goals of § 251, but conforms more closely to the traditional notion of 'successor or assign.'"[145] Thus, Qwest cannot legitimately argue that it is not a "successor or assign" because neither Qwest International nor its subsidiaries were providing local service in former USWC exchanges or were members of NECA on the date the Act was enacted.

Moreover, in approving the QCI/U S WEST merger, the FCC determined that QCI and its affiliates were "successors and assigns" as used in § 251(h) of the Act.[146] In that proceeding, McLeodUSA asked the FCC to reject the merger application because, among other things, the merged entity "will have the ability to divert favored, high-volume customers to the affiliated [competitive] LEC, which can become the provider of new, innovative services, while the [incumbent] LECs traditional local services are degraded and serve only residential users and other [competitive] LECs."[147] McLeodUSA further argued that, after the merger, U S WEST would be able to use Qwest and its affiliates as competitive LECs "to attempt to avoid the

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[145] *Ameritech Corp. and SBC Communications, Inc. for the Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to §§ 214 and 310(d) of the Communications Act and Parts 5, 22,24,25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, FCC 99-279 (rel. Oct. 8, 1999), ¶¶ 446-448. ("*SBC/Ameritech Merger Order*").

[146] *In the Matter of Qwest Communications International Inc. and U S WEST, Inc. Application for Transfer of Control of Domestic and International §§ 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 99-272, Memorandum Opinion and Order, FCC 00-91 (rel. March 10, 2000), ¶ 45.

[147] *Id.*, n. 131.

[incumbent] LEC obligations under § 251(c)(4) of the Act to offer for resale, at wholesale rates, any services the [incumbent] LEC offers at retail." The FCC rejected McLeod's argument, reasoning,

> Such an affiliate of U S WEST would be considered a "successor or assign" of U S WEST for the purposes of the obligations imposed by § 251(c)(4). Therefore, the competitive LEC hypothesized by McLeod would be treated as an incumbent LEC under § 251(c)(4).[148]

This conclusion is supported, too, by the analysis of the United States Court of Appeals for the District of Columbia in a recent case involving an appeal of the SBC/Ameritech merger approval.[149] There, the Court interpreted "successors and assigns" broadly to include affiliates of the ILEC that provide telecommunications services.

In *ASCENT*, the Court reviewed the FCCs decision to permit the merged entity to offer advanced services through a separate affiliate and, by doing so, avoid § 251(c)'s duties. Although as mentioned above, in the U S WEST/QCI merger docket, the FCC matter of factly concluded that QCI and its affiliated CLECs would be successors and assigns of U S WEST for purposes of the Act, in the SBC/Ameritech merger, the FCC painstakingly concluded that although the Act extends an ILECs market-opening obligations to an ILECs "successor and assign," the advanced services affiliate was not such a successor and assign so long as it complied with various structural and transactional safeguards.[150] The D.C. Circuit rejected this analysis, finding that allowing an ILEC to "sideslip § 251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate seems to us a circumvention of the statutory scheme." The Court further found that the FCCs narrow interpretation of "successor and assign" in that context to be paradoxical:

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[148] *Id.*, ¶ 45 (footnotes omitted).
[149] *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).
[150] *Id.* at 665; *SBC/Ameritech Merger Order*, ¶¶ 444-476.

> [T]he Commission is using language designed by Congress as an added limitation on an ILECs ability to offer telecommunications services as a statutory device to ameliorate §251(c)'s restriction. We do not think that in the absence of the successor and assign limitation an ILEC would be permitted to circumvent §251(c)'s obligations merely by setting up an affiliate to offer telecommunications services. The Commission is thus using the successor and assign limitation as a form of legal jujitsu to justify its relations of §251's restrictions.[151]

Although the *ASCENT* decision involved an advanced services affiliate of an ILEC, the reasoning of the D.C. Circuit in that case applies equally here. Interpreting the statute to *not* require QCI and its affiliates to be subject to the unbundling obligations of the Act would be to encourage the merged entity to "sideslip" §251's requirements by offering telecommunications services and investing in future network infrastructure through its wholly owned affiliates. In its merger application in Colorado, QCI stated that it intended to combine the two corporations' assets, operations and network infrastructure and to plan build outs jointly to achieve synergies that would benefit the public interest and the merged entity's shareholders. This combined operation is a successor and assign of an ILEC, USWC.

For these reasons, the Commission should require Qwest to add language to its SGAT that clarifies that QCI and its affiliates are obligated to unbundle their in-region facilities, including dedicated transport. This requirement is consistent with the goals of the Telecommunications Act and is necessary to prevent Qwest, through its affiliates, from usurping its obligations under § 251(c).

2. Qwest is required under the Act and the FCC Orders to allow CLECs to lease dark fiber that exists in "joint build arrangements" with third parties

"Joint Build Arrangement" means any arrangement between Qwest and another party to jointly or separately construct, install and/or maintain conduit, innerduct or fiber across a single route or routes. This arrangement will permit either or both Qwest and the third party to use the

[151] *Id.* at 667.

other's conduit, innerduct or fiber for transport of telecommunications traffic over such route or routes. This type of arrangement includes, among other things, meet point arrangements with third parties. Qwest has testified that it will make available dark fiber that exists in these arrangements up to Qwest's side of the meet point. However, it refuses to permit CLECs to obtain access to any rights that Qwest has to the use of the facilities of the third party.[152] AT&T disagrees with this position.

Section 251(c) and 47 C.F.R. §§ 51.307 and 309 require Qwest to provide nondiscriminatory access to unbundled network elements in Qwest's ownership or control. In addition, Qwest is obligated under §§ 251(b)(4) and 224 to afford CLECs nondiscriminatory access to poles, ducts and rights-of-way. To the extent these joint build arrangements give Qwest control and/or provide Qwest a right-of-way on a third-party's network, for the provision of Qwest's telecommunications services, Qwest must permit CLECs the same access to those rights-of-way. Without this access, CLECs are impaired in their ability to compete with Qwest in communities of the state where these joint build arrangements exist. In the rural areas in particular, CLECs may not even be able to reach particular communities that Qwest can reach through its joint build arrangement with a third-party.

Checklist item number 3 in § 271 also addresses Qwest's rights-of-way obligations. Qwest must demonstrate that it is providing nondiscriminatory access to its poles, ducts and rights-of-way at just and reasonable rates, terms and conditions.[153] This checklist item is satisfied if Qwest has nondiscriminatory procedures for the evaluation of facilities requests by competitors, granting competitors nondiscriminatory access to information about its facilities;

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[152] Multistate Transcript at 348-60 (Jan. 19, 2001).
[153] *Bell Atlantic New York Order*, ¶ 263.

permitting competitors to use non-Qwest workers to complete site preparation; and compliance with applicable rates.[154]

Qwest's SGAT fails to include even the basic right of nondiscriminatory access to its control and/or rights-of-way that exist in joint build arrangements. Qwest has testified that it is not aware of any such arrangements in the seven states.[155] In discovery, AT&T requested samples of any such arrangements that exist between Qwest and third parties in the state of Colorado. Qwest objected to responding to this data request. A review of such arrangements would indicate the nature of Qwest's ownership or control over this network element. If such network element is in the nature of a right-of-way, § 10.2 of the SGAT should be effective to provide access to CLEC. If such network element is in the nature of a leased facility, such as leased dedicated transport, § 9.7.1 should afford CLECs access to the facility. Alternatively, the agreements would indicate if such facility is some other arrangement – not a right-of-way or leased facility – over which Qwest has ownership or control. To the extent that those agreements provide Qwest rights to use the third-party's facilities, including the dedicated transport available on that particular route, Qwest must permit CLECs equal access to those facilities at just and reasonable rates and terms. Otherwise, Qwest fails its § 271 obligations.

For these reasons, the Commission should require Qwest to include terms in its SGAT that allow CLECs nondiscriminatory access to Qwest's rights to use third-party property consistent with those that Qwest enjoys in any joint build arrangement to which Qwest is a party.[156]

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[154] *BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-12, Memorandum Opinion and Order, FCC 98-271, (rel. Oct. 13, 1998), ¶¶ 174 - 83.

[155] Multistate Transcript at 348-60 (Jan. 19, 2001).

[156] Qwest acknowledges that it already inventories in TIRKs dark fiber acquired from third parties or its parent company. Multistate Workshop 3 Transcript at 70 (March 27, 2001).

3. Qwest's definition of Finished Services is not supported by the FCCs orders and rules

Qwest's SGAT makes reference to "finished service" in a number of sections.[157] The SGAT did not have a definition for "finished service," so Qwest subsequently made one up. The FCCs orders and rules also do not make any references to "finished service." An FCC order does make reference to tariff service.[158] In its *Supplemental Order Clarification*, the FCC prohibits CLECs from connecting EELs to tariff services.[159]

In its definition of finished service, Qwest includes Local Interconnection Service, or LIS trunks. LIS trunks are the trunks that connect traffic between CLECs and Qwest. These are not tariffed services and Qwest is required to provide them pursuant to § 252(c)(2) of the Act at cost-based prices.

There is no restriction in the FCC orders that prohibit connecting UNEs to interconnection trunks. Therefore, the restrictions contained in the SGAT that prohibits CLECs from directly connecting combinations of UNEs to finished services, in this case interconnection, or LIS, trunks runs afoul of 47 C.F.R. § 51.309(a).[160] The words "and Local Interconnection Services" should be stricken from the definition of "finished service."[161]

4. Qwest's distinction between UDIT and EUDIT conflicts with FCCs definition of dedicated transport

The FCC has identified dedicated transport as a network element.[162] Qwest has divided dedicated transport into two elements -- Unbundled Dedicated Interoffice Transport ("UDIT")

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[157] *See, for example*, SGAT § 9.23.1.2.2.
[158] *Supplemental Order Clarification*, ¶ 22.
[159] *Id.*
[160] *See* SGAT § 9.23.1.2.2.
[161] Qwest subsequently agreed to this change in subsequent workshops in other jurisdictions. If the change is adopted, this would close this issue.
[162] *See, generally, UNE Remand Order*, ¶¶ 322-68.

and Extended Unbundled Dedicated Interoffice Transport ("EUDIT").[163] There is no legal basis to make such a distinction, as other commissions in the Qwest region has previously concluded in rejecting Qwest's proposal. That distinction creates only unintended consequences, to the CLECs detriment, and perpetuates an outdated rate structure that is inapplicable to carrier-to-carrier relationships.

In its *UNE Remand Order*, the FCC reaffirmed its definition of dedicated transport contained in the *Local Competition Order*.[164] The FCC concluded that "incumbent LECs must provide unbundled access to dedicated transmission facilities between LEC central offices or between such offices and those of competing carriers. This includes, at a minimum, interoffice facilities between end offices and serving wire centers (SWC), SWCs and IXC POPs, tandem switches and SWCs, end office or tandems of the incumbent LEC, and wire centers of incumbent LECs and requesting carriers."[165] "[A]n interoffice facility could be used by a competitor to connect to the incumbent LECs switch or to the competitor's collocated equipment."[166]

Under Qwest's UDIT-EUDIT distinction, UDIT is Qwest's proposal for dedicated transport between Qwest's wire centers. If a CLEC wants dedicated transport from its wire center (or an IXC from its POP) to a Qwest wire center (the first wire center is called the SWC by Qwest), the CLEC would order EUDIT. UDIT is a distance-sensitive, flat-rated rate element.[167] EUDIT is flat-rated, non-distance sensitive. The CLEC end of EUDIT also does not contain the electronics necessary to provide the CLEC with the capability of the UNE.

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[163] *See* SGAT § 9.6.1.
[164] *UNE Remand Order*, ¶ 323.
[165] *Local Competition Order*, ¶ 440; 47 C.F.R. § 51.319(d)(1)(A).
[166] *Local Competition Order*, ¶ 440; 47 C.F.R. § 51.319(d)(2)(C).
[167] Multistate Workshop 3 Transcript at 102-03 (March 27, 2001).

The FCC did not make a distinction between dedicated transport between ILEC wire centers and dedicated transport between an ILEC wire center and a CLEC wire center. It is all defined as dedicated transport.[168] Qwest has made the distinction to perpetuate a rate structure used in the access world.[169] The entire dedicated transport link from point A to point Z should be based on a distance sensitive, flat rate charge.[170] This will more accurately reflect the costs to the CLEC.

The FCC requires dedicated transport to be recovered through a flat rate charge.[171] As a general rule, the costs for network elements "must recover costs in a manner that reflects the way they are incurred."[172] Qwest's rate structure for EUDIT does not follow the FCCs guidelines, because the rate for the EUDIT is non-distance sensitive. It is an average rate. As with any average rate, some CLECs will pay more than the cost and some will pay less. However, CLECs that elect to build closer to the Qwest wire centers lose the cost benefits of doing so under Qwest's proposal, because the CLEC has to pay the entire EUDIT rate.[173] Qwest's proposal for EUDIT fails to reflect the way costs are incurred.

The EUDIT /UDIT distinction also imposes disincentives on the CLEC to build facilities to a meet point between the CLEC wire center and Qwest SWC. If a CLEC does build to a meet point, the CLEC pays the entire EUDIT rate, as if the CLEC built none of its own facilities. This is because, unlike UDIT, EUDIT is a flat, non-distance sensitive rate. The EUDIT, because it is non-distance sensitive, is not adjusted to reflect the portion of the facility built by the CLEC. If

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[168] *See Local Competition Order*, ¶ 440.
[169] The EUDIT as dedicated transport is treated very similar to how entrance facilities in the access world are. Multistate Workshop 3 Transcript at 103-04 (March 27, 2001).
[170] *Id.* at 109-10.
[171] 47 C.F.R. §§ 51.507(a) and 51.509(c); *Local Competition Order*, ¶ 744.
[172] *Local Competition Order*, ¶ 743.
[173] Multistate Workshop 3 Transcript at 104 (March 27, 2001).

the CLEC must pay the entire rate, it has no incentive to build any of its own facilities between its wire center and Qwest's SWC. This demonstrates that the EUDIT is not cost-based, in violation of § 252(d) of the Act.

Qwest's proposal is also discriminatory. The SGAT provides that CLECs can use UDIT to connect to another independent telecommunications carrier or local exchange carrier using a midspan meet arrangement.[174] A midspan meet to an independent telecommunications carrier is priced on a fixed and per mile basis.[175] If a CLEC wishes to obtain dedicated transport to connect its wire center to a Qwest wire center it must use a non-distance sensitive EUDIT. If a CLEC wants to obtain dedicated transport from Qwest to connect from a Qwest wire center to another local exchange carrier, it can order a distance-sensitive UDIT. CLECs are also carriers, and the same ability to obtain dedicated transport on a distance-sensitive rate from Qwest wire center to the CLEC wire center should also be available.[176]

Finally, the EUDIT does not have electronics on the CLEC end. The CLEC is ordering and paying for dedicated transport to its wire center at a specific bandwidth. Under Qwest's proposal, the CLEC receives "half the dark fiber".[177] It is not "energized" to permit the transmission of voice or data. In its analysis requiring the unbundling of dedicated transport, the FCC made it clear that dedicated transport includes the electronics: "We clarify that this definition includes all technically feasible capacity-related services, including those provided by electronics that are necessary components of the functionality of capacity-related services and are used to originate and terminate telecommunications services." The FCC also noted that

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[174] SGAT § 9.6.
[175] Multistate Workshop 3 Transcript at 104 and 106-07 (March 27, 2001).
[176] *Id.*
[177] The FCC described dark fiber: "[D]ark or 'unlit' fiber, unlike 'lit' fiber, does not have electronics on either end of the dark fiber segment to energize it to transmit telecommunications service. *UNE Remand Order*, ¶ 325.

"[s]elf provisioning dedicated transport requires competitive LECs to incur significant direct and other costs, including the cost of the fiber, the cost of deploying the fiber in public rights-of-way, trenching and the cost of purchasing and collocating the necessary transmission equipment."[178] The FCC unbundled dedicated transport because it concluded that the CLECs would be impaired if they had to incur these costs, costs Qwest now seeks to impose on the CLEC.[179] It is inconsistent with the FCC *UNE Remand Order* and unlawful for Qwest to require CLECs to pay for electronic costs on the CLECs' end of EUDIT.

The Commission should order Qwest to eliminate the EUDIT/UDIT distinction, provide dedicated transport between all required locations on a flat rate, distance-sensitive basis and require Qwest to provide the electronics on dedicated transport terminating at a CLEC wire center.

5. The local use restrictions on the use of unbundled interoffice transport are unlawful

Section 9.6.2.4 of the SGAT imposes unlawful restrictions on the use of unbundled interoffice transport. The language prohibits the use of interoffice transport as substitutes for special or switched access services "except to the extent CLEC provides such services to its end user customers in association with local exchange services or to the extent that such UNEs meet the significant amount of local exchange traffic requirement set forth in § 9.23.3.7.2."[180] The FCC has made it clear that ILECs cannot place any restrictions on the use of UNEs.[181] The FCC reaffirmed its position in the *UNE Remand Order*.[182]

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[178] *UNE Remand Order*, ¶ 356. The FCC noted that the transmission equipment "can include such things as fiber distribution panels, *optical terminating equipment*, multiplexers, digital cross connects, test access equipment, digital loop carrier equipment, power distribution panels, and cable racks." *Id.*, n. 702 (emphasis added).
[179] *Id.*, ¶ 355.
[180] SGAT § 9.6.2.4.
[181] *Local Competition Order*, ¶ 356. 47 C.F.R. § 51.309(a).
[182] *UNE Remand Order*, ¶ 484.

The FCC, in its *UNE Remand Order*, made it clear that requesting carriers can order loop and transport combinations to provide interexchange service without any requirement to provide a certain amount of local exchange traffic.[183] This would permit carriers to convert special access circuits to lower-priced UNEs. The ILECs subsequently argued that they would lose substantial sums of universal service support. As a result, the FCC modified its conclusion in paragraph 486 of the *UNE Remand Order*, stating that CLECs or IXCs could not convert special access to combinations of loop and transport unless it provided a significant amount of local exchange service to a particular customer.[184] In its *Supplemental Order Clarification*, the FCC clarified what it meant by "a significant amount of local exchange service.[185] However, the FCC never extended the requirement "of a significant amount of local exchange service" to other than a loop/transport combination. There is no basis, then, to extend the restriction contained in paragraph 22 of the *Supplemental Order Clarification* to dedicated transport generally.

In its *UNE Remand Order*, the FCC noted that the record was insufficient for the FCC to determine how its rules should apply in the "discrete situation" where a requesting carrier uses dedicated transport between the incumbent LECs SWC and an IXC switch or POP, in lieu of special access.[186] The FCC concurrently issued its *Fourth Further Notice of Proposed Rulemaking* to take comments on the use of dedicated transport in this "discrete situation."[187] It was unclear, however, whether the FCC had prohibited the use of dedicated transport from the IXCs POP to the ILECs wire centers during the comment phase, considering its prior pronouncement and rules that ILECs could not place any restrictions on UNEs.[188]

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[183] *Id.*, ¶ 486.
[184] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999), ¶ 2 ("*Supplemental Order*").
[185] *Id.*, *Supplemental Order Clarification*, ¶ 22.
[186] *UNE Remand Order*, ¶ 489. This connection is referred to as EUDIT by Qwest.
[187] *Id.*, ¶¶ 492-496.
[188] *UNE Remand Order*, ¶ 484; 47 C.F.R. § 51.309(a).

The FCC made its position a little clearer in its *Supplemental Order* and *Supplemental Order Clarification*. Language in this order suggested that its decision in the *UNE Remand Order* placed a "temporary constraint" on the use by requesting carriers of dedicated transport from the IXCs POP to the ILECs SWC as a substitute for special access.[189] However, Qwest's language goes far beyond any temporary constraint by imposing local use restrictions on dedicated transport from and to all permissible locations. It also appropriately imposes the restrictions the FCC imposed on the use of EELs on dedicated transport, although there is no way to apply these restrictions to EUDIT.[190] Qwest's language in § 9.6.2.4 must be rejected as inconsistent with the provisions of the *UNE Remand Order*.

Qwest proposed the following language in other jurisdictions that is acceptable to AT&T and resolves this issue:

> CLEC shall not use EUDIT as a substitute for special or Switched Access Services except to the extent CLEC provides such services to its end user customers in association with local exchange services. Pending resolution by the FCC, Qwest will not apply the local use restrictions contained in 9.23.3.7.2.

6. CLECs should not have to pay a separate regeneration charge to receive dedicated transport at its collocation

It is AT&T's position that Qwest should be required to provide the signal ordered, whether it be a DS1 or DS3, for example, at the CLECs collocation cage.[191] Qwest contends that it should be allowed to bring the transport into the wire center and terminate it to an interoffice frame, what *it* calls the design-to point, and then charge the CLECs for an ITP to connect the transport from the frame to the CLECs' collocation. CLECs should not pay for regeneration from the interoffice frame to the CLECs' collocation. Qwest has control over the location of the

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[189] *Supplemental Order*, ¶¶ 4, n. 5 and 8 and 9; *Supplemental Order Clarification*, ¶ 3, n. 9.
[190] Multistate Workshop 3 Transcript at 125 (March 27, 2001).
[191] Multistate Workshop 3 Transcript at 95-96 (March 27, 2001).

CLECs' collocation arrangements. Based on Qwest decisions, regeneration may or may not be necessary, for all or some of the CLECs collocated in a central office.[192]

Qwest is obligated to provide network elements on a nondiscriminatory basis to CLECs, in other words, treat all carriers equally.[193] Qwest's proposal does not do this. It is obvious some carriers must pay regeneration and other carriers do not. The correct answer is that no CLEC should have to pay for regeneration charges, as long as Qwest has the sole ability to determine the location of the CLECs' collocation arrangements. The Commission should conclude, as have other state commissions in the Qwest region, that no regeneration charge is appropriate for any CLEC under these circumstances.

7. Qwest places unreasonable restrictions on the use of the EELS.

The FCC has required the ILECs to provide the enhanced extended link ("EEL") under certain circumstances, as described above. The EEL is supposed to reduce the CLECs costs by allowing a CLEC to combine loops and transport and transport the traffic to a collocation in a different Qwest wire center. CLECs can multiplex multiple loops on to the transport and bypass the central office that the loops terminate at, instead terminating the loops in a collocation at another Qwest wire center.[194]

a. Waiver of Termination of Liability Assessments ("TLAs"). (EEL-5)

CLECs should not have to pay the TLAs for the private line/special access circuits they wish to convert to EELs. AT&T and other CLECs ordered a number of private line/special access circuits in lieu of loops and loop/transport combinations because Qwest would not provision the circuits as UNEs.[195] These orders may also have

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[192] *Id.* at 94-95.
[193] *Local Competition Order*, ¶ 315.
[194] *See UNE Remand Order*, ¶¶ 288 and 480.
[195] Multistate Workshop 3 Transcript at 104-07 (March 28, 2001).

had construction charges associated with them.[196] Qwest argues that it provides such combinations. However, Qwest did not begin to provide EEL combinations to CLECs until long after the FCC had identified its obligation to provide combinations. Qwest did not begin to permit the CLECs to order combinations of network elements until the U.S. Supreme Court[197] decision upheld Rule 315(b) and the Ninth Circuit Appeals found that a state commission could require a provision in an interconnection agreement that ILECs must combine UNEs on behalf of CLECs.[198] Therefore, although Qwest had an obligation to provide combinations since the *Local Competition Order* was released on August 8, 1996, Qwest refused to provide combinations until recently.

If AT&T wanted a loop/transport combination to serve a customer, it had to order and pay private line or special access rates. The agreements for these services also required TLAs and may have required construction charges. In order to get the benefits of the EEL *now*, after all this time, Qwest wants the CLECs to pay the termination liabilities. This is adding insult to injury. CLECs had to pay, and continue to pay, the higher private line/special access rates, rates they should not have had to pay since the day the circuits were provisioned, and now they cannot convert the very same circuits to EELs, although permitted by the FCC, because Qwest also wants the CLECs to pay the TLAs.

The only reasonable solution is for the Commission to order that all TLAs are waived for private line/special access circuits that qualify as EELs. CLECs have already

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[196] *Id.* at 104.
[197] *AT&T Corp. v. Iowa Utils. Bd.*, et al., 119 S.Ct. 721, 737 (1999).
[198] *U S WEST v. MFS*, 193 F.3d 744, 758-759 (9th Cir. 1999); *MCI v. U S WEST*, 204 F.3d 1262, 1267 (9th Cir. 2000). Qwest has testified that it did not have to provide DS1 loops and EELS until the *UNE Remand Order* was released by the FCC.

paid the higher rates since the date the circuits were provisioned as private line/special access instead of UNEs. The CLECs also may have paid construction charges. It is only reasonable to waive the TLAs because of Qwest's refusal to provision the circuits as UNEs in the first instance as required by law. Any other ruling rewards Qwest and penalizes the CLECs for Qwest's refusal to comply with the Act and FCC orders.

b. Waiver of use restrictions for private line/special access circuits that qualify as EELs but are not converted

CLECs have raised instances where Qwest has prohibited CLECs from connecting UNEs to special access/private line circuits. There are instances where special access/private line circuits may meet the local use restrictions and qualify as an EEL. However, the CLEC may determine that it is not economic to convert the circuits to an EEL because the TLAs would apply. The CLECs want to connect special access/private lines that would qualify as EELs to UNEs.[199] Qwest prohibits this.

This is another case where Qwest did not initially allow the CLECs to order a UNE combination, although required by law to do so. The TLAs in existing special access/private line contracts make it uneconomic to convert special access/private line circuits to EELs. Instead of converting the circuits to EELs and paying the TLAs, the CLECs want Qwest to waive the restriction on connecting UNEs to tariff services.

The Commission should confirm that Qwest cannot prohibit a CLEC from connecting UNEs to special access/private line circuits where the CLEC was unable to order the special access/private line circuits as UNEs. Once again, any other holding rewards Qwest and penalizes the CLECs for Qwest's refusal to comply with the Act and FCC orders.

[199] Multistate Workshop 3 Transcript at 110 (March 28, 2001).

c. **Qwest should waive the local use restrictions on connecting UNEs to finished services where Qwest refuses to build UNEs.**

In another scenario, a CLEC may want to order a UNE DS1 loop, and Qwest responds that UNE DS1 loops are not available. Qwest argues it does not have to build UNEs. The CLEC, accordingly, orders a DS1 loop under a retail tariff. The CLEC is currently multiplexing UNE loops on to transport. The CLEC would like to use the same multiplexer used for UNE loops and multiplex the retail DS1 loop on to the UNE transport. Qwest does not permit the CLEC to do this.[200] The CLECs have asked Qwest to waive any use restrictions that may be applicable.

Although a UNE built under SGAT § 9.19 will be considered a UNE, Qwest has made it clear that its processes for building UNEs and private line or retail services are not the same.[201] It is possible that Qwest would build a retail service and not construct a UNE under SGAT § 9.19. Qwest, therefore, can impose significant costs on CLECs beyond those mandated by § 252 (d) by refusing to build a UNE, requiring the CLEC to obtain a retail service, and subsequently imposing the use restrictions on the use of that retail service, thus precluding the CLEC from using the same multiplexer and transport. And, as acknowledged by Qwest, this is a unilateral decision on Qwest's part.[202]

Qwest argues that the *Supplemental Order Clarification* provides a basis for its position that the retail DS1 loop (a tariff service) cannot be connected to an EEL.[203] Assuming that the UNE loops are being multiplexed on to Qwest transport, Qwest argues

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[200] *Id.* at 187.
[201] *Id.* at 59-60.
[202] *Id.* at 259 (March 27, 2001).
[203] *Supplemental Order Clarification*, ¶ 22.

that the EEL restrictions apply and the EEL cannot be connected to a tariffed service, in this case the retail DS1 loop.[204]

However, the matter does not end there. Qwest has taken the position that it does not have to build UNEs, in this case, a DS1 loop. The only way to get the loop is for the CLEC to order from the retail tariff and pay the corresponding retail rate, and possibly construction charges.[205] However, in addition to having to pay retail rates, Qwest's refusal to build a loop also creates additional consequences that add even more costs. Since Qwest will not allow the CLEC to connect the retail loop to an EEL or UNE, the CLEC cannot multiplex the one DS1 loop on to its existing dedicated transport. The CLEC must, therefore, pay for additional multiplexing and transport costs, independent of the existing multiplexer and dedicated transport costs for the UNEs. The correct solution is for the Commission to find that Qwest is required to build UNEs (which AT&T has shown is the law). Many of the unreasonable restrictions that are the subject of this brief are caused by Qwest's position that it need not build UNEs. At minimum, the Commission should eliminate any restrictions on connecting tariff or finished services to UNEs.[206]

d. <u>CLECs should be permitted to place different type trunks on the same trunk groups</u>

As the SGAT now stands, CLECs cannot aggregate different types of traffic on the same trunk. CLECs should be able to use a large pipe (*e.g.*, DS3) to carry both tariff

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[204] However, if the CLEC is providing its own transport, there is no prohibition on the CLEC multiplexing UNE loops and retail loops on the same multiplexer. Any such prohibition runs afoul of 47 C.F.R. § 51.309(a).

[205] A CLEC could order a loop under SGAT § 9.19; however, Qwest has no obligation to build. Assuming Qwest will not build the loop under § 9.19, it is forced to order it out of the retail tariff. Qwest has the ability then to impose extraordinary costs on the CLEC by its refusal to build UNEs.

[206] *See* SGAT §§ 9.1.5 and 9.23.1.2.2.

(e.g., private line) and non-tariff (*e.g.*, UNEs) DS1 facilities or circuits. By changing its definition of "Finished Services" by eliminating LIS trunks, CLECs can now place interconnection trunks and UNE trunks on the same, larger pipe. However, there are still restrictions on placing private line or retail services on the same, larger pipe.[207]

The restrictions contained in the SGAT are inconsistent with good engineering and network efficiency. As it is now, CLECs have to have separate trunks for private line, LIS trunks (as long as the definition of finished services includes LIS trunks) and dedicated transport. It wastes capacity and adds cost to the CLEC.[208] More importantly, UNEs are not always available.[209]

Qwest's position, along with a number of other positions by Qwest, only add costs to the CLECs. A CLEC may have DS1s available on a private line DS3. Because Qwest does not allow the CLEC to place DS1 UNEs on this DS3, the CLEC must order a separate UNE DS3. However, Qwest may not have a DS3 UNE available. Qwest argues it does not have to build UNEs, change out electronics to make more available capacity on existing facilities or add electronics to dark fiber. And, the CLEC cannot use spare capacity on the private line for DS1 UNEs because of Qwest's restrictions on connecting UNEs to finished services. In the meantime, the DS3 private line is underutilized.[210]

Conversely, the CLEC may have a DS3 UNE with available capacity. The CLECs may wish to place private line DS1s on the DS3 UNE, but is prohibited from doing so. The CLEC must buy a DS3 private line and both of the DS3s are underutilized.

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[207] Multistate Workshop 3 Transcript at 36-39 & 183-185 (March 28, 2001).
[208] *Id.* at 201.
[209] *Id.* at 53-54, 183-185 & 204.
[210] *Id.* at 183-86 & 204.

The more efficient method is for CLECs to be permitted to aggregate DS1s of different type traffic on larger pipes. AT&T is willing to keep discreet traffic on the various DS1s.[211] The DS3 would be priced on a pro rata basis.[212]

Qwest's interpretation of existing FCCs rules has placed the CLECs in a Gordian knot. Like Alexander the Great, the Commission should cut this knot and untie the CLECs' hands. The Commission should find that Qwest's restrictions violate 47 C.F.R. § 309(a) by placing unreasonable restrictions in the use of UNEs.

III. CONCLUSION

AT&T has demonstrated that Qwest fails to comply with §§ 251(c)(3) and 271 of the Act in numerous respects. The Commissions should find that Qwest is not in compliance with checklist items 2, 5, and 6 of the Act.

Dated this 18th day of March 2002.

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[211] *Id.* at 41-42 & 205.
[212] *Id.* at 46-47.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INVESTIGATION INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	**Docket No. TC 01-165**

VERIFICATION OF MICHAEL HYDOCK

I, Michael Hydock, being duly sworn, hereby state that I am District Manager in the Local Services and Access Management organization of AT&T. By this verification, I hereby affirm the factual assertions of AT&T's Verified Comments on Checklist Items 2, 5 and 6 as true and correct statements to the best of my knowledge and expertise.

Dated this 18th day of March 2002.

Michael Hydock

STATE OF COLORADO)
) **ss**
CITY AND COUNTY OF DENVER)

SUBSCRIBED AND SWORN TO before me this 18th day of March 2002 by Michael Hydock, who certifies that the foregoing is true and correct to best of his knowledge and belief.

Witness my hand and official seal.

Notary Public

My commission expires: 1/22/06

NOTARY PUBLIC
ADAM W. WALCZAK
STATE OF COLORADO

My Commission Expires 1/22/06

PROJECT PLAN FOR UNE-P TESTING

December 12, 2000

This Project Plan sets forth the working agreement for Unbundled Network Element Platform ("UNE-P") testing between Qwest Corporation ("Qwest") and AT&T Corp. ("AT&T"), both of which are collectively referred to as the "Testors" in the state of Minnesota. AT&T wishes to test the methods, processes and operating systems ("OSS") for ordering, provisioning, maintenance and repair, and billing for UNE-P services provided by Qwest (the "Test"). The Testors will proceed as follows:

1. The Testors will conduct a cooperative operational test for the sole purpose of testing the methods, processes and operating systems for ordering, provisioning, maintenance and repair, and billing associated with the UNE-P provided by Qwest in Minnesota. The Test will consist of: (i) converting Qwest retail residential lines to UNE-P, (ii) provisioning UNE-P lines; (iii) processing orders to make subsequent changes to services or features provided on the UNE-P Test lines, and (iv) migrating a number of lines to or from the Testors. Subject to the availability of facilities, the Test lines will be provided by (i) provisioning 800 Qwest retail residential lines to the agreed upon AT&T business location(s); and (ii) provisioning 200 UNE-P lines, both as set forth in Appendix 1. The Testors will jointly manage the volume of orders. Qwest will process the Test orders over the mutually agreed upon electronic interface (EDI Version 6.0).

None of the services provided by Qwest as part of this Test will be used to provide local exchange service or exchange access service to end user customers or by AT&T for any business

purpose other than for use by AT&T for the sole purpose of testing such operating systems and services as described herein. All Test facilities and services will be provided pursuant to the terms of Qwest's applicable retail, carrier tariff(s) and the Minnesota Interconnection Agreement between AT&T and Qwest, and AT&T will pay Qwest for all retail services and UNE-P provided to AT&T during the course of the Test in accordance with and subject to the terms and conditions of Qwest's tariffs and the Minnesota Interconnection Agreement. AT&T will have sole responsibility for all charges billed to such Test lines, including, but not limited to, interexchange, intraLATA toll, and local usage charges, up to and including such time that the Test lines are disconnected. For purposes of this Test only, the Test locations will be considered residential locations and will be treated as residential lines under applicable Qwest Tariffs and the Minnesota Interconnection Agreement. However, when the lines are converted to UNE-P they will carry a distinct USOC of U5R or U5RAX.

The Test will commence on April 16, 2001 and continue for a period not to exceed nine (9) months. However if Qwest does not provision the Test lines by March 1, 2001, or if AT&T is unable to test the Qwest Release 6.0 of EDI based upon the release of final system specifications scheduled for release on November 6, 2000 because of a delay in the release, AT&T may, without negotiation, extend the Test duration by the same period of time such test lines or EDI release is delayed, whichever is longer.

2. Order Types.

(a) AT&T will send UNE-P Test orders containing features, services, attributes and/or elements.

(b) AT&T intends to submit orders for an agreed to amount of UNE-P Test lines for migration back to Qwest retail services. Such migration orders will request features, functions, and services for Qwest retail as were provisioned on the UNE-P line at the time the Test line is migrated back to Qwest retail services.

(c) In the event that AT&T determines that it would like to continue the use of all or some of the Test lines after the conclusion of the Test, AT&T will notify Qwest of this desire no later than two (2) weeks prior to the conclusion of the Test and the Testors will negotiate in good faith regarding an extension.

3. Trouble Tickets.

(a) When AT&T sends an order and the orders are unsuccessful for reasons AT&T has reasonably determined are attributable to Qwest, AT&T will open timely and accurate trouble tickets with Qwest for each order. Qwest will address and resolve the failure in a reasonable and timely manner.

(d) (b) With respect to all trouble tickets opened by AT&T, AT&T will cooperate with Qwest in resolving the problems and/or failures presented in such trouble tickets. Qwest will provide a cause and disposition of all found troubles.

(e)

4. Qwest and AT&T will each provide their own personnel resources necessary to complete the Test activities. Qwest and AT&T will identify key points of contact for each of the activities before any Test activities begin.

Qwest will report the Test results consistent with the Regional Oversight Committee PIDs. Either party may provide test data to a government agency, regulator or any third party designated by such agency or regulator (collectively, "Regulator"), without providing the test data to the other party prior to disclosure to the Regulator. In such instances, unless the Regulator directs otherwise, the disclosing party ("Disclosing Party") shall provide the other party ("Non-disclosing Party") with the test data at the same time it provides the test data to the Regulator. In the event test data is provided to a Regulator, the Disclosing Party -- upon request by the Non-disclosing Party -- shall use best efforts to meet in person or via a conference call with the Non-disclosing party, within two (2) business days of disclosing the test data to the Regulator, to discuss the disclosed test data. Notwithstanding any provision of this Agreement, this section shall not apply to the disclosure of Test data by Qwest in aggregate form (combined with other carrier data) unless and until the state commission orders Qwest to provide such aggregate data to, and meet with, AT&T in the same manner that AT&T provides Test data to, and meets with, Qwest under this section.

APPENDIX 1

1. Provisioning

(i) The Test lines will be located at AT&T Tower 901 Marquette, Minneapolis, MN 55402.

(ii) AT&T will order and Qwest will install 800 Qwest retail residential lines in Minnesota. AT&T can obtain the current baseline information with the current Universal Service Order Codes (USOCs), directory listing types, blocking types, and features available for these lines via the IMA/EDI interface. Subject to the availability of facilities, Qwest will use commercially reasonable efforts to install these residential lines no later than March 1, 2001. Upon the submission of timely and complete orders from AT&T, Qwest will migrate these lines to UNE-P, and process the subsequent changes to the services and features on these lines in a timely manner.

(iii) AT&T will order 200 UNE-P lines by submitting a local service request ("LSR") electronically to Qwest. Subject to the receipt of timely and complete orders from AT&T, Qwest will use commercially reasonable efforts to properly install these lines in a timely manner. Qwest will provide to AT&T an installation report after the lines are provisioned. Upon submission of timely and complete orders from AT&T, Qwest will process subsequent changes to the services and features on these lines in a timely manner.

2. Termination of Test Lines

Because AT&T may order the disconnection and migration of lines as part of the Test, AT&T will, no later than the agreed to termination date, send electronic mail or other written notice ("Termination Notice") to AT&T's account manager at Qwest stating that any disconnection order received by Qwest after receipt of the Termination Notice will be treated by

Qwest as a final disconnection ("Final Disconnection") of that line. However, since the Test orders will be processed as normally intended, disconnect orders submitted during the course of the Test will cause service on the lines to be disconnected. If AT&T wishes to continue to use these lines during the Test, it will issue a new connect order for these lines via electronic LSRs. For the Final Disconnection of all UNE-P lines, AT&T will send the Final Disconnection orders via electronic LSRs to Qwest. Any Test lines that are billed as retail lines as of less than one week prior to the applicable termination date will be disconnected by Qwest on the applicable termination date.

3. Inside Wire. AT&T will have sole responsibility for all inside wiring associated with all Test lines to a Network Interface Device at a demarcation point identified and agreed to by the Testors.

4. Billing. During the trial, Qwest will provide the following information to AT&T related to billing and measurement: Summary Bills, a wholesale bill based upon mutually agreeable bill dates, an Access Daily Usage File (ADUF), an Optional Daily Usage File (ODUF). Billing details of the transmission of data will be determined by a working team consisting of members from Qwest and AT&T. Billing data for the Test will be exchanged via existing electronic interfaces used between the companies for such purposes.

5. Operator Services and Directory Assistance. Qwest will allow AT&T to test variations of routing that will enable AT&T to test different vendors' operator services and directory assistance platforms. This testing will be concurrent with the test period.

6. Primary Local Carrier (PLOC) Designation Testing. During the timeframe of the trial, AT&T and Qwest will test the PLOC indicators by allowing AT&T to convert the agreed to amount of lines back to Qwest using the PLOC conversion process, and to re-convert those lines back to AT&T.

CONTINUATION

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7. Certification Test Issues. In order to allow AT&T to perform test certification on IMA/EDI release 6.0 for the trial, Qwest agrees to provide AT&T with access to the test lines as soon as such a test facility is available and no later than it is available to other CLECs. Access to these test lines will be made available no later than January 26, 2001. In the event the test lines are not available on January 26, 2001, AT&T may extend the test duration without negotiation for the same period that access to those test lines and facility are unavailable.

Agreed to by:

Qwest Corporation

AT&T of the Mountain States

EXHIBIT B

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INVESTIGATION INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	)	Docket No. TC 01-165

AT&T'S COMMENTS ON

SECTION 272

March 18, 2002

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AT&T Communications of the Midwest, Inc. ("AT&T"), provides the following comments on the disputed issues concerning Qwest's compliance with § 272 of the Telecommunications Act of 1996 ("Act").

I. INTRODUCTION

Section 272 of the Telecommunications Act of 1996 ("Act") requires that interLATA long distance services provided by a Bell operating company ("BOC") such as Qwest Corporation ("QC" or "the BOC"), within the region in which it is the incumbent local exchange carrier ("ILEC") must be provided through a separate affiliate. The requirements of § 272 tend to be obscured by the inquiry under § 271, which establishes the obligations a BOC must satisfy to obtain authority from the Federal Communications Commission ("FCC") to provide in-region interLATA services. Compliance with § 272, however, is not an afterthought but is vitally important to ensuring the viability of effective competition in both the local exchange and interLATA long distance markets. Indeed, the FCC has made it clear that, based on § 217(d)(3)(B), a finding that a BOC fails to comply with § 272 constitutes an independent ground for denying relief under § 271.[1]

> Congress required us to find that a § 271 applicant has demonstrated that it will carry out the requested authorization in accordance with the requirements of § 272. We view this requirement to be of crucial importance, because the structural and nondiscrimination safeguards of § 272 seek to ensure that competitors of the BOCs will have

[1] Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271 (rel. Oct. 13, 1998), ¶ 322 ("BellSouth Louisiana II Order"); Application of Ameritech Michigan Pursuant to § 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298, ¶ 342 (rel. Aug. 19, 1997) ("Ameritech Michigan Order"). See 47 U.S.C. §271(d)(3)(B) The FCC shall not approve a § 271 application unless it finds that "the requested authorization will be carried out in accordance with the requirements of § 272."

> nondiscriminatory access to essential inputs on terms that do not favor the BOC's affiliate. These safeguards further discourage, and facilitate detection of, improper cost allocation and cross-subsidization between the BOC and its § 272 affiliate. These safeguards, therefore, are designed to promote competition in all telecommunications markets, thereby fulfilling Congress' fundamental objective in the 1996 Act.[2]

The FCC bears ultimate responsibility to determine whether a BOC will comply with § 272, which the FCC makes based on its "predictive judgment regarding the future behavior of the BOC."[3] In making such a determination, the FCC will "look to past and present behavior of the BOC applicant as the best indicator of whether it will carry out the requested authorization in compliance with the requirements of § 272,"[4] and "mere paper promises to comply are insufficient."[5] The FCC, however, places substantial weight on the factual record compiled by the state commissions, as well as those state commission recommendations, in determining whether a BOC has satisfied, or likely will satisfy, its obligations under sections 271 and 272.[6]

Qwest pays lip service to the requirements in § 272 and related FCC orders, but Qwest's interpretation of those requirements bears little resemblance to the safeguards envisioned by Congress or the FCC. Qwest's view of its obligations can be charitably characterized as narrow, legalistic, and technical. Rather than accepting the need to maintain a completely separate affiliate with which it deals at arms-length and without discriminating against competing long distance carriers, Qwest has maintained an integrated corporate structure designed to benefit the BOC and its § 272 affiliate at the expense of both companies' competitors. In some cases, Qwest has simply failed to

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[2] Ameritech Michigan Order ¶ 346. See BellSouth Louisiana II Order ¶ 320.
[3] Ameritech Michigan Order ¶ 347.
[4] Id.
[5] BellSouth Louisiana II Order ¶ 339. Ameritech Michigan Order ¶ 55.
[6] E.g., Ameritech Michigan Order ¶ 30.

comply or even attempt to comply with applicable statutory and FCC requirements while unabashedly claiming that it has been in compliance with § 272 since passage of the Act.

The Commission should refuse to accept Qwest's promises of future performance when Qwest's past and present is littered with attempts to manipulate the facts and the law to its advantage and has exhibited consistent failures to comply with both the letter and the spirit of its legal obligations. The minimal compliance Qwest has demonstrated has largely been the result of scrutiny of Qwest's documents and procedures by AT&T and accounting consultants that Qwest grudgingly retained at the insistence of the facilitator in the multistate proceedings. Despite repeated observations and findings of noncompliance with § 272 based on this scrutiny, however, Qwest refuses to acknowledge any noncompliance, even as Qwest revised its transactions and procedures to address those findings. Qwest's recalcitrance and its continuing denial of other past and current instances of noncompliance discussed below demonstrate that Qwest is not complying, and likely will not comply in the future, with § 272.[7]

II. DISCUSSION

Section 272 includes several specific requirements in addition to the general obligation in § 272(a) that the BOC use a separate affiliate to provide originating in-region interLATA services. Sections 272(b) and (c), respectively, impose structural and transactional safeguards, and nondiscrimination safeguards. Section 272(d) and (e),

[7] The ALJ in Minnesota has recommended to the Commission that it find that Qwest has failed to meet the requirements of § 272. A copy of his Findings of Fact, Conclusions of Law and Recommendations is attached as Exhibit A.

respectively, impose a biennial audit requirement and an obligation on the BOC and § 272 affiliate to fulfill requests from unaffiliated entities or third parties, while § 272(g) imposes certain marketing restrictions on the BOC. The FCC has promulgated a number of rules to implement the requirements of § 272.[8] The *Accounting Safeguards Order*, in relevant part, generally addresses sections 272(b)(2)-(5), 272(c)(2) and 272(d).[9] The *Non-Accounting Safeguards Order*, in relevant part, generally addresses the remainder of the requirements of § 272(a), (b), (c), (e) and (g). The FCC has determined that the BOC must comply with the Act since the date of its enactment and must comply with the *Accounting Safeguards Order* since the effective date of the order.[10]

The following discussion addresses each of the provisions of § 272 and related FCC orders in which AT&T takes issue with Qwest's current and future compliance in the order in which these provisions appear in the statute.

A. Section 272(a) – Separate Affiliate

Section 272(a) states that a BOC may not originate in-region, interLATA services unless it provides that service through an affiliate that is separate from the BOC and meets the requirements of § 272(b).[11] Qwest acknowledges this requirement, but contends that § 272(a) is satisfied once Qwest has demonstrated compliance with § 272(b). Qwest's and its predecessor U S WEST's past repeated failure to

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[8] Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, Report and Order, FCC 96-490 (rel. Dec. 24, 1996) ("Accounting Safeguards Order"); Implementation of the Non-Accounting Safeguards of § 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order, FCC 96-489 (rel. Dec. 24, 1996) ("Non-Accounting Safeguards Order").

[9] Accounting Safeguards Order, ¶¶ 195-208.

[10] Accounting Safeguards Order, ¶ 193.

[11] 47 USC § 272(a).

comply with § 272(a) and § 271, however, colors Qwest's current view of § 272 as a whole. Further, such history should demonstrate to the Commission that without additional scrutiny and safeguards, Qwest is unlikely to adhere to the requirements of § 272 once Qwest is granted in-region interLATA authority.

On September 27, 1999, the FCC found that "U S WEST's provision of non-local directory assistance service to its in-region subscribers constitutes the provision of in-region, interLATA service," and "the nationwide component of U S WEST's non-local directory assistance service was unlawfully configured."[12]

On September 28, 1998, the FCC concluded that U S WEST Communications, Inc., the BOC, through its marketing arrangement with pre-merger Qwest, was "providing in-region, interLATA service without authorization, in violation of § 271 of the Act."[13]

On February 16, 2001, the FCC concluded that Qwest, through its 1-800-4US-WEST calling card service, was providing in-region, interLATA service in violation of § 271.[14]

In each of these cases, the BOC was providing in-region, interLATA service, which was a violation not only of § 271 but also of the requirement in § 272(a) that such services be provided only by a separate affiliate. Qwest characterizes these violations as good faith disputes over the proper interpretation of § 271 and contends that they are irrelevant to Qwest's compliance with § 272. The fact that Qwest has had not one or two

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[12] *Petition for U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, CC Docket No. 97-172, Memorandum Opinion and Order, FCC 99-133 (rel. Sept. 27, 1999), ¶¶ 2 and 63. *See* Ex. AT&T 22 (Skluzak Affidavit), ¶¶ 162 - 165.
[13] *AT&T Corp. et al., v. U S WEST Communications, Inc.*, File No. E-99-42, Memorandum Opinion and Order, FCC 98-242 (rel. Oct. 7, 1998), ¶¶ 1, 38 and 52. *See* Ex. AT&T 22, ¶¶ 166 - 168.
[14] *AT&T Corp v. U S WEST Communications, Inc.*, File No. E-99-28, Memorandum Opinion and Order, DA01-418 (rel. Feb. 16, 2001). *See* Ex. AT&T 22, ¶¶ 169 - 171.

[redacted] history of "good faith disputes" over its obligations under the Act, however, shows that [redacted] has tested and crossed the boundaries of permissible conduct in an attempt to evade statutory limitations on its operations. The Commission should expect [redacted] to be no less willing to explore ways to avoid compliance with the requirements of § 272 and applicable FCC orders.

The Commission's review of Qwest's compliance with § 272 necessarily requires the Commission to exercise predictive judgment based on past events. Qwest's history demonstrates that Qwest construes its legal obligations narrowly to the point of violating those obligations. The Commission, therefore, should carefully scrutinize all of Qwest's claims that it is – and that it has been – in compliance with § 272 to ensure not only that such claims are valid when they are made but that proper procedures and safeguards are in place to encourage Qwest's ability to avoid compliance with § 272 in the future.

2. [redacted]

Section 272(b)(2) states that the § 272 affiliate "shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate."[redacted] The FCC has stated that § 272(b)(2) requires the BOC's § 272 affiliate to maintain its books, records and accounts pursuant to Generally Accepted Accounting

[redacted] Section 53.203(a) allows the § 272 affiliate compliance. Qwest, however, ratifies how § 272(b)(2) [redacted] the Statutory Separate Subsidiary affiliates in it. Such an interpretation is clearly [redacted]

Principles ("GAAP"),[16] principles that include timeliness and accruals, and maintain the records separate from the BOC.[17] AT&T's review of Qwest's records found numerous instances of the failure to follow accrual accounting and to timely book billable transactions.[18] Most notably, the BOC and its current § 272 affiliate, Qwest Communications Corporation ("QCC" or "the § 272 affiliate") failed to book *any* transactions between July 2000 and April 2001 because the BOC failed to bill any of these transactions.[19] QCC's representative elliptically refers to the fact that the GAAP principle of timeliness was not always followed and that "the preparation, posting, billing, and payment of transactions between Qwest Long Distance, QCC and the BOC" were impacted.[20] These instances of failure to timely accrue, timely bill for services and meet the terms of the intercompany agreements not only conflict with GAAP but also demonstrate a lack of sufficient internal controls to prevent such failures in the future.[21]

The FCC also looks for a regular audit program for the affiliate that ensures GAAP compliance.[22] In addition to reviewing the sufficiency of the Internet postings, the FCC looks to see if the BOC maintains an audit trail of past Internet postings.

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[16] BellSouth Louisiana II Order, ¶ 328.
[17] Id.; Accounting Safeguards Order, ¶ 170.
[18] Skluzak Minnesota Affidavit ¶¶ 37(a); 38; 67(c), (d), and (h); 78; 79 (a – c); 104(a – f) and 107.
[19] Skluzak Minnesota Affidavit ¶ 38; 92; 97; and 129. Qwest has argued that QCC did not become a § 272 affiliate until March 26, 2001. AT&T maintains that Qwest's own records demonstrate that QCC was representing that QCC was a § 272 affiliate as of January 1, 2001; however, regardless of the date QCC became the § 272 affiliate, it was required to follow GAAP. Failure to follow GAAP, moreover, is not limited to QCC. The Skluzak Minnesota Affidavit details several instances where U S WEST Long Distance and Qwest LD failed to comply with GAAP. *Id.* ¶¶ 67(c, d and h); ¶ 78 and 79 (a – c).
[20] Brunsting Minnesota Rebuttal Affidavit at 4 and 13 ("There was difficulty identifying QCC affiliate transactions in 2000 due to the merger transition.") These transactions did not get booked (or accounted for) until an outside consultant became involved. *Id.*at 16.
[21] In response to AT&T's criticisms, Qwest acknowledged during the multistate workshops in June 2001 that it had "discovered" that the master service agreement between the BOC and the 272 affiliate "mistakenly" did not include a requirement to pay interest on past due amounts. Qwest claims now to have corrected this "error," but the error was discovered through AT&T's review of Qwest's documentation, not as a result of any Qwest internal accounting controls. Multistate Transcript for June 8, 2001 at 66.
[22] BellSouth Louisiana II Order, ¶ 328.

including publicly available accounting and financial data, as well as confidential data.[23] Qwest has failed to comply with these requirements. Qwest formerly disclosed agreements, work orders and task orders, and the details of individual transactions pursuant to the agreements and orders. As of January 1, 2000, however, Qwest only posts agreements, work orders and task orders – Qwest no longer posts individual transactions pursuant to the work orders and task orders. Such postings are insufficient to provide an adequate audit trail, and AT&T's reviews of accounting records and the Internet postings further demonstrate a failure to maintain an audit trail for many transactions.[24]

Qwest attempts to dismiss these deficiencies as one-time occurrences that resulted from the transition from Qwest LD to QCC as the § 272 affiliate and have since been corrected. The Commission should be as concerned with this explanation as with the accounting safeguard deficiencies themselves. Qwest has longstanding state and federal obligations to account for transactions between the BOC and its affiliates. Qwest, by its own admission, undertook enormous efforts to account for the transactions between the BOC and QCC when Qwest decided to make QCC the § 272 affiliate – including retaining outside personnel to account for (and in some cases create documents

[23] Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to § 272 of the Telecommunications Act of 1996 To Provide In-Region InterLATA Services in Texas, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238 (rel. June 30, 2000), ¶¶ 404-05 ("SBC Texas Order").

[24] Skluzak Minnesota Affidavit ¶¶ 66, 67(a), (b) [which is a summary of numerous transactions and in violation of the FCC's rulings that there be no summaries], 67 (m)-(p), 80, 88 (a), (e), (h) [sic], 97, 104(e), and 105. As noted in this affidavit, none of the transactions between QCC and Qwest for the period July 2000 to March 2001 were billed until April 2001. This results in a total lack of an audit trail. Furthermore, until the *SBC Texas Order* came out, even *Qwest* believed it had to post individual transactions pursuant to the work orders and task orders. The extensive problems documented in the affidavit reinforce the conclusion that Qwest had poor internal controls and inadequate training.

memorializing) affiliate transactions.[25] Such efforts demonstrate that Qwest does not properly account for affiliate transactions involving the BOC, and only the designation of QCC as the § 272 affiliate resulted in many, if not most, of the transactions between it and the BOC coming to light. Again, the evidence demonstrates that Qwest's history of taking its reporting obligations lightly will be repeated in the absence of rigorous oversight and appropriate safeguards.

Qwest also observes that it files annual reports via the FCC's Automatic Reporting and Management Information Systems ("ARMIS") that are accompanied by the report of independent accountants, Arthur Andersen LLP, which concludes that Qwest Communications International ("QCI," the ultimate parent corporation) and subsidiaries were complying with GAAP.[26] This report proves nothing. The auditor only reviewed a sample of items to reach its conclusion, and there is no indication how many – if any – transactions between the BOC and the § 272 affiliate were included.[27] Indeed, the audit was for the BOC and QCI, and even Qwest concedes that none of the transactions between the BOC and QCC, the current § 272 affiliate, could have been included.[28] The FCC looks to a regular audit program for the *272 affiliate* for evidence of compliance with § 272(b)(2), not solely the BOC or its parent corporation.

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[25] Qwest also contends that it accomplished this transition of § 272 affiliates within three months, far less time than permitted under § 272(h) for BOCs to bring their operations into compliance with § 272. Section 272(h), however, is inapplicable to these circumstances. That section provides a BOC with one year to bring any activity in which a BOC is engaged on the date of the enactment of the Act into compliance with § 272. Qwest and U S WEST were entirely separate companies on February 8, 1996, and the transition from Qwest LD to QCC as the § 272 affiliate occurred several years after that date. Nothing in § 272, or the Act as a whole, authorizes Qwest to take one year to bring its § 272 affiliate into compliance with § 272 more than four years after the Act was enacted.

[26] Schwartz Minnesota Direct Affidavit at 28 & Exhibit MES 272.5.

[27] Minnesota Hearing Transcript at 139-40 (Qwest Schwartz).

[28] *Id.* at 141-42. *See also* Schwartz Minnesota Direct Affidavit at 28 for further examples of Qwest's qualifications of this audit: ("While this audit, known as the Joint Cost Audit, does not focus specifically on the relationship between the BOC and the 272 Affiliate ....", and "... the statement of compliance rendered by Arthur Andersen as part of that audit is general in nature ...."

Qwest also relies on the review undertaken by KPMG pursuant to the recommendation made by John Antonuk, the multistate facilitator, in his report to the participating state commissions. The KPMG Report was limited in scope and demonstrates only that Qwest was not in compliance with § 272 during the test period of April through August 2001.[29] While Qwest claims to have instituted reforms to address these deficiencies, those reforms have not been tested to determine whether they will, in fact, prevent recurrences of those deficiencies. Indeed, Qwest does not even concede that the KPMG Report found specific instances in which Qwest was not in compliance with § 272, much less acknowledge that its own accounting consultant, as well as AT&T, disagrees with Qwest's claims to have complied with § 272(b)(2) since the passage of the Act. Without additional testing, the Commission should place no reliance on Qwest's paper promises of compliance with § 272(b)(2), regardless of whether a Qwest consultant has verified the existence of those paper promises.[30]

C. Section 272(b)(3) – Separate Employees

Qwest's § 272 affiliate "shall have separate officers, directors and employees from the [BOC] of which it is an affiliate."[31] Consistent with its interpretation of other provisions of § 272, Qwest's view of this requirement exalts narrow, legalistic, and technical form over substance. There has been a revolving door atmosphere among Qwest's affiliates, with employees going back and forth between the BOC and § 272

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[29] AT&T Minnesota Comments on KPMG Report; *see* KPMG Report.

[30] In addition to the KPMG Report, Qwest also obtained the declaration of Philip Jacobsen, a partner with KPMG, who stated that Qwest had adopted measures in response to the KPMG Report. Schwartz Minnesota Rebuttal Affidavit at Ex. MES 272.20. Mr. Jacobsen, however, verified only the existence, and selected employees' awareness, of these measures, not whether those measures have been, or will be, effective in preventing a recurrence of the deficiencies found in the KPMG Report.

[31] 47 U.S.C. § 272(b)(3).

affiliates.[32] There has also been widespread employee sharing, and many BOC employees have spent 100% of their time working for the § 272 affiliate.[33] The free flow of employees back and forth between the BOC and its § 272 affiliate facilitates the sharing of information between companies – including confidential information which employees necessarily bring as part of their experience from one company to another. The wholesale transfer of employees among affiliates and extensive employee sharing thus subverts the purpose of § 272(b)(3) by fostering an integrated corporate culture while maintaining only a minimal appearance of separate companies.

Qwest counters that a transfer of employees between affiliated companies is only to be expected and that Qwest currently does not have any employees who are loaned by one affiliate to another. Specifically with respect to the sharing of confidential information, Qwest also claims that it has instituted sufficient safeguards to ensure that no confidential information is disclosed between the BOC and its § 272 affiliate. Whether or not interaffiliate employee transfers or loans are common or currently occurring, the procedures and policies that Qwest allegedly has adopted do not, and will not, prevent improper sharing of company control or confidential information through the exchange of employees.

Qwest offers as evidence of those procedures and policies its employee "code of conduct" and procedures for interaffiliate employee transfers that are comparable to termination at one company and rehiring at the other.[34] Such procedures fail to address the problems. The transferred employees, like a new employee, must sign a letter

[32] Skluzak Minnesota Affidavit ¶ 48(c)-(g).
[33] *Id.* ¶¶ 52-54.
[34] Schwartz Minnesota Direct Affidavit at 17.

agreeing to protect confidential information, but the employees are bound only to protect that information from third parties – nothing in the letter requires the employees to protect the confidential information of one Qwest affiliate from disclosure to another Qwest affiliate.[35] Qwest's "code of conduct" does not even address this issue. The documents that Qwest produced thus provide no evidence of any restrictions on the sharing of confidential information between affiliates.

Qwest, moreover, concedes that it places no restrictions on the jobs or positions that a former employee of one affiliate can hold with another affiliate.[36] As a result, nothing prevents an employee with knowledge of confidential information gained at one Qwest Company from transferring to a position with an affiliate where the employee can use that knowledge to the benefit of the affiliate. A BOC employee that is a wholesale account representative for long distance carriers, for example, would have corresponding, competitively sensitive knowledge of both the BOC's network and the services (including type, amount, and location) ordered by its carrier customers. Yet, that employee could transfer to a position with the 272 affiliate in which the employee could make use of his or her knowledge to the § 272 affiliate's competitive advantage.

Qwest also claims to have adopted policies on loaned employees, but those policies have yet to be developed beyond a nebulous concept.[37] Such policies cannot be considered as a viable or effective constraint on the ability of the BOC and its § 272

[35] Minnesota Hearing Transcript at 218-21 (Qwest Brunsting); *see* Brunsting Minnesota Direct Affidavit at Ex. JLB 272.9.
[36] Minnesota Hearing Transcript at 125 (Qwest Schwartz); *see* Schwartz Minnesota Direct Affidavit at Ex. MES 272.15.
[37] Minnesota Hearing Transcript at 128-31 (Qwest Schwartz).

affiliate to share control and confidential information through employees "loaned" from one to the other.[38]

Qwest's past transfer and sharing of employees demonstrates that the employees of the BOC and § 272 affiliate are not truly independent. Qwest's policies and procedures with respect to current and future interaffiliate employee transfers and loans further demonstrate that Qwest does not have sufficient safeguards in place to ensure that confidential information and company control are not shared between the BOC and the § 272 affiliate. Accordingly, the Commission should conclude that Qwest has failed to demonstrate compliance or likelihood of compliance with § 272(b)(3).

D. Section 272(b)(5) – Arm's Length Transactions

Section 272(b)(5) states that the § 272 affiliate "shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection."[39] The FCC, in its *Accounting Safeguards Order*[40] and *Non-Accounting Safeguards Order*,[41] has promulgated rules and requirements that must be followed to demonstrate compliance with § 272(b)(5), including the requirement that all transactions be posted to the Internet within 10 days of the transaction on the company's home page. "[T]he description of the asset or service and the terms and conditions of the transactions should be sufficiently

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[38] For example, Qwest's "loan policy" would still allow for the loaning of an employee who works less than 100% of the time for the 272 affiliate, as well as other methods to circumvent the confines of its own policy. *See* Skluzak Minnesota Affidavit ¶ 54 (i - j).

[39] 47 U.S.C. § 272(b)(5).

[40] *Accounting Safeguards Order*, ¶¶ 112-166. The relevant paragraph regarding posting of transactions is paragraph 122. AT&T generally has not contested the prices paid for services, except to note that they appear excessive to the point that no non-affiliated third party would avail themselves of the agreements between the BOC and § 272 affiliate. Instead of allowing subsidization by below-cost pricing, it appears that one company is effectively being subsidized by above market cost pricing. *See* Skluzak Minnesota Affidavit ¶ 109(a) and (b); 120; 47 U.S.C. § 254(k).

[41] Non-Accounting Safeguards Order, ¶¶ 191-194.

detailed to allow [the FCC] to evaluate any compliance with our accounting rules."[42] The FCC has further observed that failure to totally disclose the details of the transactions between a BOC and its § 272 affiliate "deprives unaffiliated parties of the information necessary to take advantage of the same rates, terms and conditions enjoyed by the BOC's § 272 affiliate."[43] The FCC has further enhanced its disclosure requirements in subsequent orders evaluating BOC applications.[44]

As an initial matter, Qwest has been under an obligation to disclose transactions since February 8, 1996, and post transactions since August 12, 1997.[45] Qwest did not activate its website until September 28, 1998.[46] Therefore, Qwest waited over a year to post any transactions to the 272 website, although it knew of its obligations since the release of the order.[47] Qwest has not rebutted such evidence. Thus, there is a clear violation of the § 272(b)(5) requirements and contrary evidence to Qwest's oft-repeated claims of an unblemished record of § 272 compliance since the passage of the Act.

Cory Skluzak on behalf of AT&T has described Qwest's failure to disclose sufficient information in its postings after January 1, 2000, and has itemized a significant number of instances of Qwest's failure to engage in "arm's length" transactions and to post transactions within 10 days of the transaction.[48] Qwest nevertheless claims that its pricing and posting methodology is consistent with FCC precedent, specifically the

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[42] Accounting Safeguards Order, ¶ 122.
[43] BellSouth Louisiana II Order, ¶ 335.
[44] Ameritech Michigan Order, ¶¶ 367-369; BellSouth Louisiana II Order, ¶¶ 335-37.
[45] Skluzak Minnesota Affidavit ¶¶ 57 (n. 64)-58.
[46] *Id.*
[47] Multistate Transcript for June 8, 2001 at 46.
[48] Skluzak Minnesota Affidavit ¶¶ 66 (d-e), 67 (containing an exhaustive list). After January 1, 2000, specific "billed amounts" were no longer posted to the website. *Id.* ¶ 72. AT&T thus was unable to determine if Qwest was in compliance with the FCC's accounting rules without viewing information Qwest now considered confidential and available for inspection only on-site and after executing a protective agreement.

FCC's approval of postings by Southwestern Bell Telephone Company ("SBC") in the SBC Texas 271 proceeding. Qwest dismisses its failure to timely post transactions as predating its designation of QCC as its § 272 affiliate in March 2001, and contends that its decision to minimize posting detail after January 1, 2000, is expressly sanctioned by the FCC in the SBC Texas 271 order. Once again, Qwest's narrow and formalistic interpretation of its legal obligations demonstrates its fundamental unwillingness to comply with those obligations.

AT&T and Qwest disagree on the date when QCC became Qwest's § 272 affiliate. AT&T's position is that QCC took on that role with the merger of U S WEST and Qwest (or, at the latest, on January 1, 2001, if not in September 2000),[49] while Qwest maintains that QCC replaced Qwest LD on March 26, 2001. Qwest maintains this stance despite unrebutted evidence to the contrary from one of its own attorneys.[50] The date is critical to a determination of whether Qwest was in compliance with § 272(b)(5) during the last half of 2000 and the first quarter of 2001,[51] but the dispute threatens to overshadow the larger issue of *how* Qwest proposes to demonstrate compliance with § 272. Qwest purports to have designated QCC as the § 272 affiliate only *after* Qwest has retroactively documented affiliate transactions and posted those transactions to a new website. Qwest thus seeks to manipulate its legal obligations to fit the facts it has created. Similarly, Qwest apparently breaks down a single agreement into multiple transactions, as a means of avoiding pricing requirements that otherwise would have

[49] Eckert Minnesota Affidavit ¶¶ 110-11.
[50] *Id.* at 112. On September 15, 2000, a Qwest attorney wrote, "Qwest is in the process of developing a transition plan for another subsidiary to become § 272 compliant."
[51] Qwest does not dispute that QCC did not post *any* transactions for the period July 2000-April 2001 or that not one work order for services provided by QC to QCC was posted to the Internet prior to March 27, 2001. Regardless of § 272 requirements, Qwest had an existing obligation to comply with the FCC's accounting rules.

applied.[52] Far from demonstrating Qwest's adherence to § 272(b)(5), such legerdemain shows only the lengths to which Qwest will go to claim, while effectively evading, compliance with its legal obligations.

The sufficiency of Qwest's transaction postings is yet another example of this approach. Prior to January 1, 2000, Qwest and its § 272 affiliate posted not only agreements, task orders, and work orders but the detail of services or items purchased under the work orders or task orders, but Qwest no longer posts such invoice-level detail and claims that such information is confidential.[53] Master agreements, work orders and task orders are no more than an offer to provide services or items at specific rates, terms and conditions. Without posting the detail of the actual transaction, the detail of the actual service or items purchased and the amount actually paid for the service or item actually received, no company can evaluate properly whether it would want the same service performed for it or purchase the same item. Nor can a company that nevertheless elects to take the same arrangement determine if it is receiving the same rates, terms and conditions without the detail, because the detail reflects what was actually received and paid for, not what was offered. The detail, therefore, also permits detection of the failure to follow accounting rules and provides a means to detect discrimination. Qwest's refusal to post this detail thus undermines and thwarts the goals of the posting requirement.

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[52] *See* Selwyn Minnesota Affidavit ¶¶ 39-41.

[53] Skluzak Minnesota Affidavit ¶¶ 63 (the procedure prior to 2000), 70, 72. Qwest and Qwest LD appeared to have at least attempted to comply with the filing requirement during this period, although there were several instances where transactions were not posted timely.

Qwest purports to rely on the *Bell Atlantic New York Order*[54] and the *SBC Texas Order*[55] to justify its insufficient posting. Neither order is susceptible to Qwest's crabbed interpretation. The *Bell Atlantic New York Order* does not state that the BOC need not provide detail or volumes, but provides only that:

> Bell Atlantic discloses "the number and type of personnel assigned to the project, the level of expertise of such personnel, any special equipment used to provide the service, and the length of time required to complete the project."[56]

The FCC in this paragraph was talking about the descriptions on the website. This quote cannot be considered words of limitation because it does not speak of the obligation to post them,[57] which even Qwest does not contest is an obligation.

The *SBC Texas Order* similarly does not state that the BOC need not post the detail or volume of transactions. The FCC merely stated that it found that the postings, on the whole, were sufficiently detailed."[58] This language alone cannot be used to justify not posting the detail of transactions under the work orders or task orders. Qwest's alleged confidentiality concerns also lack merit, particularly in light of Qwest's past practice of having posted this information publicly and the recent FCC order requiring

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[54] Application of Bell Atlantic New York for Provision of In-Region, InterLATA Services in New York State, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. Dec. 22, 1999), ¶ 413; ("Bell Atlantic New York Order").

[55] Application of SBC Communications, Inc., et al. for Provision of In-Region, InterLATA Services in Texas, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238 (rel. June 30, 2000), ¶ 405; ("SBC Texas Order").

[56] Bell Atlantic New York Order, ¶ 413, quoting the Bell South Louisiana II Order, ¶ 337.

[57] See Ameritech Michigan Order, ¶¶ 368-69.

[58] SBC Texas Order, ¶ 405.

public disclosure of such information as part of the biennial audit conducted pursuant to § 272(d).[59]

Qwest must timely post transactions between the BOC and the § 272 affiliate to the web site in the same level of detail as Qwest formerly posted such transactions before January 1, 2000, to comply with § 272(b)(5) and FCC orders. Qwest currently refuses to do so. Qwest has also failed to make timely postings in the past and has devoted its efforts to avoiding, rather than complying with, applicable requirements that the BOC and the § 272 affiliate deal with each other at "arm's length." Under these circumstances, the Commission should conclude that Qwest has failed to demonstrate compliance or the likelihood of compliance with § 272(b)(5).

E. Section 272(c)(1) -- Nondiscrimination

Section 272(c)(1) provides that a BOC when dealing with its § 272 affiliate, "may not discriminate between that . . . affiliate and any other entity in the provision or procurement of goods, services, and information, or in the establishment of standards."[60] The FCC has concluded that "the protection of § 272(c)(1) extends to any good, service, facility, or information that a BOC provides to its § 272 affiliate."[61] More specifically, the FCC "construe[s] the term 'services' to encompass any service the BOC provides to its § 272 affiliate, including the development of new service offerings."[62]

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[59] *Accounting Safeguards Under the Telecommunications Act of 1996; § 272(d) Biennial Audit Procedures*, CC Docket No. 96-150, *Memorandum Opinion and Order*, FCC 01-1 (rel. January 10, 2002) (*Verizon 272 Confidentiality Order*); 47 U.S.C. § 272(d). This recent FCC order addresses Verizon Communications, Inc.'s request to keep certain information contained in its initial § 272(d) biennial audit report confidential and unavailable to third parties.

[60] 47 U.S.C. § 272(c)(1).

[61] *Non-Accounting Safeguards Order* ¶ 218.

[62] *Id.* ¶ 217.

Qwest's own evidence demonstrates that Qwest is not in compliance with these requirements. Qwest's witnesses have testified that the "BOC is committed to providing its services to all of its IXC customers, including the 272 affiliate, on a nondiscriminatory basis,"[64] but the evidence provided in support of that statement demonstrates just the opposite. When the 272 affiliate requests a service that the BOC has not previously provided, the BOC undertakes a business case analysis to determine whether to provide that service.[65] When an unaffiliated IXC requests such a service, however, the BOC performs no business case analysis but provides the requested service only if the service is currently being provided to the 272 affiliate.[66] Qwest thus will develop new service offerings in conjunction with its 272 affiliate but will not do so in conjunction with unaffiliated IXCs. Such discriminatory service development is a *prima facie* violation of § 272(e)(1) and the FCC's *Non-Accounting Safeguards Order*.

In addition, Qwest fails even to address several undertakings that the FCC has reviewed in considering a BOC's compliance with § 272(c)(1).[67] Cory Skluzak also has detailed several transactions in which the BOC has provided more favorable treatment to its affiliates than to nonaffiliated carriers, including a lack of timely billing and payments and the failure to charge interest on late payments.[67]

Particularly troubling is Qwest's use (or potential use) of affiliates to avoid the BOC's legal obligations. The BOC, for example, has been circumventing the non-discrimination safeguards by using a non-272 affiliate to develop improvements to the

[64] Schwartz Minnesota Direct Affidavit at 26.
[65] *Id.* Exhibit MES 272.17 at 4-6; Minnesota Hearing Transcript at 134-35 (Qwest Schwartz).
[66] Schwartz Minnesota Direct Affidavit, Exhibit MES 272.17 at 7-8; Minnesota Hearing Transcript at 135-38 (Qwest Schwartz).
[67] Skluzak Minnesota Affidavit ¶ 140.
[67] *Id.* ¶¶ 130-39 & 41.

BOC's services provided to the 272 affiliate.[68] The BOC also leases dark fiber and transport services from QCC, but because QCC (not the BOC) owns those facilities, other carriers cannot obtain those same services at the same rates, terms, and conditions.[69] The BOC, moreover, has not represented that it will make the facilities it leases from its affiliate available to other carriers.[70] If the BOC does not make those facilities available to other carriers, the BOC could deny competitors' requests for unbundled network elements or other local exchange services that the BOC must provide under § 251 based on lack of facilities *owned by the BOC*, even though the BOC has access to facilities leased from its affiliate. Qwest thus is vesting ownership of network facilities in an affiliate with no obligations under § 251 to make them available to other carriers at least in part to enable the BOC to avoid its obligation to make its network facilities available to competitors.

By shifting services and facilities among affiliates, the BOC and the § 272 affiliate can participate in joint planning, design and development and provide local exchange services free of the strictures of the nondiscrimination safeguards in sections 251 and 272.[71] Such manipulation is emblematic of Qwest's approach to § 272 – to circumvent legal requirements where possible and to undertake the bare minimum Qwest believes necessary to comply with the narrowest, most formalistic interpretation of the requirements that Qwest cannot avoid. Such an approach, as well as Qwest's failure to

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[68] *Id.* ¶ 133.
[69] Minnesota Hearing Transcript at 119-20 (Qwest Schwartz); *Id.* at 215-16 (Qwest Brunsting).
[70] *Id.* at 120-21 (Qwest Schwartz).
[71] Note that Qwest also shifts services up to Qwest Services Corporation, which is actually the parent of both Qwest and QCC, circumventing § 272 requirements. *See* Brunsting Minnesota Rebuttal Affidavit at 28; Skluzak Minnesota Affidavit ¶ 131, n. 127, and ¶ 156 wherein AT&T discusses Qwest's joint marketing of QCC's interLATA long-distance.

comply even with that approach, demonstrates that Qwest has failed to prove that it complies, or is likely to comply, with § 272(c)(1).

F. Section 272(c)(2) – Compliance With Accounting Principles

Section 272(c)(2) requires the BOC to account for all transactions with the § 272 affiliate in accordance with accounting principles "designated or approved" by the FCC.[72] The FCC has held that the BOC must comply with the Part 32 affiliate transaction rules to satisfy § 272(c)[73] "GAAP is incorporated into the Commission's Uniform System of Accounts [Part 32] to the extent that regulatory considerations allow."[74] Furthermore, Part 32 states that the BOC's financial records shall be kept in accordance with GAAP to the extent permitted by Part 32.[75]

As was discussed above in the context of § 272(b)(2), Qwest has failed to follow the FCC's accounting rules and thus has failed to demonstrate compliance, or likelihood of compliance, with § 272(c)(2).

G. Section 272(d) – Biennial Audit

Section 272(d) establishes and governs the biennial audit that is conducted to determine compliance with § 272 after the FCC grants § 271 authority. Qwest asks the Commission to put substantial faith in this audit process as a means of ensuring that Qwest complies with § 272. The first biennial audit, however, will not be conducted until one year after Qwest has been granted § 271 authority. The earliest that Qwest could even apply for such authority in South Dakota would be some time this summer, and the earliest the FCC would grant such authority would be 90 days later. The initial audit thus

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[72] 47 U.S.C. § 272(c)(2).
[73] *Bell Atlantic New York Order* ¶ 415. 47 C.F.R. § 32.27.
[74] *BellSouth Louisiana II Order* ¶ 328, n. 1026 (citing 47 C.F.R. § 32.1); 47 C.F.R. § 32.12.
[75] 47 C.F.R. § 32.12.

will not be conducted before the fourth quarter of 2003, and the audit report likely would not be available for three to six months after the audit is conducted. The earliest that Qwest would file the results of the first biennial audit, therefore, would be some time in the first quarter of 2004 – over two years from now.[76]

The Commission and affected parties cannot hope to have an effective remedy for Qwest's noncompliance with § 272 if such noncompliance is not discovered until two years, or more, after it occurs. The biennial audit thus is not a substitute for ensuring that Qwest currently complies and likely will continue to comply with its obligations under § 272.

H. Section 272(e)(1) – Nondiscriminatory Access Services

Section 272 provides that a BOC "shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates."[77] The FCC has concluded that such a request "includes, but is not limited to, initial installation requests, subsequent requests for improvement, upgrades or modifications of service, or repair and maintenance of these services."[78] The FCC "also conclude[d] that the BOCs must make available to unaffiliated entitiesinformation regarding the service intervals in which the BOCs provide service to themselves or their affiliates."[79] In addition, "regardless of the procedures that a BOC

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[76] *See* Minnesota Hearing Transcript at 142-44 (Qwest Schwartz); *Id.* at 278-79 (AT&T Skluzak). Indeed, given the precedent of the filing of the first § 272(d) biennial audit report (that of Verizon – New York), even an estimate of the first quarter of 2004 for Qwest may be optimistic. Verizon began offering in-region, interLATA telecommunications services on or about January 1, 2000, but significant portions of its biennial audit still have not been released as of the end of January 2002. *See, Verizon 272 Confidentiality Order*, CC Docket No. 96-150, ¶ 4.

[77] 47 U.S.C. § 272(e)(1).

[78] Non-Accounting Safeguards Order ¶ 239.

[79] *Id.* ¶ 242.

employs to process service orders from unaffiliated entities, it must be able to demonstrate that those procedures meet the statutory standard."[80]

Qwest has not even attempted to provide the information required by the Act and the FCC to demonstrate that the BOC is providing, and will continue to provide, nondiscriminatory telephone exchange access to its 272 affiliate and unaffiliated long distance carriers. QCC, as the fourth largest long distance carrier in the country, currently obtains access services from the BOC, but Qwest has not offered any evidence to demonstrate that the BOC provides those services to the § 272 affiliate within a period no longer than the period that the BOC provides the same or comparable services to unaffiliated carriers.[81] Nor has Qwest provided any evidence on the procedures that the BOC will use to process orders from its 272 affiliate and unaffiliated carriers other than the otherwise unsupported statement that "[t]he BOC's sales representatives will process orders in a nondiscriminatory manner."[82]

Qwest is the sole source of this information. As the FCC has observed, "[t]he statute imposes a specific performance standard on the BOCs in § 272(e)(1), and we conclude that, absent Commission action, the information necessary to detect violations of this requirement will be unavailable to unaffiliated entities."[83] Qwest has also acknowledged that, as the applicant in this Commission process, Qwest bears the burden to prove that it is complying, and will comply, with § 272 and applicable FCC orders.[84]

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[80] *Id.* ¶ 241.
[81] Minnesota Hearing Transcript at 133-34 (Qwest Schwartz); *Id.* at 223-25 (Qwest Brunsting).
[82] Schwartz Minnesota Affidavit at 31-32.
[83] *See Accounting Safeguards Order* ¶ 242. *Also see, Verizon 272 Confidentiality Order*, CC Docket No. 96-150, ¶ 8, n. 23 ("Evaluating compliance with the § 272(e) nondiscrimination safeguards requires, however, a comparison of the results for unaffiliated carriers with the results for Verizon's own operations. Without knowing the results for Verizon's own operations, parties simply cannot make a useful comparison.")
[84] *See* Minnesota Hearing Transcript at 393-94 (Qwest Munn).

Qwest has produced no evidence, much less sufficient evidence, to carry its burden with respect to compliance with § 272(e)(1). Accordingly, the Commission should find that Qwest is not in compliance with this statutory requirement.

III. CONCLUSION

Section 272 is not an insignificant or meaningless obstacle to Qwest's ability to provide interLATA services. Section 272 represents Congress' effort to ensure that Qwest does not leverage its local exchange market power in the long distance market. Qwest disagrees and asks the Commission to endorse Qwest's approach of minimizing, manipulating, and if necessary ignoring, the requirements of § 272. The Commission should refuse to do so if the Commission is committed to continuing to foster the development of local exchange competition and to preserve the existing competitiveness of the long distance market in South Dakota.

The Commission, therefore, should conclude that Qwest has failed to demonstrate that it is, or likely will be, in compliance with § 272.

The Commission should further conclude that Qwest cannot satisfy its burden of proof on compliance with § 272 until an independent third party has verified that sufficient and effective accounting and non-accounting safeguards are in place and functioning and Qwest has adequately addressed the nondiscrimination and other issues discussed above. [85]

[85] *See id.* at 280-281 & 283-285 (AT&T Skluzak) for a more detailed presentation of this request.

Respectfully submitted this 18th day of March 2002.

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Exhibit A

OAH Docket No. 7-2500-14487-2
PUC Docket No. P-421/CI-01-1372

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 the Separate Affiliate Requirements of the Telecommunications Act of 1996 (Section 272)

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RECOMMENDATIONS

The above-entitled matter came before Administrative Law Judge (ALJ) Richard C. Luis for evidentiary hearing on January 7, 2002 and January 8, 2002, in the Small Hearing Room of the Minnesota Public Utilities Commission (MPUC), Suite 350, Metro Square, 121 Seventh Place East, St. Paul, Minnesota.

John Munn, Attorney at Law, Qwest Corporation (QC or Qwest BOC), 1801 California Street, Suite 3800, Denver, Colorado, 80202; and Jason Topp, Attorney at Law, Qwest Corporation, 200 South Fifth Street, Room 395, Minneapolis, Minnesota, 55402, appeared on behalf of Qwest Corporation and Qwest Communications Corporation (QCC or the 272 Affiliate).

Priti R. Patel, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103-2106, appeared on behalf of the Minnesota Department of Commerce.

Greg Kopta, Attorney at Law, Davis, Wright, Tremaine, L.L.P., 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington, 98101, appeared on behalf of ATT.

Mary Crowson, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Residential Utilities Division of the Office of Attorney General.

Karen Hammel, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, and John Lindell, Public Utilities Analyst, Suite 350 Metro Square, 121 Seventh Place East, St. Paul, Minnesota 55101, appeared in a neutral capacity on behalf of the staff of the Minnesota Public Utilities Commission.

NOTICE

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

Questions regarding filing of exceptions or replies should be directed to Dr. Burl Haar, Executive Secretary, Minnesota Public Utilities Commission, Suite 350 Metro Square, 121 Seventh Place East, St. Paul, Minnesota 55101. Exceptions must be specific and stated and numbered separately. Oral argument before a majority of the Commission will be permitted to all parties adversely affected by the ALJ's recommendation who request such argument. Such request must accompany the filed exceptions or replies, 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 or replies, 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, reject or modify the Administrative Law Judge's recommendations and that said recommendations have no legal effect unless expressly adopted by the Commission as a final order.

STATEMENT OF ISSUES

The issues in this matter concern whether Qwest has demonstrated by a preponderance of the evidence that QCC (the 272 Affiliate) meets the requirements of Section 272 to enable Qwest Corporation to meet the requirement of Section 271(d)(3)(B) as part of QC's 271 application. Specifically, the issues are whether QCC has shown that it will operate independently from the Qwest BOC, in accordance with Section 272(b)(1); whether it will maintain books, records, and accounts separate from those maintained by the Qwest BOC, in accordance with Section 272(b)(2); that it will have separate officers, directors, and employees from the Qwest BOC, in accordance with Section 272(b)(3); that it will not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Qwest BOC, in accordance with Section 272(b)(4); that it will conduct all transactions with the Qwest BOC of which it is an affiliate on an arm's length basis, with any such transactions reduced to writing and available for public inspection, in accordance with Section 272(b)(5); that it and the Qwest BOC will comply with the joint marketing requirements set forth in the FCC's 1996 *Non-Accounting Safeguards Order* and Section 272(g); and that the Qwest BOC will not discriminate between the 272 Affiliate and any other entity

in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards, in accordance with Section 272(c).

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

FINDINGS OF FACT

I. Procedural Background

1. On September 11, 2001, the Minnesota Public Utilities Commission (Minnesota PUC) 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/CI-96-1114.

2. In the Notice and Order for Hearing, the Minnesota PUC stated that a thorough and orderly development of certain factual matters will be required in the above-mentioned docket and therefore, referred the matter to the Office of Administrative Hearing (OAH) for contested case proceedings.

3. In the Notice and Order for Hearing, the Minnesota PUC indicated that it seeks a Report from the OAH making proposed findings and recommendations on issues relevant to Qwest's compliance with Section 271 of the Telecommunications Act of 1996 (Act), one of which is Qwest's compliance with Section 272 of the Act.[1]

4. This matter was divided into six individual dockets involving issues arising from different aspects of the Act's standards for 271 approval. This docket addresses compliance with Section 272.

II. Statutory Framework – Jurisdiction and Authority

5. The Telecommunications Act of 1996 conditions entry by a Bell Operating Company (BOC) into the provision of in-region interLATA ("long distance") services on compliance with certain provisions of section 271.[2] BOCs must apply to the Federal Communications Commission (FCC) for authorization to provide interLATA services originating in any in-region state.[3] The FCC must issue a written determination on each application no later than 90 days after receiving such application.[4]

6. 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,

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[1] As used in this Report, "Qwest" refers to the overall corporate enterprise of Qwest Communications International Inc. Where affiliated companies are mentioned, each affiliate will be individually identified.
[2] 47 U.S.C. §271
[3] Id. at § 271(d)(1).
[4] Id. at § 271(d)(3).

interLATA services, a BOC must first demonstrate, with respect to each state for which it seeks authorization, that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or 271(c)(1)(B) (Track B).[5] In order to obtain authorization under section 271, the BOC must also show that: (1) it has "fully implemented the competitive checklist" contained in section 271(c)(2)(B);[6] (2) the requested authorization will be carried out in accordance with the requirements of section 272;[7] and (3) the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience, and necessity."[8] The statute specifies that, unless the FCC finds that these criteria have been satisfied, the FCC "shall not approve" the requested authorization.[9]

7. The FCC set standards for compliance with section 272 in the *Accounting Safeguards Order* and the *Non-Accounting Safeguards Order.*[10] Together, these safeguards discourage and facilitate the detection of improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate.[11] In addition, the safeguards are designed to ensure that BOCs do not discriminate in favor of their section 272 affiliates.[12]

8. The FCC must consult with the MPUC to verify whether Qwest has opened its local markets in Minnesota to competition in compliance with the requirements of Section 271(c).[13]

9. The Minnesota PUC has responsibility under Section 271(d)(2)(B) of the Act to advise the FCC whether to grant or deny Qwest's request to provide interLATA service within Minnesota.[14]

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[5] *Id.* at § 271(d)(3)(A).
[6] *Id.* at §§ 271(c)(2)(B), 271(d)(3)(A)(i).
[7] 47 U.S.C. § 272. *See Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*), Second Order On Reconsideration, FCC 00-9 (rel. Jan. 18, 2000); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), petition for review pending sub nom. SBC Communications v. FCC, No. 97-1118 (filed D.C. Cir. Mar. 6, 1997) (held in abeyance May 7, 1997), First Order on Reconsideration, 12 FCC Rcd 2297 (1997) (*First Order on Reconsideration*), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) (*Second Order on Reconsideration*), *aff'd sub nom. Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, FCC 99-242 (rel. Oct. 4, 1999) (*Third Order on Reconsideration*).
[8] 47 U.S.C. § 271(d)(3)(C).
[9] *Id.* § 271(d)(3); *see SBC Communications, Inc. v. FCC*, 138 F.3d 410, 413, 416 (D.C. Cir. 1998).
[10] *See Accounting Safeguards Order* and *Non-Accounting Safeguards Order, supra.*
[11] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914; *Accounting Safeguards Order*, 11 FCC Rcd at 17550; *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, 12 FCC Rcd 20543, 20725 (1997) (*Ameritech Michigan Order*).
[12] *Non-Accounting Safeguards Order*, at paras. 15-16; *Ameritech Michigan Order*, 12 FCC Rcd at 20725, para. 346.
[13] 47 U.S.C. § 271(d)(2)(B).
[14] *Id.*

10. The FCC has defined a 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. . ."[15] In prior orders, the FCC has stated that it will "consider carefully state determinations of fact that are supported by a detailed and extensive record."[16]

III. BACKGROUND

11. In early October 2001, Qwest Corporation (the Qwest BOC) filed its petition with the Minnesota PUC seeking a finding of compliance with Section 272 of the Act. In its petition, the Qwest BOC identified Qwest Communications Corporation (QCC or the 272 Affiliate) as the Qwest entity that will provide in-region interLATA services if Qwest is given Section 271 authority by the FCC.

12. In support of its petition, Qwest filed the Affidavits of Judith Brunsting and Mark Schwartz.[17] Ms. Brunsting is the Senior Director of 272 Business Development in the 272 Affiliate.[18] The purpose of Ms. Brunsting's testimony is to provide the Minnesota PUC with information relating to the progress the 272 Affiliate has made with regard to Section 272 compliance and to demonstrate that upon Qwest's receipt of in-region, interLATA authority in Minnesota, the 272 Affiliate will comply with Section 272.[19]

13. Ms. Schwartz is a Director in FCC Regulatory Accounting at the Qwest BOC and is responsible for ensuring that the Qwest BOC's regulatory accounting practices comply with Section 272.[20] The purpose of her testimony is to demonstrate that the Qwest BOC is prepared to satisfy all of the relevant requirements of Section 272 of the Act, and related FCC rules, following the receipt of in-region interLATA authority in Minnesota by the BOC's 272 Affiliate.[21]

14. The Department of Commerce responded to Qwest's petition and other filings through the testimony of Dr. Lee L. Selwyn.[22] Dr. Selwyn is President of Economics and Technology, Inc. (ETI), a research and consulting firm specializing in telecommunications and public utility regulation and public policy, and Dr. Selwyn has presented testimony before the Minnesota PUC on a number of occasions dating back

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[15] *Ameritech Michigan Order*, at para. 30.

[16] *Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, 13 FCC Rcd 20599, para. 18 (1998) (*BellSouth Louisiana II Order*).

[17] See, e.g., Public and non-public versions of Schwartz Affidavit; Schwartz Rebuttal Affidavit and Schwartz Surrebuttal; Public and non-public versions of Brunsting Affidavit; Brunsting Rebuttal; Brunsting Surrebuttal.

[18] See, e.g., p. 1.

[19] Id.

[20] See, e.g., p. 1.

[21] Id.

[22] See, e.g., Public and non-public versions of Selwyn Affidavit).

to the mid-1970s.[23]

15. ATT responded to Qwest's petition and other filings through the testimony of Cory Skluzak.[24] Mr. Skluzak is employed by ATT as a policy analyst in the Access Management Group.[25]

16. In response to the filings by the Department of Commerce and ATT, Qwest filed additional affidavits of Ms. Brunsting and Ms. Schwartz and introduced the testimony of Dr. William Taylor.[26] Dr. Taylor is the Senior Vice President of National Economics Research Associates, Inc. (NERA). Dr. Taylor's testimony disputed economic and policy issues raised by Dr. Selwyn.[27]

17. Qwest, the Department and ATT participated in the hearing. Witnesses for the various parties were allowed to present short summaries of their testimony. Counsel for parties were given opportunity to cross-examine the witnesses. Counsel for parties were given the opportunity to conduct redirect of their respective witnesses, if necessary.

18. During the hearing, Dr. Selwyn was given an opportunity to respond orally to the written testimony of Dr. Taylor.[28] Qwest was provided an opportunity to file surrebuttal reply testimony by Dr. Taylor after the hearing. That surrebuttal reply testimony of Dr. Taylor was submitted on January 16, 2002.[29] Dr. Taylor's surrebuttal reply testimony is admitted to the record as Exhibit 39.

IV. QWEST'S "FAMILY OF COMPANIES."

19. Qwest consists of parent and subsidiary corporations, dividing areas of business or corporate functions among them.[30] Qwest Communications International, Inc. (QCI), is the ultimate parent corporation. One of QCI's wholly-owned subsidiaries is the Qwest Services Corporation (QSC). Two of QSC's wholly-owned subsidiaries are the Qwest Corporation (QC or the Qwest BOC) and Qwest Communications Corporation (QCC or the 272 Affiliate). The Qwest BOC provides local telephone service across a 14-state region as a Regional Bell Operating Company (RBOC). QCC is a facilities-based provider of interLATA services (long distance). It currently provides long distance services outside the RBOC's 14-state region.

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[23] Ex. 35, Attachment 1
[24] Exs. 22 and 23 (Public and non-public versions of Skluzak Affidavit).
[25] Ex. 22, p. 1.
[26] Exs. 3, 14, 15 and 21.
[27] Ex. 21, p. 2 (Affidavit of Taylor).
[28] Hearing Transcript, Vol. 2, pp. 350-400.
[29] Ex. 39 (Reply Affidavit of Taylor).
[30] Where reference is made to the overall corporate organization of parents and subsidiaries in this Report, the expression "family of companies" or "Qwest" will be used.

V. APPLICATION OF SECTION 272.

20. Since Qwest owns an RBOC, Qwest can only originate interLATA telecommunications services in the RBOC's region through a separate affiliate that meets the standards set out in Section 272.[31] The separate affiliate requirement is incorporated into the Section 271 application process.[32] The FCC states that "compliance with section 272 is 'of crucial importance' because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field."[33] Failure to comply with the Section 272 requirements is an independent ground for denial of a Section 271 application.[34] While the obligation to comply with Section 272 does not start before the FCC grants interLATA authority in the RBOC's region, Qwest asserts that its 272 Affiliate currently meets the applicable standards.

21. Circumstances under which a separate affiliate is required are set out in subdivision (a) of Section 272. The specific requirements that the affiliate must meet are set out in subdivisions (b) through (g). Broadly speaking, the requirements set out a framework for permissible contacts and conduct between the BOC and an affiliated company that will provide interLATA telecommunications services in the same region where the BOC is the incumbent local exchange carrier.

22. Structural and transactional requirements are set out in subdivision (b) of Section 272. Nondiscrimination safeguards are set out in subdivision (c). The standards to be met in a biennial audit are set out in subdivision (d). Prohibitions against discrimination in the fulfillment of certain requests made by unaffiliated providers are set out in subdivision (e). Subdivision (f) has a sunset provision that is inapplicable here. The standards to be met when joint marketing is conducted between the BOC and its 272 affiliate are set out in subdivision (g). Subdivision (h) provided a one-year transition period from February 8, 1996, for any BOC to cease offering existing services that had become prohibited by the Act. Each of the Section 272 standards at issue in this matter will be discussed individually.

VI. SECTION 272(B)(1) – THE "OPERATE INDEPENDENTLY" REQUIREMENT.

23. Section 272(b)(1) requires that the separate affiliate "shall operate independently from the Bell operating company." In its *Non-Accounting Safeguards Order*, the FCC indicated that "operating independently" does not have a common

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[31] 47 U.S.C. §272(a)(2)(B).
[32] 47 U.S.C. §271(d)(3)(B).
[33] *Application by SBC Communications Inc., Southwestern Bell Tel. Co., 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*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18374, para. 395 (2000) (*SWBT Texas Order*) (citing *Ameritech Michigan Order*, 12 FCC Rcd at 20725; *Bell Atlantic New York Order*, 15 FCC Rcd at 4153, para. 402).
[34] Id., citing *Ameritech Michigan Order*.

sense meaning when used in this context.[35] The FCC indicated that the restriction meant that there could be:

> (1) no joint BOC-affiliate ownership of switching and transmission facilities;
>
> (2) no joint ownership of the land and buildings on which such facilities are located;
>
> (3) no provision by the BOC (or other non-section 272 affiliate) of operation, installation, or maintenance services with respect to the 272 affiliate's facilities; and
>
> (4) no provision by the section 272 affiliate of operation, installation or maintenance services with respect to the BOC's facilities.[36]

24. When rules implementing the statute were adopted, the FCC was urged to adopt a wider interpretation of the requirement for the BOC and 272 affiliate to operate independently. The FCC responded:

> We decline to read the "operate independently" requirement to impose a blanket prohibition on joint ownership of property by a BOC and a section 272 affiliate. Rather, we limit the restriction to joint ownership of transmission and switching facilities and the land and buildings where those facilities are located. We conclude that the prohibition we have adopted should ensure that the section 272 affiliate's competitors gain nondiscriminatory access to those transmission and switching facilities that both section 272 affiliates and their competitors may be unable to obtain from other sources.[37]

25. In addition to requiring that a BOC and its Section 272 affiliate do not share ownership of switching and transmission facilities, the BOC and 272 affiliate are also prohibited from contracting with each other for one entity to provide operating, installation, or maintenance services with respect to the other's facilities. The FCC has stated:

> As stated above, we believe that a prohibition on joint ownership of transmission and switching facilities is necessary to ensure that a BOC complies with the nondiscrimination requirements of section 272. Consistent with that approach, we further interpret the term "operate independently" to bar a BOC from contracting with a section 272 affiliate to obtain operating, installation, or maintenance functions associated with the

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[35] *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, *Third Order on Reconsideration*, released October 1, 1999, 14 FCC Rcd. 16299, 16305 ("*Third Order on Reconsideration*").

[36] *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 21981-21982.

[37] *Id.* at 21983.

BOC's facilities. Allowing a BOC to contract with the section 272 affiliate for operating, installation, and maintenance services would inevitably afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors.[38]

26. Qwest represents that section 272(b) of the Act prohibits a 272 affiliate from jointly owning telecommunications, transmissions and switching facilities or the land or the building on which the facilities are located and states that the 272 Affiliate "will not jointly own any transmission and switching facilities in the future."[39]

27. Qwest had planned to propose Qwest Long Distance (QLD, formerly known as US West Long Distance) to be its 272 Affiliate.[40] QLD was a long distance reseller, not a facilities-based carrier.[41] In January 2001, Qwest decided that its existing, out-of-region interLATA carrier, QCC, would be its 272 Affiliate for in-region interLATA services.[42] QCC currently owns some network facilities and the Qwest BOC will be transferring other facilities to QCC. Such facilities transfers are being monitored on a quarterly basis.[43]

28. The Department of Commerce requested specific information as to what transmission and switching facilities will be used by QCC to provide interLATA long distance services and who owns those facilities. Information regarding the terms of use, routing of Minnesota interLATA calls, nature of the traffic routed by those facilities, and documentation of collocation for switching facilities was also requested.[44]

29. Qwest states that it is "still in the process of completing its network strategy."[45] Qwest has not provided documentary evidence that supports its assertion that the Qwest BOC and the 272 Affiliate will not jointly own transmission and switching facilities in the future. Qwest asserts that no such documentation exists.[46] There has been no description of Qwest's asset deployment plan within its network strategy.[47] Qwest has stated that the Qwest BOC and the 272 Affiliate "will not jointly own any network facilities or share OI&M functions."[48]

30. Qwest has not met its burden of proof that the Qwest BOC and 272 Affiliate will "operate independently" because Qwest has not demonstrated by a preponderance of the evidence that the entities will not jointly own any transmission and switching facilities or the land and buildings where those facilities are located if and

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[38] *Non-Accounting Safeguards Order*, para. 163.
[39] Hearing Transcript Vol. 1, p. 204; Ex. 12, pp. 8-9.
[40] Ex. 1, p. 6; Hearing Transcript Vol. 1, p. 18.
[41] Ex. 1, p. 6.
[42] *Id.*
[43] Ex. 1, p. 12.
[44] Ex. 19 (Department IR No.15010 to Qwest).
[45] *Id.*
[46] Ex. 12, p. 207.
[47] *Id.*
[48] Ex. 12, pp. 8-9; Ex. 1, pp. 10-11, Ex. 3, pp. 6-7.

when granted authority to re-enter the interLATA market.

31. Qwest can meet its burden of proof that its 272 Affiliate will "operate independently" by completing an asset deployment inventory that shows Qwest BOC and the 272 Affiliate do not jointly own any transmission and switching facilities and the land and buildings where those facilities are located at the time when QCC is authorized to enter the interLATA market in the Qwest BOC service region.

VII. SECTION 272(B)(2) -- THE SEPARATE "BOOKS, RECORDS, AND ACCOUNTS" REQUIREMENT.

32. Section 272(b)(2) sets out the requirement that a separate affiliate:

> shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate ....

33. In the *Accounting Safeguards Order*, the FCC determined that Section 272 affiliates must maintain their books, records, and accounts in accordance with Generally Accepted Accounting Principles ("GAAP").[49]

34. Qwest has indicated that both the Qwest BOC and the 272 Affiliate follow GAAP, as adopted by the FCC in Docket 96-150; maintain separate charts of accounts; maintain separate sets of financial statements; maintain expenditure controls; maintain separate ledger systems; maintain separate software systems on hardware located at separate facilities; have separate federal tax identification numbers; pay taxes and fees to various taxing and regulatory agencies separate from one another; and separately report to state and federal regulatory agencies.[50]

35. QCC's general ledger software is the PeopleSoft FRED system and that software is operated on computers located in Arlington, Virginia.[51] The Qwest BOC's general ledger software is the PeopleSoft PROFIT system and that software is operated on computers located in Denver, Colorado.[52]

36. The Qwest BOC has commissioned a report by Arthur Andersen, L.L.P., that found "no material departures from GAAP."[53] The Qwest BOC files biennial reports with the FCC using the Automated Reporting Management Information System (ARMIS).[54] Qwest failed to account properly for transactions occurring in 2000.[55] ATT maintains that this failure constitutes a basis for denying Qwest's application under Section 271. This failure was attributed to the merger transition between US West and

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[49] *Accounting Safeguards Order*, 11 FCC Rcd. at 17617-17618.
[50] Ex. 12, pp. 10-13; Ex. 1, pp. 12-15.
[51] Ex. 12, p. 12.
[52] *Id.*
[53] Ex. 1, p. 14.
[54] *Id.*
[55] *Id.*, p. 15.

Qwest.[56] Transactions from 2000 were identified between the Qwest BOC and QCC in a special accounting process conducted in 2001 and those transactions were billed with interest.[57]

37. The FCC requires providers to account for transactions using GAAP. In 271 applications, the past failure of a provider to comply with GAAP is not conclusive of future noncompliance.[58] Qwest is not obligated to meet the requirements of Section 272 before the grant of interLATA authority. Qwest must show that it will comply once that authority has been granted. Qwest has described controls to assure ongoing compliance with GAAP for future transactions. Qwest has demonstrated by a preponderance of the evidence that the Qwest BOC and the 272 Affiliate will comply with Section 272(b)(2).

VIII. SECTION 272(B)(3) -- THE "SEPARATE EMPLOYEES" REQUIREMENT.

38. Section 272(b)(3) sets forth the third structural and transactional requirement that :

> The separate affiliate required by this section--
>
> . . .
>
> (3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;[59]

39. Qwest indicated that the Qwest BOC and the 272 Affiliate each do not have any officers or directors who are officers, directors or employees of the other entity.[60] There are individuals who share officer and director functions between the 272 Affiliate and other non-Qwest BOC entities. For example, Joseph P. Nacchio is identified as the Chairman, Chief Executive Officer, and President of QCC.[61] Mr. Nacchio is CEO of Qwest Communications International (QCI), the parent company for the entire Qwest family of companies. The relationship between the officers, directors, and employees of the Qwest BOC and the 272 Affiliate includes:

(a) The Qwest BOC has employees, officers and directors on a payroll that is separate from the payroll for 272 Affiliate's employees, officers and directors.

(b) No director of the 272 Affiliate will also act as a director of the BOC as long as Section 272 remains in force.

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[56] *Id.*
[57] *Id.*
[58] *SWBT Texas Order*, para. 401.
[59] 47 U.S.C. §272(b)(3).
[60] Ex. 1, p. 16; Ex. 12, pp. 13-14.
[61] Ex. 12, JLB 272.7.

(c) Employees for the Qwest BOC, the 272 Affiliate and the Qwest Services Corporation (QSC) will wear different colored dots on their badges to identify their payroll employer.[62] The Qwest BOC employees wear blue dots, QCC employees wear red dots, and QSC employees wear yellow dots.[63] QSC provides legal services, public policy advice, and other services on a contract basis to both the Qwest BOC and the 272 Affiliate.

(d) The Qwest BOC and 272 Affiliate employees may occupy the same Qwest buildings and in some cases will be located on the same floors, but employees for the Qwest BOC, the 272 Affiliate and QSC will have nameplates with a color identifying their payroll employer.[64]

(e) While employees of the Qwest BOC and the 272 Affiliate will be on only one affiliate's payroll,[65] any employee of either of the two affiliates may be "loaned" to the other for up to four (4) months in a 12-month period.[66] Loaned employees would work full-time for the borrowing entity. Loaned employees will be under the supervision and authority of the borrowing entity, not the company issuing the employee's paycheck.[67] Loaned employees will continue to wear a badge with a color designating each employee's payroll employer.[68] While not currently occurring, such employee loans would be priced, identified, and made available to competing interexchange carriers (IXCs).[69]

(f) Employees of the Qwest BOC or the 272 Affilate may be assigned to perform "services" on behalf of the other entity under an affiliate agreement entered into between the two entities without those employees being considered to have been "loaned" to the other entity.

(g) Administrative services such as payroll,[70] human resources,[71] accounting and financial functions,[72] and computer systems[73] will be provided by the Qwest BOC or QSC to the 272 Affiliate. The Qwest BOC operates the internal computer system (Qwestnet) that provides access to shared corporate information and email.[74] The description of Qwestnet indicates that the 272 Affiliate's access to underlying data is restricted. There is no reciprocal

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[62] Ex. 12, p. 14; Ex. 1, p. 17.
[63] Transcript, Volume 1, p. 81.
[64] Ex. 35, Att. 2.3.
[65] Ex. 1, p. 16.
[66] Ex. 12, p.15.
[67] Ex. 35, Att. 2.14.
[68] Hearing Transcript Vol. 1, p. 95.
[69] Ex. 1, p. 82.
[70] Ex. 17 (Summary of Affiliate Transactions).
[71] Ex. 35, Att. 3.14.
[72] Ex. 12, p. 12.
[73] Ex. 35, Att. 3.15.
[74] *Id.*

statement indicating that employees from the Qwest BOC are restricted from accessing proprietary data of the 272 Affiliate.[75]

(h) Persons to be hired by Qwest are presented with an offer letter and attachment identifying terms of the employment relationship.[76] The offer letter contains a blank for filling in the particular entity to be the payroll employer.[77] The letter characterizes "Qwest" as the employer. The attachment describes the duties of the employee as running to "Qwest." Confidential information is described as information held by "Qwest" and not generally known to third parties.[78] There is no description of any obligation to maintain information confidential from any affiliate in the Qwest "family of companies."

(i) The Qwest BOC will provide billing and collection services on behalf of the 272 Affiliate,[79] and Qwest BOC customer service representatives will provide billing inquiry services for and on behalf of the 272 Affiliate.[80]

(k) Qwest has established policies for employees to follow when an employee terminates employment with one Qwest company and accepts employment with another Qwest company.[81]

(l) Employees of Qwest must review a Code of Conduct manual and sign a nondisclosure statement agreeing not to share nonpublic information with third parties.[82] The Code of Conduct manual states that confidential information can be used "for Qwest business only."[83] The Code of Conduct manual does not expressly state that information must be maintained as confidential between entities in the Qwest "family of companies." In its section entitled "Government Relations," the Code of Conduct states that:

> State and federal regulatory requirements govern the relationship and business transactions between the various affiliates of Qwest. These requirements cover:
>
> * * *
>
> Information flow between entities ....[84]

No other portion of the Code of Conduct describes this "information flow." Employees are directed to contact Legal Affairs or Regulatory Accounting for

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[75] *Id.*
[76] Ex. 12, JLB 272.9.
[77] *Id.*
[78] Ex. 12, JLB 272.9, Attachment.
[79] Ex. 35, at Att. 2.2; see also *id.* at Att. 3.16.
[80] *Id.* at Att. 3.16.
[81] Ex. 12, p. 15.
[82] *Id.* JLB 272.9.
[83] Ex. 1, MES 272.14, p. 14.
[84] Ex. 1, MES 272.14, p. 21.

further information.[85] Legal Affairs, as Qwest is currently structured, is provided as a service to the Qwest BOC and QCC by QSC. Regulatory Accounting is part of the Qwest BOC.

40. Qwest's policy of contracting services between entities can result in a Qwest BOC employee working 50% of the day performing services for the Qwest BOC and the remaining 50% of the day performing services for the 272 Affiliate (QCC).[86] Similarly, a QCC employee could provide services to the Qwest BOC in the same manner. Contracting services does not change the formal employer of the employee and does not change the supervisory relationship governing the employee.

41. Qwest's contracting of services between the Qwest BOC and QCC is governed by Article 4 of the Master Services Agreement between these entities, which states:

> Qwest Corp [the BOC] hereby declares and agrees that it has engaged in an independent business and will perform its obligations under this Agreement as an independent contractor and not as the agent or employee of QCC [the 272 affiliate]; that Qwest Corp does not have the authority to act for QCC or to bind QCC in any respect whatsoever, or to incur any debts or liabilities in the name of or on behalf of QCC; that any persons provided by Qwest Corp shall solely be the employees or agents of Qwest Corp under its sole and exclusive direction and control. Qwest Corp and its employees or agents are not entitled to QCC's unemployment benefits as a result of performing under this Agreement . . . Qwest Corp shall indemnify and hold QCC harmless for any causes of action arising out of Qwest Corp's liability to its employees or agents.[87]

42. Qwest asserts that its Code of Conduct governs "information flow between entities" and that this ensures that confidential information is not shared.[88] The portion of the Code of Conduct cited merely states that, "The rules are often complex and may create special requirements for record keeping, reporting and regulatory approvals."[89] Employees are directed to "[c]ontact Legal Affairs or Regulatory Accounting for questions regarding the relationships or business dealings between Qwest affiliates."[90] This language is inadequate to inform any employee of QC or QCC what information is confidential and that such confidential information must not be shared across the BOC/272 Affiliate boundary.

43. Qwest has no policy (beyond the vague statement in the Code of

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[85] *Id.*
[86] *Id.* at 89.
[87] Ex. 18, Article 4.
[88] Exhibit 2, MES 272.15, at 21.
[89] *Id.*
[90] *Id.*

Conduct) to restrict the sharing of confidential information transmitted by e-mail. Qwest has not identified any process by which employees of Qwest can be accurately and immediately identified, including in the e-mail system, as to which employees work for which entity in the Qwest "family of companies."

44. Qwest has indicated that the sharing of confidential information between employees of the Qwest BOC and QCC would only be appropriate where that information was, "reduced to writing, priced according to the rules, the information was paid for, and it was provided to third parties."[91] Qwest intends to rely on the separation of employees to prevent sharing of confidential information rather than offer confidential information to third parties.

45. Qwest has proposed a color identifying system designed to indicate whether an employee is accessing information appropriately. But a "blue dot" employee (of the Qwest BOC) may be working in a "red" area (of QCC) by contract. That blue dot employee may be on loan to QCC. Or that blue dot employee may be in the red area improperly. Conversely, a "red dot" employee could be in the blue dot area under the same variety of circumstances. The colored dot on the employee's badge does nothing to clarify whether that employee's presence is appropriate since Qwest has proposed so many ways in which these employees will be working together. Similarly, Qwest has proposed situations where supervisory staff could be loaned or contracted for among the affiliates.

46. The mechanisms proposed by Qwest are inadequate to distinguish among employees of Qwest BOC, QCC, and QSC. The mechanisms go only so far as identify each individual employee as separate (based on payroll employer) from other employees. But the actual supervision of employees and handling of confidential information is proposed to be independent of the actual payroll employer of each employee. Qwest's proposal for handling confidential information held by employees who cross affiliate company boundaries is inadequate to meet the nondiscrimination standard. In addition, there is no description as to how information will be managed on the Qwestnet network. The payroll employer of email recipients is not readily identifiable. Qwest expects that employees moving from one affiliate to another in the Qwest family of companies will retain the same email address. There is no ongoing assurance that the recipient of the information will recognize that the information is confidential and act appropriately.

47. The failure to identify adequately the employer of each employee within the shared information technology system (Qwestnet and e-mail) renders the improper sharing of confidential information (intentional or inadvertent) nearly certain. Since Qwest is relying on the separation of employees to meet the nondiscrimination provision, the proposed information technology system process must actually separate the employees from the information. Failure to do so under these circumstances violates the requirement of Section 272(b)(3) that the 272 Affiliate have separate

[91] Hearing Transcript Vol.1, p. 80.

employees from the BOC.

48. Qwest has not demonstrated by a preponderance of the evidence that it has sufficient safeguards in place to prevent the improper communication of confidential information between the Qwest BOC and the 272 Affiliate.

49. Qwest's policy of lending BOC employees to the 272 Affiliate violates the requirement of Section 272(b)(3) that the separate affiliate have separate employees. The policy of loaning employees contradicts the Master Services Agreement and constitutes a provision of services under terms and conditions not available to unaffiliated interLATA providers since the employees are under the supervision of the borrowing entity. Continued existence of this policy results in Qwest not meeting its burden of proof that the Qwest BOC and QCC will maintain separate employees if and when it obtains authority to enter the interLATA market.

50. The Department of Commerce asserted that the "sharing" of employees by the Qwest BOC and QCC under the terms of the Master Services Agreement constitutes a failure to maintain "separate employees" as required by Section 272(b)(3). The contracting for services between affiliates is expressly permitted by the FCC, so long as the other requirements, such as non-discrimination and retention of supervisory responsibility, are met.[92]

51. The Department of Commerce asserted that QCC should be required to compensate the Qwest BOC for intangible benefits received when experienced employees transfer from the BOC to the 272 Affiliate. The Department of Commerce recommended that a fee be imposed on transfers akin to that adopted by the California PUC.[93] The California PUC adopted a 25% "employee transfer fee" to be applied against the annual salary of any Pacific Bell employee that is transferred to an affiliate.[94]

52. The Department of Commerce maintains that imposing compensation for such employee transfers is important to prevent the cross-subsidization of the 272 affiliate from the BOC. The argument is that the 272 affiliate gains high level, experienced professionals from the BOC, while the BOC receives no comparably valuable employees or any compensation in return.[95] Qwest pointed out that no interLATA exchange carrier (IXC) compensates any former employer for the training received or added value of that employee's experience.

53. The obligation to maintain separate employees does not prevent employees from changing employment between BOC-affiliated companies. There is nothing in the separate employee requirement that would require compensation for employees moving between affiliated companies. The California PUC decision appears to address concerns of appropriate pricing of tariffed services, not the requirements of

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[92] *Third Order on Reconsideration*, para. 18.
[93] California Public Utilities Commission, D.87-12-067, 27 CPUC2d 1, 136.
[94] *Id.*
[95] *Id.*

Section 272. Requiring an employee transfer fee would impose a cost on the 272 Affiliate that is not required of competing IXCs.

54. There is legitimate concern over employee transfers as a means of evading the separate employee requirement. Requiring Qwest to maintain logs of employees hired between affiliates, with sufficient detail to determine the job titles of those employees and their length of service is a means of detecting such evasion. Such a listing is required to be developed during the biennial audit required by Section 272(d).[96] Maintaining that record on an ongoing basis can provide a means of self-policing by the Qwest BOC and the 272 Affiliate. As with the audit procedure, the transfers should be recorded between all Qwest affiliate companies. Similarly, requiring all such transfers to comply with all of the formalities of new hires is another means of ensuring that the transfers do not avoid other requirements of Section 272.[97]

55. The management structure of QCC (the 272 Affiliate) is divided between a Board of Directors and corporate officers. As of June 1, 2001, the QCC Board consisted of two individuals.[98] Both of these individuals were also officers of QCC. These same two individuals are also officers of Qwest Communications International, Inc. (QCI - the ultimate parent for the Qwest family of companies). In addition to these two officers, QCC has another eight officers. The titles of these individuals indicate that they also have officer functions in either QSC (the immediate parent of QCC) or QCI.[99] The QCC Director of Finance is a Qwest Services Corporation employee.[100] Ms. Brunsting is the only employee of the 272 Affiliate responsible for administration and public policy.[101] Ms. Brunsting reports directly to Carol Kline, who is an employee of Qwest Service Corporation.[102]

56. The Qwest BOC paid QCC for "management services" provided by Joseph P. Nacchio.[103] The Qwest BOC paid QCC for "management services" provided by a number of QCC supervisors, including Augustine M. Cruciotti.[104] Mr. Cruciotti is listed as a Director of the Qwest BOC.[105] Qwest explained that Mr. Cruciotti terminated his status as an employee of QCC on December 15, 2000.[106] He remains a Director for the Qwest BOC and an officer and employee of QSC (the parent company of both the

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[96] Ex. 22, p. 17

[97] Requiring formalities provides an opportune time to sever an employee's electronic access to confidential information to avoid violations of the anti-discrimination provisions of Section 272.

[98] Exhibit 12, JLB 272.7.

[99] *Id.* The only exception to the common officers, judging by title, is the Treasurer.

[100] Hearing Transcript Vol.1, p. 210.

[101] Hearing Transcript, Vol. 1, p. 172.

[102] *Id.* at 173. Ms. Kline is also a member of the QCI Senior Management Team.

[103] Exhibit 22, p. 22. The terms of the contractual agreement are trade secret data, and therefore not included in this report.

[104] Exhibit 22, p. 23. The terms of the contractual agreement are trade secret data, and therefore not included in this report.

[105] Exhibit 12, JLB 272.8.

[106] Exhibit 14, p. 18.

Qwest BOC and the 272 Affiliate).[107]

57. Another Qwest executive, Robin Szeliga, is simultaneously Vice President and Chief Financial Officer of QCI, an officer of QCC, an officer of QLD, and an officer of QSC.[108] Ms. Szeliga signed a reporting statement on behalf of the Qwest BOC that was required to be signed by an officer of the BOC. Qwest described the action as an error,[109] and explained that her action resulted from Ms. Szeliga's position having "expanded or changed several times in the past year due to reorganizations resulting from the merger and the decision to use QCC as the 272 Affiliate."[110]

58. The management structure of the Qwest BOC is divided between a Board of Directors and corporate officers. As of June 1, 2001, the Qwest BOC Board consisted of two individuals.[111] These same two individuals are officers of QCI. One of these two individuals is an officer of Qwest BOC.[112] QCC paid the Qwest BOC for a substantial number of employees providing supervision or management of QCC employees.[113]

59. ATT and the Department of Commerce asserted that the proper analytical framework for separate employees, officers, and directors was whether such persons performed separate functions. Qwest asserted that the obligation was met solely by identifying the payroll employer, regardless of what that person was doing. The FCC has addressed whether common corporate officers and directors between parent companies and affiliates meets the separate officers and directors requirement of Section 272(b)(3). In the Ameritech Michigan Order, the FCC stated:

> We do not find it necessary to examine in detail the various corporate reporting relationships that TCG and Ameritech debate in their pleadings to find that Ameritech does not comply with section 272(b)(3). The fact, however, that the Presidents of both Ameritech Michigan [the BOC] and ACI [the 272 affiliate] report to the same Ameritech Corporation Executive Vice President, as Ameritech [the common parent] acknowledges, underscores the importance of the separate directors requirement. Generally, corporate officers report to their board of directors, and, in the case of the BOC interLATA affiliate, that board is to be a separate body than the BOC's board. Given that the principal corporate officers of Ameritech Michigan and ACI report to the same Ameritech Corporation officer, it is clear that as a practical matter (as well as a matter of law), Ameritech Corporation is the corporate director for both Ameritech and

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[107] Id.
[108] Exhibit 12, p. 17
[109] Exhibit 3, p. 14
[110] Exhibit 14, pp. 17-18
[111] Exhibit 12, 15 272.6
[112] Id.
[113] Exhibit 22, p. 21. The terms of the contractual agreement are trade secret data, and therefore not included in this report.

ACI.[114]

60. The arrangement of officers and directors created by Qwest goes beyond the common reporting of officers to a single superior outside of the particular corporate entity. The directors and officers of both the Qwest BOC and QCC are integrated within each company and the officers and directors of each company are integrated into the corporate structure of the common parent. Some of these same individuals have provided management between the Qwest BOC and its 272 Affiliate by contract. This structure defeats the purpose of the separate officers and directors requirement, described by the FCC as follows:

> We recognize that corporations are ultimately responsible to their shareholders and that, in the context of any parent-subsidiary relationship, complete independence of management of the subsidiary will not always be possible. However, in enacting section 272(b)(3), Congress obviously required that the BOC and the interLATA affiliate be separately managed to at least some degree, and one of the affirmative requirements of that provision is the separate director requirement.[115]

61. Qwest has not attempted to show that independence of management is impossible here.[116] Qwest relies upon language in the *Non-Accounting Safeguards Order* to support its contention that it has met the requirements of Section 272(b)(3) regarding the officers and directors of the Qwest BOC and QCC. That language states:

> the section 272(b)(3) requirement that a BOC and a section 272 affiliate have separate officers, directors, and employees simply dictates that the same person may not simultaneously serve as an officer, director, or employee of both a BOC and its section 272 affiliate."[117]

62. The FCC explicitly mentioned that passage from the *Non-Accounting Safeguards Order* in the *Ameritech Michigan Order*.[118] The law governing the corporate relationships involved in that application resulted in the BOC and the 272 affiliate having, as a factual matter, different directors.[119] Despite this formal separation

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[114] *Ameritech Michigan*, at para. 362.
[115] *Id.*, at para. 361.
[116] In the *Bell South Louisiana II Order*, the FCC found having a single independent director adequate to carry out the "collective oversight and consideration for the effective realization of the Board of Director's substantial responsibilities." *Bell South Louisiana II Order*, at para. 330. A board cannot carry out an oversight function of corporate officers when all or even most of the members of the board are themselves corporate officers. It bears noting that the *Bell South Louisiana II Order* was issued prior to recent events highlighting the importance of effective board oversight of corporate officers. The FCC may well reconsider its holding on the adequacy of a single independent director, should the issue arise again.
[117] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21990.
[118] *Ameritech Michigan*, para. 355 at footnote 917.
[119] Under the applicable law, the shareholders of the parent company were "deemed" to be directors of the 272 affiliate. The BOC asserted that the parent was not "deemed" to be directors of the BOC. *Ameritech Michigan*, para. 360.

between the directors of the two companies, the FCC held that, "[the 272 affiliate] lacks the independent management that Congress clearly intended in enacting the separate director requirement."[120] That separation is not to be "easily nullified merely through a legal fiction."[121] The same absence of independent management results from the management structure Qwest created for the Qwest BOC and QCC.

63. The integration of management structure proposed by Qwest conflicts with the FCC's interpretation of what constitutes separate officers and directors. The statement in the *Non-Accounting Safeguards Order* (that "separate" just means not the same person in each position) was significantly qualified by the FCC in its *Ameritech Michigan Order*, where reporting relationships (similar to those in the Qwest family of companies) were not a concern, because of the existence of independent directors to oversee the conduct of the corporate officers. There are no such independent directors in the Qwest proposed structure. The FCC's statement that the congressional intent of the separate officers and directors requirement was "obviously" to require separate management compels a finding that the structure proposed by Qwest does not meet the statutory standard.

64. Qwest has frequently cited the Biennial Audit process as assurance that any noncompliance will be rectified in a variety of areas. The audit process directs auditors to examine the corporate management structure, including reporting "to determine the independence of the affiliate."[122] Similarly, the audit procedures require examination of all services rendered by all affiliates to the 272 affiliate.[123] The auditors are directed "to determine whether any departments [of the 272 affiliate] report either **functionally or administratively (directly or indirectly)** to an officer of the BOC."[124] As this language makes clear, the issue is not the organizational chart, but the underlying structure of relationships used to manage the organization. The practice of having the same persons who are QCC officers and directors occupying positions elsewhere in the Qwest corporate management structure is the sort of functional, indirect reporting that is identified as a concern in the audit process.

65. Qwest has not demonstrated by a preponderance of the evidence that it has separate officers and directors between the Qwest BOC and its 272 Affiliate as required by Section 272(b)(3).

IX. SECTION 272(B)(4) – PROHIBITING ANY CREDIT ARRANGEMENT THAT WOULD PERMIT RECOURSE BY A 272 AFFILIATE CREDITOR TO THE ASSETS OF THE BOC.

66. Section 272(b)(4) sets forth the requirement that a 272 affiliate:

> may not obtain credit under any arrangement that would permit a creditor,

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[120] *Ameritech Michigan*, para. 353.
[121] *Ameritech Michigan*, para. 361.
[122] Ex. 1, MES 272.14, p. 20.
[123] *Id.*
[124] *Id.* (emphasis added).

upon default, to have recourse to the assets of the Bell operating company.[125]

67. In the *Non-Accounting Safeguards Order*, the FCC interpreted Section 272(b)(4) as prohibiting a BOC, the parent of a BOC, or a non-section 272 affiliate of a BOC from co-signing a contract or other instrument with a section 272 affiliate that would permit a credit or recourse to the BOC's assets in the event of default by the section 272 affiliate.[126]

68. Qwest maintains that creditors of the 272 Affiliate do not and will not have recourse to the assets of the Qwest BOC. Qwest asserts that the 272 affiliate does not and will not make available to any creditor recourse to the BOC's assets indirectly through a non-272 Qwest Affiliate.[127] The 272 Affiliate is capitalized separately from the Qwest BOC, through Qwest Capital Funding, Inc., another affiliate of QCI.[128]

69. The integration that Qwest contemplates between its Qwest BOC and the 272 Affiliate requires the former to provide an extensive array of services for and on behalf of the latter.[129] These services are governed by the Master Services Agreement. The Master Services Agreement provides for payment by the 272 Affiliate 30 days after receipt by the 272 Affiliate of the invoice from the Qwest BOC.[130] DOC asserts that this arrangement has the effect of creating effectively permanent financing of QCC's purchases of BOC services for a period in excess of 30 days.

70. DOC maintains that the accounts receivable approach described by Qwest would place the Qwest BOC in the position of an unsecured creditor in the event of a default on the part of the 272 Affiliate. The Qwest BOC would be in the same position as any other unsecured creditor insofar as its ability to "collect" the debt from the 272 Affiliate.[131]

71. There is no improper provision of operating capital to the 272 Affiliate by maintaining a net account receivable from the 272 Affiliate, so long as the Qwest BOC offers the same terms and conditions in its accounting for receivables from unaffiliated entities. There is no requirement under Section 272 for the Qwest BOC to treat its separate affiliate less advantageously than competitors.

72. Offering the same terms and conditions to all providers of intraLATA services is the standard for compliance with several Section 272 requirements, including the issues raised regarding accounts receivable. The Master Services Agreement, Amendment No. 1, requires a late fee for unpaid balances in accounts

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[125] 47 U.S.C. §272(b)(4).
[126] *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 21995.
[127] Ex. 12, p. 18.
[128] Hearing Transcript Vol. 1, p. 208; Ex. 12, p. 18.
[129] Ex. 35, p. 57.
[130] Ex. 18 (Master Services Agreement).
[131] Ex. 35, at 57-58.

receivable.[132] The record contains copies of bills showing exactly this type of unpaid balance.[133] However, these bills indicate that the Qwest BOC had not levied late fees on the balances carried over by the 272 Affiliate, despite the terms in the amended Master Services Agreement imposing such a late fee.[134] There is no evidence from Qwest that late fees are not imposed on competing interLATA providers with overdue balances.

73. Despite the failure to charge late payment fees to the 272 Affiliate in the same manner as late fees are charged to other IXCs, failing to properly manage accounts receivable for services provided by Qwest does not constitute recourse to the assets of the Qwest BOC. The no recourse standard being imposed by Section 272(b)(4) is directed at third party creditors, not the 272 Affiliate itself. Failure to manage the accounts receivable to ensure timely payment for services provided to the 272 Affiliate does not constitute recourse to the assets of the Qwest BOC. The record shows that Qwest has managed receivables from the 272 Affiliate under terms more advantageous than those imposed on unaffiliated interLATA providers. That situation existed as recently as October 2001.[135] While this practice is, in effect, the Qwest BOC affording the 272 Affiliate an interest-free line of credit, the improper conduct relates to the nondiscrimination requirements, not the nonrecourse provisions. Qwest has met its burden of proving that the Qwest BOC and 272 Affiliate will operate in compliance with Section 272(b)(4).

X. SECTION 272(B)(5) – CONDUCTING ALL TRANSACTIONS BY THE 272 AFFILIATE WITH THE BOC ON AN ARM'S LENGTH BASIS.

74. Section 272(b)(5) sets forth the requirement that a 272 affiliate:

> shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.[136]

75. The Qwest BOC and the Qwest 272 Affiliate are wholly owned subsidiaries of the Qwest Services Corporation.[137] The organizational chart of the Qwest corporate structure indicates that both the 272 Affiliate and the Qwest BOC report to the Qwest Services Corporation.[138] Qwest Services Corporation provides legal and policy support services for all Qwest affiliates, including the Qwest BOC and the

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[132] Ex. 1, Att. MES-272.7; Ex. 18, Amendment 1.
[133] Ex. 9.
[134] Ex. 1, Att. MES-272.7; Ex. 18, Amendment 1. Qwest's addition of a late fee to the amended Master Services Agreement supports the inference that Qwest usually charges a late fee on overdue billings.
[135] Ex. 9 (Response to DOC IR 15031); Ex. 35, Att. 3.1 (*Affiliate Billing Request Form*, BART BAN# BIQCC030, and Invoice NO: A681201)
[136] 47 U.S.C. § 272(b)(5).
[137] Ex. 12, pp.161-62.
[138] Ex. 12, Att. 272.3.

272 Affiliate.[139]

76. In answering interrogatories sent by the Department to Qwest regarding the extent to which the Qwest BOC and the 272 Affiliate were engaging in joint marketing, a policy support analyst with the Qwest Services Corporation answered the questions.[140]

77. Ms. Brunsting is the only employee of the 272 Affiliate responsible for administration and public policy.[141] Ms. Brunsting reports directly to Carol Kline, who is an employee of Qwest Service Corporation.[142] The Director of Finance for the 272 Affiliate is an employee of the Qwest Services Company. Qwest Services Company provides a number of corporate accounting functions for the 272 Affiliate. The 272 Affiliate does not have its own Vice President or Director of Finance.[143] Persons holding officer, director, and supervisor positions within the Qwest family of companies also provide "management services" under contract to the Qwest BOC.

78. Qwest repeatedly stated that, for transactions between the BOC and the 272 Affiliate, it would "conduct all transactions on an arm's length basis, reduce them to writing, and make them available for public inspection."[144] DOC pointed out that QSC will be providing legal and policy planning services to each side of the Qwest BOC-QCC transaction. The separation between the Qwest BOC and QCC is bridged by the provision of services to both entities by the same employees who will be in possession of confidential information belonging to each entity not being offered to competitors on a nondiscriminatory basis. That separation is also bridged by the integrated management structure that places officers and directors in positions where they cannot exercise independent judgment regarding the interests of the 272 Affiliate.

79. Entities dealing with each other cannot depend upon the same source for legal services, public policy analysis, and financial consulting with respect to transactions occurring between the two entities and remain at "arm's length" in a transaction. The decision-maker at the separate affiliate cannot report to the same officer of the joint owner of the affiliate and the BOC and maintain "arm's length" in a transaction.[145] The practice of contracting for management and supervisors between the Qwest BOC and QCC also erodes the capacity of each entity to act at "arm's length" in transactions.

80. Qwest maintains that there are efficiencies arising from the use of services from a common source. These efficiencies, Qwest asserts, are legitimate practices that

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[139] Ex. 2, p. 31.
[140] Hearing Transcript, Vol. 1, p. 50; Ex. 6 (Qwest responses to DOC IRs 15036, 15038, 15049, and 15050).
[141] Hearing Transcript, Vol. 1, p. 172.
[142] *Id.* at 173.
[143] *Id.* at 210.
[144] Trancript Vol. 1, pp. 19-20.
[145] This is particularly true, where, as here, the Board of Directors is composed of other officers of the parent company who are also officers of the 272 Affiliate.

have been approved by the FCC. At no point has the FCC stated that a BOC can engage in practices that place a BOC-affiliated entity in a confidential relationship with both the BOC and its 272 affiliate when transactions between them are being conducted that must be at arm's length. Such an arrangement results in an evasion of the arm's length requirement.

81. Qwest witness Ms. Brunsting testified in her written affidavit that:

> As affiliates, the 272 affiliate and BOC have unique financial and business responsibilities and obligations to their boards of directors and ultimately to their shareholders, notwithstanding section 272 requirements.[146]

82. Ms. Brunstig states that one of those unique financial and business responsibilities is to ensure that the Qwest BOC's aggregate profits will be maximized, even if in order to accomplish those results, certain individual affiliates' profit levels would need to be sacrificed.[147]

83. The pricing of transactions is another critical component of the arm's length requirement. Where, as here, the 272 Affiliate is a wholly-owned subsidiary of Qwest Services Corporation, any profit or loss by QCC is ultimately experienced by the parent corporation. The same financial reality is true for the Qwest BOC, which is also a wholly-owned subsidiary of Qwest Services Corporation. Any financial transaction between the Qwest BOC and QCC results in a net difference of **zero** to Qwest Services Corporation when only the two subsidiaries are involved.[148] But Section 272(c) requires that any services offered by the BOC to its 272 affiliate be made available to competing interLATA providers on the same terms and conditions. A transaction with no net difference between entities with a common owner can have a dramatically different financial result when applied to competing carriers.

84. A single example is sufficient to demonstrate the potential for serious adverse impact on competition in the telecommunications market when pricing of services is manipulated. Combining local and long distance billing on a single monthly statement and paying both billings with a single payment is perceived by consumers as an attractive option. Qwest has already engaged in advertising suggesting that it will be able to offer that feature. QCC has already entered into an agreement with the Qwest BOC to pay at least $1.20 per bill (up to $1.50 per bill if volume discount totals are not met) for each monthly customer billing. Since most of QCC's billings will be made to customers of the Qwest BOC, relatively few of these bills will be generated independently of the existing bills that the Qwest BOC is already generating to its own customers. The actual costs incurred by the Qwest BOC in combining its billing with

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[146] Ex. 12, p. 17.

[147] Hearing Transcript Vol. 1, p. 193.

[148] Any service charge to QCC from the Qwest BOC is charged as an expense by QCC and income by the Qwest BOC in the same amount. Since both the Qwest BOC and QCC are wholly-owned subsidiaries of QSC, the profit and loss of each affiliate must be reported as QSC's own on its accounting statements. The same is true for QCI, with respect to QSC's profit or loss.

that of QCC may be lower than ten cents per bill page.[149] The payment between QCC and the Qwest BOC has no impact whatsoever on the revenues received by QSC (the common parent of QCC and the Qwest BOC) or QCI (the ultimate parent company). But the offering of the "negotiated price" to third parties can make participation in the service too expensive or impair the ability of those third parties to compete in the market.

85. The capacity for manipulating pricing between a BOC and its 272 affiliate has been recognized by the FCC.[150] Manipulation of pricing to the detriment of third parties is generically known as a "price squeeze." The FCC has been directed to consider the impact of any potential price squeeze in 271 applications.[151] Manipulation of Total Element Long Run Incremental Cost (TELRIC) pricing of network elements can impair the ability to compete of competing local exchange carriers (CLECs). Similarly, manipulation of pricing for services between the BOC and its 272 affiliate can impair competition in the interLATA services market.[152] Requiring that transactions be conducted at "arm's length" is a means of preventing such manipulation.

86. The arm's length requirement of Section 272(b)(5) means that transactions between the BOC and its 272 affiliate must reflect a bargained for price of the product or service. With interlocking management structures between the parent and affiliates, different means of pricing for different transactions, and the expressed

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[149] Exhibit 22, p. 63.

[150] *In the Matter of BellSouth Telecommunications, Inc. Permanent Cost Allocation Manual Petition for Waiver of Section 32.27 of the Commission's Rules*, ASD File No. 01-46 (December 17, 2001). Paragraph 5 of the FCC's Order states:

> BellSouth explains that the affiliate BellSouth Long Distance, Inc. (BSLD), was created to provide interLATA services pursuant to section 272 of the Communications Act of 1934, as amended (Communications Act). All transactions between a Bell operating company and its section 272 affiliate must comply with the arm's length requirements of section 272(b)(5). BellSouth contends that it can comply with the arm's length requirements by recording the transaction at incremental cost for regulatory accounting purposes. We disagree. Our rules require such transactions with section 272 affiliates, where no tariff rate, prevailing price or publicly filed agreement exists, to be recorded for regulatory accounting purposes at the higher of cost or market when the carrier is the seller or transferor, and the lower of cost or market when the carrier is the buyer or transferee. BellSouth has not demonstrated how an incremental cost valuation would comply with the statutory requirement that transactions be at an arm's length basis. It is not sufficient to assert that the statutory requirement is met if the price for the transaction is recorded for financial accounting purposes at fair market value. The Commission's revision of section 32.27(c) to allow the floor and ceiling discussed above does not apply to transactions with section 272 affiliates. For these reasons, we deny BellSouth's petition for waiver with respect to transactions with BSLD.

[151] *Sprint Communications Co. v FCC*, 274 F.3d 549, 553-56 (D.C.Cir. 2001).

[152] Qwest focuses its comments on the claimed desire of "entrenched" IXCs, such as ATT, to avoid competition with the 272 Affililate. But the current competitive market contains a wide variety of interLATA providers, many of which do not have the market share or financial resources of large IXCs, such as ATT. Qwest has used fully distributed cost pricing for features not likely to be obtained by competitors. Qwest has used pricing significantly over its own costs to put QCC customer billings for telephone services on the Qwest BOC customer bill. The impact of a "price squeeze" in a desirable feature such as the single customer bill has the potential for the greatest impact on the smaller IXCs.

intent that transactions be structured for the benefit of the Qwest BOC,[153] the arm's length requirement of Section 272(b)(5) is not met.

87. The current operations of the Qwest BOC and the 272 Affiliate do not meet the arms length transaction requirement of Section 272(b)(5). Qwest's intended manner of operation of the 272 Affiliate is akin to that of a closely-held subsidiary, not a separate affiliate as required by Section 272.

XI. SECTION 272(B)(5) – MAKING ALL TRANSACTIONS WITH THE 272 AFFILIATE AVAILABLE FOR PUBLIC INSPECTION.

88. Section 272(b)(5) requires that any transactions between the BOC and the 272 affiliate must be available for public inspection. The FCC has clarified that this requirement consists of three components:

> (1) the 272 affiliate must provide, at a minimum, a detailed written description of the asset transferred or the service provided in the transaction, and post terms and conditions of the transaction on the company's home page on the Internet within 10 days of the transaction;[154]
>
> (2) the description "should be sufficiently detailed to allow us to evaluate compliance with our accounting rules";[155] and
>
> (3) the descriptions must be made available for public inspection at the BOC's principal place of business, and must include a statement certifying the truth and accuracy of such disclosures.[156]

89. The FCC has stated that the 272 affiliate must "provide a detailed written description of the asset or service transferred and the terms and conditions of the transaction" and, that such description "should be sufficiently detailed to allow us to evaluate compliance with our accounting rules."[157] As the FCC has stated:

> In the *Accounting Safeguards Order*, however, we expressly stated that the information contained in a BOC's CAM [Cost Allocation Manual] is not sufficiently detailed to satisfy section 272(b) because the BOC's CAM contains only a general description of the asset or service and does not describe the terms and conditions of each individual transaction. Therefore, a statement of the valuation method used, without the details of the actual rate, does not provide the specificity we required in the *Accounting Safeguards Order*. Because Ameritech has failed to provide a sufficiently detailed description of the transactions to allow us to evaluate

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[153] *See* Findings 81 and 82.
[154] *Accounting Safeguards Order*, 11 FCC Rcd. at 17593-94.
[155] *Id.*
[156] *Id.*
[157] *Id.*

compliance with our accounting rules, we are unable to find that Ameritech will carry out the requested authorization in accordance with section 272.[158]

90. ATT objected to the level of detail provided generally in the work orders posted to Qwest's website. Qwest responded that its work orders provide the same level of specificity found on those posted to the Southwestern Bell Corporation (an RBOC) website for its affiliate transactions.

91. When asked what specific details of an affiliate transaction must be posted on the Qwest web site, Ms. Schwartz responded:

> The details should be sufficient enough to allow a third party to determine whether or not they would be interested in providing that service and as you indicated, it would provide rates, terms, and conditions. . . . the FCC has further given guidance that that sufficiency should include the level and expertise of personnel, the frequency that the service is provided, any special equipment used, and so forth. So again, we do comply with the FCC sufficiency guidelines . . . .[159]

92. Ms. Schwartz testified that one of the purposes of posting work orders, such as the *Joint Marketing Work Order*, on the Internet is to ensure that the services that the Qwest BOC provides to its 272 affiliate are also available on the same terms and conditions to other competing IXCs.[160]

93. Each affiliate agreement includes a brief description of services to be provided, the employees providing the service, and the rate at which the service will be charged.[161] By FCC rule, a carrier must price a service at the greater of fair market value or fully distributed cost only after the total aggregate value of that service reaches or exceeds $500,000.[162] To assign a pricing method, Qwest provides a *Fair Market Value Questionnaire* to be filled out concurrently or prior to the execution of the contract. This Questionnaire asks the respondent to specify:

(1) if the estimated annual billing for this service is greater than $500,000;

(2) whether benchmarking studies have been performed (and if so, the studies must be attached to the worksheet); and

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[158] *Ameritech Michigan Order* at para. 369.
[159] Hearing Transcript, Vol. 1, pp. 66-67.
[160] *Id.* at 71.
[161] Ex. 35, Att. 2.2.
[162] 47 CFR 32.27.

(3) whether an external market exists for the service, and any explanation/studies this would entail.[163]

94. For the provision of joint marketing services to the 272 Affiliate, the Qwest BOC did not perform a fair market value study or undertake a benchmarking report.[164] Actual billing data provided in response to Department Information Request No. 15031, shows a total billing for joint marketing services that exceeds $500,000, on which no payments were made and no late charges were assessed.[165]

95. Qwest failed to comply with the rules on affiliate transactions when it failed to justify its pricing methodology on joint marketing. While the affiliate rules are not part of Section 272, Qwest also failed to post the terms and conditions of the transaction as required by Section 272(b)(5) by not disclosing that no interest or late fees would be charged on overdue payments from its 272 Affiliate.[166] Qwest has not demonstrated that its 272 Affiliate currently meets the applicable standards for posting transactions.

96. The *Information Technologies Services Work Order, Amendment 1*, between the Qwest BOC and the 272 Affiliate contains a provision for "Facilities Management" (floor space in the Qwest Corporation Zuni facility).[167] A portion of this Work Order entitled, "Facilities Management," appears to lease office space between the Qwest BOC and the 272 Affiliate in Denver, Colorado. There is no description of the *amount* of office space to be provided to the 272 Affiliate contained in the Work Order.[168]

97. Failure to reduce to writing the amount of office space provided by the Work Order does not comply with Section 272(b)(5) because it fails to include a critical term or condition of the transaction.[169] Failure to specify the amount of office space obtained does not describe with sufficient specificity the terms and conditions of the transaction reflected in the Work Order.

98. Qwest claims that the estimated annual billing for this "rental" of office space is below $500,000.[170] The Department of Commerce points out that this assertion cannot be tested because the amount of space for which the 272 Affiliate has

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[163] Ex. 35, Att. 3.1.
[164] *Id.*
[165] Ex. 9 (Response to DOC IR 15031); Ex. 35, Att. 3.1 (*Affiliate Billing Request Form*, BART BAN# DOCC030, and invoice No. A681201). The totals are trade secret data and therefore they are not provided in this Report.
[166] Qwest maintained that its Master Services Agreement had been amended in July 2001 to include the charging of interest and such interests has been billed retroactive to when the services were provided, Exhibit 3, at 19. The trade secret invoice is dated significantly later than July 2001 and contradicts Qwest's assertion that interest was being charged on overdue amounts payable after July 2001.
[167] Ex. 35, at Att. 3.15
[168] *Id.*
[169] Ex. 35, p. 44.
[170] Ex. 35, Att. 3.15.

contracted is unknown.[171] The $500,000 "trigger" requires application of particular methods of valuation to comply with FCC rules. There is no exemption from the posting requirement in Section 272(b)(5) for transactions falling below $500,000 in annual cost.

99. Qwest did not attempt to determine the fair market value of services for Accounts Payable services[172] and Human Resources services[173] by comparing costs from outside vendors. Qwest indicated that its services were customized to provide for specific Qwest BOC needs and, therefore, a fair market value study could not be undertaken. Qwest described these services as follows:

> The regulated employees who perform accounts payable functions provide for payment of vendor invoices, payment of employee expenses, image processing, corporate card, vendor base, reconciliation, system administration duties. These employees are specialists for Qwest in the knowledge of our accounts payable process. External vendors do not offer such a broad spectrum of support and services. Nor do they have the expertise specific to Qwest accounts payable process. Therefore, the services performed by these regulated employees are not available in the same degree in the market place.[174]

100. The fact that some "customization" of accounts payable, payroll, human resources or any other generic corporate operational function may be required does not render such functions incapable of being subject to a fair market value assessment.[175] The activities described by Qwest are generic and frequently "outsourced" (i.e., purchased from a third-party provider). Customization is part of the purchase price for that activity and does not impair Qwest's ability to obtain market valuation for these services.[176]

101. Qwest has no obligation to go beyond the level of specificity maintained by other RBOCs when posting affiliate transactions. But the FCC rules require fair market valuation for some transactions. Where certain transactions have triggered the fair market valuation provision, Qwest has failed to price appropriately and post the terms and conditions of those transactions. Further, where a particular transaction is conducted (such as rental of office space) the posting must include relevant specific details, such as the actual space obtained, to contain the terms and conditions of the transaction. The current manner of reporting these transactions between the Qwest BOC and the 272 Affiliate falls short of the requirement that such transactions be "public" within the meaning of Section 272(b)(5). Qwest must ensure that future postings will comply with this requirement to meet the standards of Section 272.

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[171] *Id.*
[172] Ex. 17 (Summary of Affiliate Transactions, *see* Finance Services Work Order).
[173] *Id.* (*see* Human Resources Work Order).
[174] Ex. 35, Att. 3.13.
[175] Ex. 35, p. 47.
[176] *Id.*

XII. SECTION 272(c) – THE "NONDISCRIMINATION" REQUIREMENT.

102. Section 272(c) requires that a BOC not discriminate in favor of its 272 affiliate and against competitors. That statutory provision states:

> (c) NONDISCRIMINATION SAFEGUARDS- In its dealings with its affiliate described in subsection (a), . . . a Bell operating company--
>
> (1) may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards; and
>
> (2) shall account for all transactions with an affiliate described in subsection (a) . . . in accordance with accounting principles designated or approved by the Commission.[177]

103. In its *Non-Accounting Safeguards Order*, the FCC interpreted this section to require a BOC to "provide to unaffiliated entities the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions."[178]

104. The FCC has also concluded that the non-discrimination requirement in section 272(c)(1) extends to any good, service, facility or information that a BOC provides to its section 272 affiliate, including those that are not telecommunications-related,[179] as well as administrative and support services.[180]

105. Qwest has acknowledged that it has the obligation for the Qwest BOC to not discriminate in favor of its 272 Affiliate. Qwest has noted that the non-discrimination requirement extends to the use of confidential information between the Qwest BOC and its 272 Affiliate. Qwest does not intend to identify, price, or offer that information to competing IXCs. Instead, Qwest intends to rely upon other means to meet the non-discrimination requirement.

106. Qwest will rely upon the separation required by Section 272(b)(3) to comply with the nondiscrimination standard of Section 272(c) regarding the use of confidential information. Qwest has not described how common officers and directors of the parent companies and QCC will avoid being privy to such information (or if they are privy to it, how Qwest will assure that such confidential information is not used in the 272 Affiliate's decision-making process). Qwest's reliance on separation to meet the nondiscrimination standard means that it must apply that separation to officers and directors who will obtain confidential information indirectly through the parent, as well as

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[177] 47 U.S.C. §272(c).
[178] *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 22000-01.
[179] *Id.*
[180] *Id.* at 22007-08.

directly from the BOC.[181]

107. ATT asserts that Qwest discriminates by performing an evaluation for any services requested from the Qwest BOC by the 272 Affiliate. The process set out by Qwest provides a single point of contact for such inquiries which is then analyzed as to type of product, service, or information, manner of accomplishing the request, and the potential for risk arising from meeting the request.[182] The flowchart describing the process indicates that the submission of the request to the single point of contact is the "[s]ame process used by 3rd party requests for Products/Services/Information."[183] The process, as described, does not discriminate against competing IXCs.

108. Compliance with the non-discrimination requirements regarding transactions are assessed in the context of specific transactions for goods and services. Determinations regarding such compliance are discussed in Findings concerning such transactions. Specific instances of noncompliance are noted at Findings 73 and 117. Qwest has not met its burden to show that the Qwest BOC will not discriminate in favor of its 272 Affiliate.

XIII. SECTION 272(G) -- JOINT MARKETING.

109. Section 272(g) sets forth a BOC's ability to engage in joint marketing of its own local services with its 272 Affiliate's long distance service. The statute states in pertinent part:

> (1) Affiliate sales of telephone exchange service.
>
> A Bell Operating company affiliate required by this section may not market or sell telephone exchange services provided by the Bell operating company unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services.
>
> * * *
>
> (3) Rule of construction
>
> The joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection (c).[184]

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[181] The need for such separation is particularly critical where the information technology is only restricting access to the 272 affiliate. Any other user may be able to access information that cannot be provided directly to the 272 affiliate. Allowing information transfers through such other users indirectly to the 272 affiliate, without making the information available to competitors, discriminates in favor of the 272 affiliate in violation of Section 272(c).

[182] Exhibit 1, MES 272.12.

[183] Id.

[184] 47 U.S.C. § 272(g).

110. In the *Non-Accounting Safeguards* proceeding, NYNEX (then an RBOC) asked the FCC to define "marketing activities" governed by Section 272(g)(3) to include "product development, product management, market management, channel management, market research, and product pricing."[185] The FCC declined to go so far in its Order, stating:

> In our view, such activities are not covered by the section 272(g) exception to the BOC's nondiscrimination obligations. We see no point to attempt at this time to compile an exhaustive list of the specific BOC activities that would be covered by section 272(g). We recognize that such determinations are fact specific and will need to be made on a case-by-case basis.[186]

111. The FCC reiterated this position in the *Third Order on Reconsideration*. In that order, the FCC stated:

> The broad interpretation of the "joint marketing and sale of services" exception BellSouth advocates would create a loophole that would allow potential BOC discrimination in countless activities. Section 272(c)(1) would provide little protection against BOC discrimination were we to construe section 272(g)(3) as *exempting all activities* that may impact on marketing and sales activities from the nondiscrimination requirements.[187]

112. The Qwest BOC intends to engage in "joint marketing" of local exchange services provided by the Qwest BOC and interLATA long distance services to be provided by its 272 Affiliate, once Qwest receives Section 271 authority.[188]

113. The *Joint Marketing Work Order* between the Qwest BOC and the 272 Affiliate defines the type of services the Qwest BOC agrees to provide the 272 Affiliate:

> *Planning for In-region InterLATA (Local Access and Transport Area) Services* — Includes planning functions required to be ready to sell interLATA services when 271 relief is granted. Also includes pre-implementation activities such as sales operations functions, budgets, establishing sales expectations, planning sales and promotion functions, developing marketing and customer segmentation plans such as provisioning billing, order entry and management, customer care, reporting, training, and compensation; and determining requirements for changes to systems and processes.
>
> *Qwest Communications Corporation (QCC) Sales* — Providing various aspects of selling QCC products and services inside and outside the 14

[185] *Non-Accounting Safeguards Order*, para. 295.
[186] *Non-Accounting Safeguards Order*, 11 FCC Rcd 22048.
[187] *Third Order on Reconsideration*, 14 FCC Rcd 16325 (emphasis added).
[188] Ex. 1, pp. 32-33.

state region such as private line data and out of region long distance. Includes activities such as direct sales, supporting alternative sales channels, support for planning for out of region sales, managing marketing efforts for out of region services, and development of training for Section 272 products, services, policies and processes for sales and sales support personnel.[189]

114. Marie Schwartz (a Director in FCC Regulatory Accounting for the Qwest BOC) has approval authority over the *Joint Marketing Work Order*.[190] At the hearing, neither Ms. Schwartz nor Ms. Brunsting was able to provide specific details as to what type of services fall under "planning sales and promotion functions".[191]

115. When asked to describe what services were provided by the Qwest BOC to QCC under the *Joint Marketing Work Order* regarding the "planning function," Ms. Schwartz stated:

> I can't list the specific services listed under those functions, but in essence the work order in this section is basically designed to encompass those planning functions.[192]
>
> * * *
>
> I think planning means readying ourselves to joint market. I'm not familiar with the detailed plans associated, or that, you know, the details associated with the planning functions, however, you know to the extent that, for instance, it would include any marketing scripts, as we've discussed earlier, I'm not aware of any that have been drafted or prepared in final form.
>
> Q. Would you agree then that that phrase [planning, sales and promotion functions] is somewhat vague?
>
> A. Well, it does capture a number of activities that would be required to jointly market.
>
> Q. Like what?
>
> A. Well, for instance, as we just discussed, marketing scripts, making sure that we have the appropriate training available, as we talked about, to allow anyone in the customer ordering centers to be prepared to provide both in-region and -- excuse me, in-region local and interLATA service.[193]

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[189] Ex. 35, Att. 3.1.
[190] Hearing Transcript, Vol. 1, p. 64.
[191] Hearing Transcript, Vol. 1, pp. 73-74, 189.
[192] *Id.* at 71-73; 75.
[193] *Id.* pp. 72-73.

116. When asked to identify exactly what the Qwest BOC is providing to its 272 Affiliate with regard to the phrase "planning, sales, and promotion functions," as set forth in *the Joint Marketing Work Order*, Ms. Schwartz was unable to provide an explanation, but identified other Qwest BOC officials who might know.[194] The Qwest BOC has billed QCC in excess of $500,000 for these undescribed services.[195]

117. The *Joint Marketing Work Order* violates the nondiscrimination requirements of Section 272(c)(2) because it does not sufficiently disclose the services, terms, and conditions provided by the Qwest BOC to the 272 Affiliate.

118. The absence of a sufficient description of the services provided under the *Joint Marketing Work Order* implies that the Qwest BOC and QCC are not engaging in transactions with each other at arm's length as required by Section 272(b)(5).

119. Qwest acknowledged that its right to jointly market services for both the Qwest BOC and its 272 Affiliate does not exempt Qwest from the nondiscrimination requirement for "product design, planning, or development."[196] As the FCC has stated:

> BellSouth states that, to the extent BST engages in product development with BSLD, it will do so on a nondiscriminatory basis with unaffiliated entities so long as it is required to do so under section 272. We note that AT&T is concerned that BellSouth's joint marketing plans involve the development and creation of packages of services offered on an integrated basis, and that BellSouth has not shown that it will make these services available on a nondiscriminatory basis. We expect, however, as BellSouth commits in good faith, that to the extent BST is involved with planning, design, and development activities for BSLD, BST will make these services available to other entities on a nondiscriminatory basis pursuant to section 272(c)(1).[197]

120. Qwest intends to permit other IXCs to engage in joint marketing for telephone exchange services, information services, and product design, planning or development on the same terms and conditions that the service is made available to QCC.[198] Qwest did attempt to distinguish between product development services provided by QSC and those provided by the Qwest BOC.[199] Qwest's description of services in the *Joint Marketing Work Order* is insufficient to permit a competing IXC to

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[194] *Id.* pp. 73-75.
[195] Ex. 35, Att. 3.1. More examples of this arrangement between the Qwest BOC and QCC were identified by Mr. Skluzak. Ex. 22, p. 22. Since the amounts paid and personnel assigned in these transactions are trade secret data, those details are not included in this Report. A reasonable inference is that the transactions were not at arm's length, since details regarding the services provided are lacking and the amount paid for the services is substantial.
[196] Qwest Brief, p. 61.
[197] *BellSouth Louisiana II Order*, para. 360.
[198] Exhibit 3, p. 31; Exhibit 12, p. 24; Exhibit 14, p. 25.
[199] Exhibit 3, p. 31.

ascertain what specific services are being provided under that *Order*.[200] The *Joint Marketing Work Order* fails to describe the terms and conditions associated with the services provided in specific detail sufficient to allow a competing IXC to exercise its rights provided under section 272(g)(1). Qwest has not met its burden of proof that it will comply with Section 272(g)(1).

XIV. OTHER JOINT MARKETING ISSUES.

121. On July 24, 2001, Qwest ran advertisements in various Minnesota newspapers for the purpose of:

> informing the in-region population that J.D. Power and Associates has just ranked Qwest '#1 in Residential Long Distance Customer Satisfaction for High Volume Users.' Additionally, we [Qwest] will indicate that Qwest is working hard to be able to offer the same service in their area.[201]

122. The scripts used by the sales representatives for the Qwest BOC for answering responses to the advertisements directed the representative to inform the prospective customers to either call them at 1-866-LD-CHOICE, or go online to provide Qwest with contact information so that Qwest can contact them once the Qwest BOC offers long distance in the state.[202]

123. The advertisements and scripts used by Qwest demonstrate that Qwest has engaged in joint marketing activity for the products of the Qwest BOC and its 272 Affiliate prior to Qwest's entry into the interLATA market. This is joint marketing activity constituting a violation of section 272(g)(2).

124. Notwithstanding that the activity described in the preceding three Findings constitutes a violation, the particular activity the Qwest BOC engaged in was notice to the public of future planned activity. No customer was offered interLATA telephone service, either in the advertisement or on the telephone. The violation constitutes a *de minimus* failure to comply with the prohibition against joint marketing activity imposed by Section 272(g)(2).

125. ATT argues that Qwest's predecessor 272 affiliate, QLD (formerly known as U.S. West Long Distance), violated the prohibition against joint marketing. Based on these violations, ATT maintains that Qwest has not demonstrated current compliance with Section 272. Qwest maintains that the QLD noncompliance was not severe and should not prevent approval of Qwest's application now. The sale of interLATA services

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[200] Qwest maintains that no product development services have been provided to QCC after March 3, 2001. Qwest Brief, at 59. But Qwest has not identified what services have been provided to QCC that resulted in billings substantially in excess of $500,000 under the Joint Marketing Work Order. QCC is not currently eligible to market in-region interLATA services, therefore the Qwest BOC cannot jointly market those services either. The invoices on the billings described the subject of the transactions as "product development." Ex. 22, p. 22.

[201] Ex. 7, Att. A (Qwest response to Department of Commerce Motion).

[202] *Id.* at 1.

by U.S. West Long Distance occurred under a mistaken interpretation of the application of the Act. That past noncompliance, by itself, is insufficient support for a conclusion that Qwest will be unable to comply with the joint marketing requirements in the future.

126. Testimony from Qwest witnesses suggests that a critical component of Qwest's joint marketing is to offer long distance services from QCC to "inbound" *local* service customers of the Qwest BOC.[203] Commerce cites figures indicating that Qwest can reach over 20,000 new customers per month with this marketing message.[204] Due to the market reach of this method of customer contact, Commerce asserts that additional requirements beyond the federal standards should be placed upon Qwest's ability to jointly market services.

127. Commerce has suggested that states, on their own authority, may place more stringent competitive requirements on a BOC than those of the federal statute or the FCC, and that the State has the authority to enforce those requirements.[205] The Department cites Section 253(b) as support for this position, which states:

> (b) STATE REGULATORY AUTHORITY—Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.[206]

128. The FCC has found, in the *Non-Accounting Safeguards Order*, that in the event that the FCC determines that the BOC has complied with Section 271, a state Commission has the authority to impose any requirements it deems necessary short of delay or denial of entry into the intrastate interLATA market.[207] The FCC held that:

> For all of the reasons discussed above, we conclude that sections 271 and 272, and the Commission's authority thereunder, apply to intrastate and interstate interLATA services provided by the BOCs or their affiliates. We hold, therefore, that the rules we establish to implement section 272 are binding on the states, and the states may not impose, with respect to BOC provision of intrastate interLATA service, requirements inconsistent with sections 271 and 272 and the Commission's rules under those provisions. In this regard, based on what we find is clear congressional

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[203] Ex. 12, pp. 21-24; Ex. 1, pp. 31-33.

[204] "Qwest Quarterly Service Settlement Report," a monthly report regarding Minnesota customers, as required by the Commission's *Order* in *Qwest Corporation's Alternative Form of Regulation (AFOR) Service Quality Plan*, Docket No. P-421/AR-97-154, filed November 15, 2001. With billing and collection calls and service calls, the number of customer contacts rises to over 400,000 per month. But the larger number is not very useful for assessing marketing impact, since the circumstances of the contact may not be conducive to effectively selling long distance services.

[205] Exhibit 35, p. 13.

[206] 47 U.S.C. § 253(b).

[207] *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, 21929.

intent that the Commission is authorized to make determinations regarding BOC entry into interLATA services, we reject the suggestion by the Wisconsin Commission that, after the Commission has granted a BOC application for authority under section 271, a state nonetheless may condition or delay BOC entry into intrastate interLATA services.[208]

129. Qwest maintains that any action taken by the MPUC must be "competitively neutral" to comply with the *Non-Accounting Safeguards Order.* The action proposed by the Department of Commerce is to limit the information that the Qwest BOC may provide to callers when provisioning local telephone service. Such a limitation was entered in 1996 when the Bell System was broken up into seven RBOCs and ATT provided intraLATA telephone services in competition with other providers.[209]

130. The FCC has explicitly addressed what a BOC may state in jointly marketing interLATA telephone services. The FCC stated:

> We agree with BellSouth and Ameritech that a BOC, during an inbound telephone call, should be allowed to recommend its own long distance affiliate, as long as it contemporaneously states that other carriers also provide long distance service and offers to read a list of all available interexchange carriers in random order. In the Non-Accounting Safeguards Order, the Commission stated that the BOCs' existing obligation to provide any customer who orders new local exchange service with the names and, if requested, the telephone numbers of all of the carriers offering interexchange services in its service area in random order was not incompatible with the BOCs' right to joint market. The Commission concluded that a BOC could market its affiliate's long distance services to inbound callers as long as the BOC also informed those customers of their right to select the interexchange carrier of their choice and provided the names and numbers of all interexchange carriers in random order. Thus, the Non-Accounting Safeguards Order sought to balance a BOC's continuing equal access obligations pursuant to section 251(g) with the right of a BOC and its affiliate to market services jointly under section 272(g).[210]

131. The FCC identified the approach in the *BellSouth South Carolina Order* as a "safe harbor, so that the BOCs will have some guidance on what we view as consistent with sections 251(g) and 272."[211] The Department of Commerce has not identified how its proposed limitations on Qwest's marketing scripts can be applied in a

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[208] *Non-Accounting Safeguards Order*, para. 47.
[209] *In the Matter of an Investigation into IntraLATA Equal Access and Presubscription*, Minnesota PUC Docket No. P-999/CI-87-697, *Order Denying Reconsideration and Clarifying Order*, April 2, 1996, at 6.
[210] *Application of BellSouth Corporation, et al. to Provide In-Region, InterLATA Services in South Carolina*, Memorandum Opinion and Order, para. 237 (December 24, 1997)(*BellSouth South Carolina Order*).
[211] *Id.*, para. 236.

competitively neutral fashion. The proposed limitation is beyond the authority of the MPUC in the context of this 271 application.[212]

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Minnesota Public Utilities Commission and the Administrative Law Judge have jurisdiction over the subject matter of this hearing pursuant to Minn. Stat. §§14.57-.62 and 216A.05 and Minn. R. 1400.5100-.8300.

2. The Minnesota PUC gave proper notice of the hearing in this matter, has fulfilled all relevant substantive and procedural requirements of law or rule and has the authority to take the action proposed.

3. As the party proposing that certain action be taken, Qwest must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard.[213] According to the FCC, the BOC at all times bears the burden of proof of compliance with section 271, even if no party challenges its compliance with a particular requirement.[214] As the Party proposing the action in this proceeding, Qwest has the burden of establishing facts supporting its proposals by a preponderance of the evidence. Similarly, any other Party advocating an affirmative proposal has the burden of proving that proposal by a preponderance of the evidence.[215] A party asserting an affirmative defense shall have the burden of proving that the defense by a preponderance of the evidence.[216]

4. Qwest has failed to demonstrate by a preponderance of the evidence that its 272 Affiliate (QCC) will operate independently from the Qwest BOC, in accordance with Section 272(b)(1).[217]

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[212] Should the MPUC conclude that joint marketing between all LECs and IXCs should be regulated, restrictions could be crafted on a competitively neutral basis. But a fuller record would need to be established to determine the proper extent of such regulation, beyond that developed in this proceeding.

[213] Minn. R. 1400.7300, subp. 5.

[214] *Application by SBC Communications Inc., Southwestern Bell Tel. Co., 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*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18374, para. 46 (2000) (*SWBT Texas Order*); *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3972 para. 46 (1999) (*Bell Atlantic New York Order*), *aff'd, AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

[215] Minn. R. 1400.7300, subp. 5.

[216] Minn. R. 1400. 7300, subp. 5.

[217] To obtain Section 271 approval, the BOC must show that its 272 affiliate is "operating independently" from the BOC. The FCC has determined that operating independently is a term of art with a special meaning for telecommunications companies. The term is construed to mean no joint ownership of telecommunications switching and transmission facilities and the land or buildings that hold those facilities. Qwest has the obligation to show that it will meet this requirement. But the record is lacking in

(Footnote Continued on Next Page)

5. Qwest has failed to demonstrate by a preponderance of the evidence that the 272 Affiliate will have separate officers, directors, and employees from the Qwest BOC of which it is an affiliate, in accordance with Section 272(b)(3).

6. Qwest has demonstrated by a preponderance of the evidence that the 272 Affiliate will not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Qwest BOC, in accordance with Section 272(b)(4).

7. Qwest has failed to demonstrate by a preponderance of the evidence that the 272 Affiliate will conduct all transactions with the Qwest BOC on an arm's length basis with any such transactions reduced to writing and available for public inspection, in accordance with Section 272(b)(5).

8. Qwest has failed to demonstrate by a preponderance of the evidence that the Qwest will comply with the joint marketing requirements in Section 272(g), since the descriptions of work performed under the Joint Marketing Work Order are insufficient to notify competing IXCs of what joint marketing services are available.

9. Qwest has failed to demonstrate by a preponderance of the evidence that the Qwest BOC, in its dealings its 272 Affiliate, will not discriminate between the 272 Affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards, in accordance with Section 272(c) in the areas of the handling of confidential information and the availability of services to competing IXCs on the same terms as the 272 Affiliate.

10. Any of the above Findings of Fact more properly considered Conclusions of Law are hereby adopted as such, and any Conclusions of Law more properly considered Findings of Fact are hereby adopted as such.

NOTICE

THIS REPORT IS NOT AN ORDER AND NO AUTHORITY IS GRANTED HEREIN. THE PUBLIC UTILITIES COMMISSION WILL ISSUE THE ORDER OF AUTHORITY WHICH MAY ADOPT OR DIFFER FROM THE FOLLOWING RECOMMENDATIONS.

(Footnote Continued From Previous Page)
an affirmative demonstration that no such joint ownership exists. The record does show that the allocation of facilities to QCC from QC is ongoing. Therefore it is impossible to conclude that the final allocation of assets actually demonstrates that QCC will operate independently from QC. The ALJ accepts that Qwest intends to comply with the "operating independently" requirement of Section 272(b)(1). But Qwest has the burden to show that it will comply. Lacking an inventory of facilities and land, Qwest cannot meet its burden.

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

RECOMMENDATION

IT IS RECOMMENDED that the Minnesota Public Utilities Commission:

1. Include in its Order in this proceeding a determination that Qwest has failed to meet the requirements set forth in 47 U.S.C. § 272; and

2. Include in its Order a determination that Qwest could meet the requirements set forth in 47 U.S.C. § 272 by modifying the relationships among Qwest Communications International, Inc. (QCI), its wholly-owned subsidiary Qwest Services Corporation (QSC), and QSC's wholly-owned subsidiaries, Qwest Corporation (QC) and Qwest Communications Corporation (QCC) as follows:

   a. QCC shall provide an inventory of the telecommunications switching and transmission facilities it owns, and identify the land and buildings in which such facilities are located, prior to receiving 271 authorization. QCC shall ensure that none of the facilities, land or buildings are jointly owned with QC.

   b. QCC shall provide more complete postings of transactions that identify the services being provided. Inadequate postings such as the *Joint Marketing Work Order* will be reposted with the detail needed to describe adequately the services provided.

   c. Transfers of employees between QC and QCC shall cease on the date that QCC receives 271 authorization. Any employee of one of these corporations that will be working for the other must formally terminate employment with the prior employer before formally entering employment with the subsequent employer.[218] At the time of termination, the employee will execute a confidentiality agreement that expressly precludes the use of the former employer's confidential information with the subsequent Qwest-affiliated employer. Qwest shall modify its code of conduct to clarify that QCC is to be treated as a third party, not "Qwest" or "us."

   d. Qwest shall maintain a log of employee movement between all of its affiliated entities. The log shall identity each employee's job title and length of service for each affiliated employer. The log shall be

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[218] The formal termination of employment does not require any change in employee benefits or recalculation of seniority, if the benefit plans of QC and QCC are obtained from a single source and are otherwise transferable.

in the form of a database that can be searched by employee name, employer name, and length of service with employer.

e. Qwest shall modify its information systems to isolate all employees of both the Qwest BOC and QCC from confidential information that is not in the possession of those employees' payroll employer. Access to confidential information by any other Qwest entity shall be afforded on a limited basis to assure that access to such information is not provided on a discriminatory basis to the 272 Affililate. Identifiers, such as email addresses, shall readily identify the employer of the email addressee.

f. Qwest shall revoke its proposed employee loan policy and replace that policy with a statement that reaffirms that the employees of QC and QCC are separate and that supervision can only come from the actual employer of the employee. The statement shall also include a mechanism whereby violations of the policy can be reported anonymously. Qwest shall maintain a record of the complaints received, all pertinent information regarding each complaint, and the action taken in response to each complaint.

g. QSC shall institute a policy that any of its employees providing services that involve a confidential relationship shall provide services to either QC or QCC, but not both. QSC shall institute procedures to ensure that employees providing such services are identified by recipient of the service. QSC shall incorporate this provision into its service agreements with QC and QCC that expressly require QSC to treat the information of each affiliate as confidential from the other. Such treatment extends to employees of either affiliate who transfer to QSC and employees of QSC who transfer to either affiliate.

h. QC and QCC shall maintain timely entry of billing for services to each other and shall strictly enforce the penalty for late payments.

i. Qwest shall reorganize the management structure of QCC to eliminate commonality between officers and directors. No officer or director of QCC shall hold an employee, officer, or director position with either QSC or QCI. Qwest shall not establish a management reporting structure that that permits the 272 Affiliate to obtain confidential information that is not made available to competing IXCs on a nondiscriminatory basis.

j. Qwest shall terminate any contract or work order that provides management or supervisory services from either QC or QCC to the other.

k. Qwest shall commit to business relationships between the 272 Affiliate (QCC) and the Qwest BOC (QC) to treat each entity as separate corporations acting at arm's length. Qwest shall not convey any expectation, express or implied, that the interests of the 272 Affiliate are not to be pursued using the best business judgment of the directors and officers of QCC.

Dated this _14th_ day of March, 2002.

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

Reported: Shaddix and Associates
Bloomington, Minnesota
Transcript prepared, Two Volumes

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Qwest has made significant efforts to transform its existing out-of-region, facilities-based interLATA carrier, QCC, into a 272-compliant affiliate to meet the needs of the Qwest BOC's 271 application. This transformation effectively began in January 2001 and is ongoing. But Qwest must demonstrate QCC's compliance with Section 272 in order to obtain approval for entry into the in-region interLATA market. Some modifications, such as the transformation of the accounting system to accomplish complete and timely posting of transactions, are necessarily going to take time to complete. Past noncompliance in such areas is not critical to the issues of future compliance. The ALJ has found that Qwest has met its burden there.

Other aspects of the QCC transformation are more problematic. Qwest has made certain choices with respect to confidential information that render nondiscrimination difficult absent stringent separation at the employee, officer, and director points of contact between QCC and the other members of Qwest's "family of companies." The corporate management structure proposed by Qwest does not allow for such separation. That corporate structure also makes arm's length transactions more an aspiration than an achievable goal. Qwest must show that its future operations will actually meet both these requirements before its 271 application should be granted.

Arm's length transactions are not accomplished merely by stating that each transaction is at arm's length. The testimony in this proceeding is unequivocal regarding how Qwest intends to treat transactions between QCC and the Qwest BOC:

> As affiliates, the 272 affiliate and BOC have unique financial and business responsibilities and obligations to their boards of directors and ultimately to their shareholders, notwithstanding section 272 requirements.[219]

In an arm's length transaction, there is no "unique relationship" that would require anything other than the normal exercise of business judgment. To comply with the arm's length requirement of Section 272(b)(5), QCC should anticipate dealing with the Qwest BOC on the same footing as ATT, WorldCom or any other IXC. Transforming the approach taken to arm's length transactions at each point of contact between the Qwest BOC and QCC will address most of the issues raised in this proceeding.

ATT asserted that instances of past noncompliance compel the conclusion that Qwest will not comply with Section 272 in the future. Qwest maintained that past noncompliance is not relevant to future compliance, because processes have been adopted to assure that the requirements of Section 272 will be met. The ALJ has not relied on past noncompliance in making these findings. Qwest's processes have been assessed to determine if they will result in future compliance using the standards set out by the FCC and in relevant caselaw. Where those processes are inadequate, changes have been suggested to address those shortcomings.

The need for independent management and operations between a BOC and its 272 affiliate has been clearly stated by the FCC. The record in this matter contains ample information regarding how Qwest's business operations can be structured to comply with Section 272. The suggestions made in the Recommendation are the ALJ's assessment of what modifications can be made to Qwest's proposed structure of QCC to conform the operation of the affiliate to the structural separation requirements of Section 272. These suggestions are not the only means of addressing these issues. The ALJ expects that the parties will make their own suggestions to the MPUC as to what modifications are necessary and appropriate.

R.C.L.

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[219] Ex. 12, p. 17.

EXHIBIT C

Exhibit C

NOV 26 2001

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF QWEST CORPORATION'S SECTION 271 APPLICATION AND MOTION FOR ALTERNATIVE PROCEDURE TO MANAGE THE SECTION 271 PROCESS

Utility Case No. 3269

ORDER REGARDING *FACILITATOR'S REPORT ON CHECKLIST ITEM 2 (ACCESS TO UNBUNDLED NETWORK ELEMENTS), CHECKLIST ITEM 4 (ACCESS TO UNBUNDLED LOOPS), CHECKLIST ITEM 5 (ACCESS TO UNBUNDLED LOCAL TRANSPORT) AND CHECKLIST ITEM 6 (ACCESS TO UNBUNDLED LOCAL SWITCHING)*

THIS MATTER comes before the New Mexico Public Regulation Commission (the "Commission") in the above-captioned proceedings initiated by Qwest Corporation ("Qwest") for our evaluation of Qwest's forthcoming application with the Federal Communications Commission ("FCC") for authority to provide in-region, interLATA service originating in the state of New Mexico. To be eligible to provide in-region, interLATA services, Qwest must satisfy the competitive checklist and other requirements of section 271 of the Communications Act, as amended.[1]

This *Order*, the fourth in a series of interim orders in this case,[2] addresses the nature and current status of Qwest's compliance with the following section 271 checklist items: 2 (Access To Unbundled Network Elements), 4 (Access To Unbundled Loops), 5 (Access To Unbundled Local Transport) and 6 (Access To Unbundled Local Switching).

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[1] The Communications Act of 1934, as amended, by the Telecommunications Act of 1996, is referred to hereafter as the "Act."

[2] The Commission issued its first interim order in this series, Order Regarding "Paper Workshop" Report, *Report on Checklist Items 1, 2, 5, 9, 10, and 12* (*Order Regarding Paper Workshop Report*), on July 31, 2001. The Commission issued its second interim order, *Report on Checklist Items 1, 11, 13 and 14* (*Order Regarding Workshop One Report*), on September 18, 2001. The Commission issued the third interim order, *Order Regarding Emerging Services Report*, on October 16, 2001.

The Multi-State Proceeding participants addressed checklist items 2, 4, 5 and 6 through written testimony, comments, briefs, as well as the in-person "Workshop Three" proceedings conducted by the Facilitator retained by the seven states participating in the Multi-State Proceeding. Qwest filed its "Seven" SGAT for the checklist items in issue on May 30, 2001.[3] The Facilitator issued his *Facilitator's Report on Checklist Item 2 (Unbundled Network Elements), Checklist Item 4 Access to Unbundled Loops, Checklist Item 5 (Access to Unbundled Local Transport) and Checklist Item 6 (Access to Unbundled Local Switching)* (*UNE Report*) on August 20, 2001.[4]

In the *UNE Report*, the Facilitator reviewed the issues raised by the participants, identified those issues resolved during the workshop process as well as the issues remaining in dispute, and recommended resolutions for those issues remaining in dispute at the close of Workshop 3. Several Multi-State Proceeding participants, including Qwest, AT&T Communications of the Mountain States, Inc. ("AT&T") and the Commission's Utility Division Staff ("Staff"), filed "10-day" comments in response to the *UNE Report*. Furthermore, pursuant to the Commission's *Amended Third Procedural Order* in this docket, Qwest and Staff subsequently filed Commission-specific briefs. No party requested oral argument before the Commission regarding the *UNE Report*. Having reviewed the *UNE Report*, the parties' comments and briefs regarding the *UNE Report's* recommendations, the record concerning this matter generally, and being otherwise fully advised, the Commission **FINDS AND CONCLUDES:**

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[3] As set forth in the *Order Regarding Paper Workshop Report*, at 7-10 and 26-27 and as incorporated by reference in the subsequent orders issued in this docket, the procedures and rules for Commission consideration of post-report SGAT comments apply to all of the issues addressed in the *UNE Report* as well as all of the Facilitator's subsequent reports.

[4] The *UNE Report* and its appendices, including Qwest's Seven SGAT for checklist items 2, 4, 5 and 6 are available at http://www.uswestmultistate.com/proceeding_index_1.htm, the Internet website established for the Multi-State Proceeding, under the "Group 4 Reports - UNEs, 8/20/01" subheading found on that Web page. Also available at that link are the participants' Multi-State Proceeding filings with respect to these checklist items as well as the transcripts of the

I. Checklist Item 2 – Access to Unbundled Network Elements (UNEs)

1. Access or interconnection offered by a BOC to other telecommunications carriers meets the requirements of section 271 only if that access includes "[n]ondiscriminatory access to network elements in accordance with sections 251(c)(3) and 252(d)(1)."[5]

2. Section 251(c)(3) provides that incumbent LECs such as Qwest have the duty:

> [T]o provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.[6]

3. The Facilitator divided his analysis of checklist item 2 issues into the categories of "UNEs Generally" (or "general UNE issues") and "UNE Platform and Other Combinations" ("UNE-P/Combinations"). We will adhere to the same format in our consideration of checklist item 2.

A. General UNE Issue Deferred to Another Workshop

4. The Facilitator deferred one issue, the *Bona Fide Request Process*, to the General Terms and Conditions Workshop as he considered the issue to be "of general applicability to the SGAT."[7] The Commission consequently will address the *Bona Fide Request Process* in our

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workshops. The *UNE Report* is also available for examination at the offices of the Commission (224 East Palace Avenue, Santa Fe, NM 87501, telephone: (505) 827-6940).

[5] 47 U.S.C. § 271(c)(2)(B)(ii) (incorporating by reference 47 U.S.C. §§ 251(c)(3) and 252(d)(1)).

[6] *Id.* § 252(c)(3).

[7] *UNE Report*, at 16.

subsequent consideration of the *Facilitator's Report on Group 5 Issues: General Terms and Conditions, Section 272, and Track A (Group 5 Report)*.

B. General UNE Issues Resolved During Workshop Three

5. The Facilitator determined that the following general UNE issues were fully resolved during Workshop Three and should be considered closed:

1) *Definitions*;
2) *UNE Use Restrictions*;
3) *UNE Testing*;
4) *UNE Provisioning Intervals*;
5) *Notice of Changes Affecting UNE Transmission Parameters*;
6) *Construction Charges for Ancillary and Finished Services*;
7) *Unbundled Customer Controlled Rearrangement Element (UCCRE)*;
8) *UNE Demarcation Points*;
9) *Access to Newly Available UNEs and UNE Combinations*; and
10) *Information Access When Customers Change Service Providers*.[8]

6. The Facilitator further concluded that three general UNE issues should be considered resolved for purposes of the *UNE Report*, but certain aspects of the issues would be subject to later consideration in the General Terms and Conditions Workshop or referred to other proceedings such as state cost dockets; these issues are: *Changes in Law Regarding Access to UNEs*, *General Obligation to Provide UNE Access*, and *Miscellaneous Charges*.[9]

7. Finally, the Facilitator concluded that two general UNE issues should be considered closed in part with the remaining disputed aspects of each issue addressed as disputed issues in the *UNE Report*; these issues are: *UNE Demarcation Points* and *UNE Rates*.

8. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing in the parties' post-*UNE Report* briefing and having hereby found and concluded that

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[8] *Id.* at 16-20

[9] *Id.* at 16-18

the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 2, the Commission accepts and adopts the Facilitator's recommendations respecting the fifteen resolved general UNE issues.

C. General UNE Issues Decided in Earlier Workshops

9. The Facilitator found three general UNE issues sufficiently similar to certain issues decided in previous workshops that the prior decisions should govern their resolution here. The three general UNE issues deemed to have been previously resolved include: *Including LIS in the Definition of Finished Services*, *Marketing During Misdirected Calls* and *Regeneration Charges*.[10]

10. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing in the parties' post-*UNE Report* briefing and having hereby found and concluded that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 2, the Commission accepts and adopts the Facilitator's recommendations respecting the three formerly decided general UNE issues. As previously ordered by the Commission,[11] Qwest is directed to revise its SGAT to include the specific language proposed by the Facilitator in resolving *Marketing During Misdirected Calls*.

D. General UNE Issues Remaining in Dispute

11. Three general UNE issues remained at impasse at the conclusion of Workshop Three.[12]

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[10] *Id.* at 20-21.

[11] *See Order Regarding Workshop One Report*, at 66.

[12] *UNE Report*, at 21-31.

1. Disputed issue no longer in controversy

12. One issue, *Commingling UNEs and Tariffed Services on the Same Facilities*, is no longer in dispute as no party contested the Facilitator's resolution in its post-*UNE Report* briefs. Concerning this issue, the Facilitator concluded that Qwest's Frozen SGAT required language changes and proposed further specific language changes.[13] Qwest does not object to the proposed changes and notes further that it has altered its SGAT in conformity with the Facilitator's recommendations.[14]

13. The Commission finds and concludes that the Facilitator's recommendation is appropriate, reasonable and resolved in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 2. Therefore, the Commission adopts and accepts the Facilitator's resolution respecting *Commingling UNEs and Tariffed Services on the Same Facilities* and directs Qwest to amend SGAT § 9.23.1.2.2 as recommended by the Facilitator.[15]

2. Disputed issues still in controversy

Disputed Issue 1 – *Construction of New UNEs*

14. The first disputed general UNE issue actually calls into question two matters the Facilitator addressed separately: (i) the obligation to build new UNEs and (ii) the obligation to add electronics to dark fiber.

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[13] *Id.* at 28-29.

[14] Qwest Corporation's Comments On The Facilitator's Report On Checklist Item 2 (Access To Unbundled Network Elements), Checklist Item 4 (Access To Unbundled Loops), Checklist Item 5 (Access To Unbundled Local Transport) And Checklist Item 6 (Access To Unbundled Local Switching) ("Qwest's Comments"), at 9.

[15] *UNE Report*, at 29.

Obligation to Build New UNEs

15. The Facilitator observed that since Qwest has agreed to construct new facilities for the provision of UNEs to CLECs' under Qwest's carrier-of-last-resort obligations, this issue goes to determining whether, even where Qwest has no retail obligation to build, it should nevertheless be required to construct new facilities to provide UNEs and, if so, whether such construction should be at TELRIC prices.[16]

16. The Facilitator resolved the matter by concluding that incumbent LECs are under no obligation to build UNEs where none existed before:

> In essence, asking that Qwest be required to provide new construction is tantamount to requiring Qwest to risk investment in new facilities. Nothing in the Act or in the rulings of the FCC suggests that promoting competition requires altering the normal risks of new investments.[17]

17. AT&T contends the Facilitator framed the issue incorrectly. According to AT&T, at issue is whether Qwest must build UNEs for CLECs under the same terms and conditions that Qwest would build network elements for itself (or its retail customers) at cost-based rates pursuant to section 252(d) of the Act. AT&T contends the Act and the FCC have imposed this obligation upon incumbent LECs.[18]

18. AT&T argues by negative inference that the obligation to build new UNEs exists because, while the FCC explicitly limited an incumbent LEC's obligation to provide interoffice facilities to existing facilities, the FCC placed no such limitation on the provision of other network

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[16] *Id.* at 24.

[17] *Id.*

[18] AT&T's Exceptions and Comments on Workshop Three Unbundled Network Element Report ("AT&T's Exceptions"), at 1-3.

elements, whether for rural or non-rural incumbent LECs.[19] AT&T also suggests that the FCC's ruling in the *Local Competition First Report and Order*[20] that incumbent LECs have an obligation to replace UNEs being provided to CLECs is essentially the same as an obligation build UNEs for CLECs.[21]

19. Qwest counters that neither the Act nor relevant FCC orders require Qwest to construct UNEs, including loops, for CLECs if no facilities currently exist that could provide those UNEs. Qwest asserts that Eighth Circuit held in *Iowa Utilities Board v. FCC*[22] that "subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network – not to a yet unbuilt superior one."[23] According to Qwest, a demand to construct facilities for UNE provisioning where none currently exist constitutes a demand for "superior" services and imposes an unlawful requirement that Qwest unbundle something other than its existing network.[24]

20. Qwest also disputes AT&T's interpretation of operative FCC orders. To this end, Qwest emphatically disputes AT&T's claim that certain FCC statements in the *UNE Remand Order*[25] create an "exception" for unbundled transport to a requirement that Qwest construct other UNEs for CLECs. Qwest points out that AT&T has cited no provision of the Act, no FCC rule, nor

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[19] *Id.* at 3.

[20] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, 15635, ¶ 268 (rel. Aug. 8, 1996) (*Local Competition First Report and Order*).

[21] AT&T's Exceptions, at 3.

[22] 120 F.3d 753, 813 (8th Cir. 1997), *rev'd on other grounds, AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

[23] Qwest's Proposed Findings, Conclusions and Final Recommendations on Checklist Item 2 (Access To Unbundled Network Elements), Checklist Item 4 (Access To Unbundled Loops), Checklist Item 5 (Access To Unbundled Local Transport) And Checklist Item 6 (Access To Unbundled Local Switching), ("Qwest's Proposed Findings") at 8-9.

[24] *Id.* at 9.

[25] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 15 FCC Rcd 3696 (rel. Nov. 5, 1999) (*UNE Remand Order*).

any other authority that would require construction of UNEs by an incumbent LEC in the first instance. Rebutting AT&T's argument by negative implication, Qwest's avers the *UNE Remand Order* provides an example of the type of obligation incumbent LECs are *not* required to undertake as opposed to creating, as AT&T claims, an "exception" for unbundled transport to the general rule imposing on incumbent LECs an obligation to build new UNEs.[26]

21. Qwest concludes by arguing that neither Congress nor the FCC has ever mandated that an incumbent LEC build new facilities to provide UNEs to a CLEC if the incumbent has no facilities in place. According to Qwest this is because, where an incumbent LEC has no facilities, an incumbent LEC is not "denying access" to existing facilities.[27]

22. Staff endorses the Commission resolution of this issue.[28]

23. We find unpersuasive AT&T's argument that incumbent LECs have an obligation to construct new UNEs, at a CLEC's request, where none previously existed. The FCC authority cited by AT&T simply does not support its conclusion. The manifest intent of the FCC in imposing the unbundling requirement was to prevent CLECs from being forced by incumbent LECs to immediately invest in *duplicative* facilities in order to compete for customers. The FCC concluded that such investment and building would likely delay market entry, postpone the benefits of local telephone competition for consumers, and result in a misallocation of societal resources.[29] Concerning modifications, the only operative FCC pronouncements pertain to the modification of *existing* facilities, as where the FCC observed, "Our definition of loops will in some instances

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[26] Qwest's Proposed Findings, at 10.

[27] *Id.* at 31.

[28] Staff's Proposed Findings, Conclusions And Interim Order On The Group 4 UNE Report ("Staff's Proposed Findings"), at 8.

[29] *See Local Competition First Report and Order*, 11 FCC Rcd at 15690, ¶ 378.

require the incumbent LEC to take affirmative steps to condition *existing* loop facilities to enable requesting carriers to provide services not currently provided over such facilities."[30]

24. In addition, our review of the FCC's discussion of its revised "*Necessary and Impair*" standards, as articulated in the *UNE Remand Order*,[31] persuades us that these standards comprise the controlling test employed for provisioning UNEs, rather than the nondiscrimination test advanced by AT&T. Given that *Necessary and Impair* is the relevant metric used to determine whether or not an obligation to build UNEs exists, and given the FCC's emphasis on the modification of existing networks and/or avoiding the duplication of existing network facilities, there is no convincing basis for concluding that a refusal to construct a UNE, where non previously existed, constitutes a violation of the Act or the intent of the FCC.

25. Our conclusion is buttressed by the following passage from the *UNE Remand Order*:

> Notwithstanding the fact that we require incumbent to unbundle high-capacity transmission facilities, we reject Sprint's proposal to require incumbent LECs to provide unbundled access to SONET rings. In the *Local Competition First Report and Order, the Commission limited an incumbent LEC's transport unbundling obligation to existing facilities, and did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use.* Although we conclude that an incumbent LEC's unbundling obligation extends throughout its ubiquitous transport network, including ring transport architectures, *we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use.*[32]

Therefore, given the governing standards, it strains credulity to argue impairment on the sole basis of not being provided a UNE that does not exist, either for an incumbent LEC's own use or a CLEC's.

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[30] *Id.* at 15692, ¶ 382 (emphasis added).

[31] *See, e.g.*, 15 FCC Rcd at 3720-3730, ¶¶ 41-61.

[32] 15 FCC Rcd at 3843, ¶ 324 (emphasis added).

26. AT&T broaches its additional apprehension that Qwest will not build new facilities for a CLEC, but then subsequently build the facilities for itself to serve a customer. The Commission believes AT&T's concern is unwarranted. For one thing, a CLEC could pre-empt Qwest's construction by building its own facilities to serve the customer(s) in question. Moreover, if Qwest pre-empts a CLEC's construction of new facilities, once Qwest constructs such facilities a CLEC could serve those customer(s) utilizing UNEs on what would then be Qwest's *existing* facilities.

27. For these reasons, the Commission concludes, as the Facilitator did, that an incumbent LEC is under no obligation to build UNEs where none previously existed. Therefore, except as expressly modified below, the Commission accepts and adopts the Facilitator's resolution of the *Obligation to Build New UNEs*.

28. As noted, however, the Commission will not adopt all of the Facilitator's findings in resolving this issue. In particular, the Commission does not endorse the Facilitator's conclusion that there is a "substantial risk that Qwest will not recover the actual costs" of building new UNEs under the approach proposed by AT&T.[33] As the Facilitator has observed in deferring issues to state cost dockets, he is not charged with addressing the setting of rates and he is not in a position to judge the adequacy of rates. The Facilitator's "substantial risk" surmise goes to a factual issue that can only be addressed through the painstaking and fact-intensive analysis called for in the process of establishing UNE rates in our cost docket, Utility Case No. 3495.[34]

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[33] *UNE Report*, at 24.

[34] Utility Case No. 3495 is captioned *In The Matter Of The Consideration Of Costing And Pricing Rules For OSS, Collocation, Shared Transport, Non-Recurring Charges, Spot Frames, Combination Of Network Elements And Switching*.

Obligation to Add Electronics to Dark Fiber

29. The installation of electronics on dark fiber is a subset of the preceding issue. The Facilitator found that Qwest was under no obligation to install electronics on dark fiber inasmuch as a CLEC can gain access to dark fiber and can install its own electronics to light it, using its rights of access to Qwest's poles, ducts, conduits, and rights of way.[35]

30. According to AT&T, Qwest must install electronics on dark fiber to provide dedicated transport.[36] Qwest responds that it does not have to light unused dark fiber and make it available as dedicated transport or replace the electronics to expand existing capacity to make unbundled dedicated interoffice transport available on the grounds that Qwest has no obligation to build UNEs.[37] To this end, Qwest maintains a request to add electronics that do not exist is tantamount to a request to build facilities that do not exist.[38] AT&T replies that Qwest is taking the FCC's statement that incumbent LECs do not have to build dedicated transport to extremes. AT&T argues at great length that it is entirely consistent with the FCC's rules to require Qwest to call dark fiber into service and to add the necessary electronics required to provide the dedicated transport requested by CLECs.[39]

31. Staff endorses the Facilitator's resolution of this issue.[40]

32. The Commission finds, as it did concerning the *Obligation to Build UNEs*, that AT&T's arguments do not comport with the FCC's stated intent and objectives. If it so desires, a

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[35] *UNE Report*, at 25-26.

[36] AT&T's Exceptions, at 9.

[37] Qwest's Proposed Findings, at 11-12.

[38] *Id.* at 11.

[39] AT&T's Exceptions, at 10-12.

[40] Staff's Proposed Findings, at 8.

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CLEC may obtain as a UNE a specific amount of transport capacity, DS3, for example. In this situation, the incumbent LEC provides both the fiber and the electronics. However, dark fiber, as a UNE defined by the FCC, is another matter entirely.

33. Concerning dark fiber, the FCC found in the *UNE Remand Order* that, "[b]ecause dark fiber is unused transport capacity... it is 'a feature, function, and capability of facilities used to provide telecommunications services.'"[41] The FCC further found that "[a]lthough particular dark fiber facilities *may not be 'lit' they constitute network facilities dedicated for use in the provision of telecommunications service, as contemplated by the Act.*"[42] These findings contributed to the FCC's decision to modify its "...definition of the loop network element to include all features, functions, and capabilities of the transmission facilities, including dark fiber and attached electronics..."[43] and to make "...explicit that dark fiber and loop conditioning are among the 'features, functions and capabilities' of the loop."[44]

34. Consequently, the FCC modified the definition of dedicated transport to include dark fiber:

> Dark fiber is deployed, unlit fiber optic cable that connects two points within the incumbent LEC's network. As discussed above, dark or "unlit" fiber, unlike "lit" fiber, does not have electronics on either end of the dark fiber segment to energize it to transmit a telecommunications service. *Thus, dark fiber is fiber which has not been activated through connection to the electronics that "light" it and render it capable of carrying telecommunications services.*[45]

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41 *UNE Remand Order*, 15 FCC Rcd at 3844, ¶ 326.

42 *Id.* at 3845, ¶ 327 (emphasis added).

43 *Id.* at 3772, ¶ 167.

44 *Id.* at 3373 n.301.

45 *Id.* at 3844, ¶ 325 (emphasis added).

Finally, the FCC proceeded to find, "...dark fiber *meets the statutory definition of a network element*, and therefore is included within the definition of the dedicated interoffice transport network element."[46]

35. The Commission's reading of the FCC's *UNE Remand Order* leaves no doubt that an incumbent LEC is under no obligation to install electronics on dark fiber, which manifestly is a network element in its own right. Accordingly, consistent with our conclusion respecting the *Obligation to Build UNEs, supra*, the Commission accepts and adopts the Facilitator's resolution concerning the obligation to add electronics to dark fiber.

Disputed Issue 2 – *OSS Testing*

36. AT&T raises substantial concerns about the lack of SGAT language to address the testing it considers necessary to address the effectiveness of Qwest's operational support systems ("OSS") to support large-scale market entry by CLECs.[47]

37. The Facilitator resolved this issue, in part, by deferring consideration of Qwest's provisioning of a stand-alone test environment[48] to the Regional Oversight Committee ("ROC") third-party OSS test based on Qwest's commitment to have an evaluation conducted "in the

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[46] *Id.* at 3844, ¶ 326 (emphasis added).

[47] AT&T's Exceptions, at 13-19.

[48] The stand-alone test environment is a test setting that mirrors the production setting. The FCC has held that "Competing carriers need access to a stable testing environment to certify that their OSS will be capable of interacting smoothly and effectively with Bell Atlantic's OSS as modified. *In addition, prior to issuing a new software release or upgrade, the BOC must provide a testing environment that mirrors the production environment in order for competing carriers to test the new release.* If competing carriers are not given the opportunity to test new releases in a stable environment prior to implementation, they may be unable to process orders accurately and unable to provision new customer services without delays." *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*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, 4002-4003, ¶ 109 (rel. Dec. 22, 1999), (*Bell Atlantic New York Order*), *aff'd, AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) (emphasis added; footnotes omitted).

immediate term."[49] The Facilitator also proposed language for SGAT § 12.2.9.3.5 that would provide for testing beyond that already contemplated in the SGAT, such as, for example, a major CLEC product or service roll-out or change in customer relationship management systems.[50] The Facilitator also found that, subject to the revised § 12.2.9.3.5 he proposed and subject to his acceptance of Qwest's objections to AT&T's changes to §§ 12.2.9.3.1 through 12.2.9.3.4 (itemized at page 30 of the *UNE Report*), AT&T's other requested changes to § 12.9.2.3 and its subparts (as shown in WS3-ATT-MFH-2) should be incorporated into the SGAT.[51]

38. Staff endorses the Facilitator's resolution of this issue.[52]

39. AT&T maintains the SGAT presently does not contain any language on testing of Qwest and CLEC OSS and interfaces. AT&T acknowledges that, in response to concerns raised by AT&T regarding the lack of testing language and the failure of Qwest to provide a test environment that mirrors the production environment, Qwest proposed remedial language to be included in the SGAT, but that its language amounts to nothing more than an insufficient "paper promise."[53] AT&T also proposed testing language that is more comprehensive than Qwest's proposal and makes changes to the language proposed by Qwest.[54] AT&T asserts its proposal is necessary in order to ensure that CLECs are provided with a specific contractual right enforceable through complaint proceedings before state commissions.[55]

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[49] *UNE Report*, at 30.

[50] *Id.* at 31.

[51] *Id.* at 30-31.

[52] Staff's Proposed Findings, at 8-9.

[53] AT&T's Exceptions, at 15.

[54] *Id.* at 13.

[55] *Id.*

40. AT&T also contends that a stand-alone test environment is necessary to satisfy compliance with checklist item 2, should be incorporated in the SGAT, and the Commission should reject any finding of compliance with checklist item 2 until a stand-alone test environment is, in fact, available.[56] AT&T further argues that the language contained in Qwest's SGAT concerning testing proposals do not permit CLECs to test whether the Qwest systems and interfaces, and CLEC systems and interfaces built to Qwest's specifications, work as contemplated in a commercial setting in commercial volumes because Qwest's proposed language does not permit this type of testing. According to AT&T, its proposed language allows for such testing.[57]

41. AT&T further argues that the ROC test is insufficient for the type of large scale carrier-to-carrier testing that AT&T seeks and does not test AT&T's interfaces and OSS that have been built on Qwest's documentation.[58] For this reason, AT&T takes issue with the Facilitator's resolution. In particular, AT&T is concerned that the Facilitator's decision to defer the stand-alone testing environment matter flies in the face of the FCC's holding that the provision of such testing is necessary for section 271 relief. AT&T also disputes the Facilitator's finding that AT&T's language for comprehensive production testing for large scale-market entry "could prove disruptive to the OSS test procedures underway."[59]

42. According to AT&T, there is no evidence that the Minnesota test currently underway has disrupted the ROC third-party test. AT&T argues, moreover, that the Facilitator's language for § 12.2.9.3.5 makes testing more difficult and ignores past problems encountered by AT&T. For

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[56] *Id.* at 15.

[57] *Id.*

[58] *Id.* at 17.

[59] *UNE Report*, at 30; AT&T's Exceptions, at 18.

example, instead of the SGAT spelling out specific test language, a CLEC and Qwest must negotiate test language. AT&T urges us to adopt its specific, comprehensive test language because Qwest refused for months to conduct a comprehensive test in Minnesota, although the interconnection agreement approved by the Minnesota commission contained language permitting such a test. AT&T also takes exception with the Facilitator's imposition of all testing costs on the CLEC, averring there is no reason why each party should not bear its own costs.[60]

43. AT&T concludes by urging the Commission reject the Facilitator's resolution, including his proposed SGAT language in favor of AT&T's proposal.[61]

44. Qwest agrees with the language changes proposed by the Facilitator and urges the Commission to accept the Facilitator's resolution with the addition of a Qwest-proposed clarification to SGAT § 12.2.9.3.5 to include the phrase "in addition to the testing set forth in § 12.2.9.3."[62]

45. Qwest argues that AT&T's proposed language for § 12.2.9.3.5 would impose a prescriptive approach to comprehensive testing that would not allow for negotiation between Qwest and CLECs with respect to test scope, conditions, or payment responsibility.[63] Qwest further maintains that it responded to AT&T's concerns about a lack of SGAT language to address the testing it considered necessary to address the effectiveness of Qwest's OSS to support large-scale market entry by CLECs by proposing SGAT § 12.2.9.3 in Exhibit WS3-QWE-KAS-7.[64] Qwest

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[60] *Id.* at 18-19.

[61] *Id.* at 19.

[62] Qwest's Proposed Findings, at 14-15.

[63] *Id.* at 13-14.

[64] *Id.* at 12.

additionally asserts that AT&T's detailed proposal for comprehensive production testing is unnecessary and duplicative.[65]

46. Our review of the record in this proceeding leaves us with the firm conviction that the ROC third party testing of Qwest's OSS is and will continue to be rigorous and comprehensive. Furthermore, the Commission notes that parties will have another and, arguably, more substantive opportunity to address key aspects of this issue when Commission considers the CICMP testing results in reference to large-scale entry later in this proceeding. Moreover, some of Qwest's testing procedures will also be examined during the ROC OSS testing. When the time comes for the Commission to consider the CICMP and ROC OSS testing results, the parties should prepared to discuss in detail the scope of testing, including how the scope(s) proposed in this proceeding compare with those provided by BOCs that have heretofore received the FCC's authorization to provide in-regional interLATA services in other states.

47. Accordingly, the Commission finds that Facilitator's resolution appropriate, reasonable and resolved in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 2. Therefore, consistent with our oft-stated requirement that Qwest's compliance with this and other checklist items is contingent upon the receipt of a satisfactory report respecting germane ROC OSS testing results – and with one minor exception – we accept and adopt the Facilitator's resolution concerning *OSS Testing*. The change we make goes to the last sentence in the Facilitator's proposed language for SGAT § 12.2.9.3.5: "*Absent a finding that the test scope and activities address issues of common interest to the CLEC community, the costs shall be assigned to the CLEC requesting the test procedures.*" The recovery of OSS transition costs

[65] *Id.* at 13.

is topic that is more appropriately addressed in our cost docket where the issue of cost recovery can more fully be explored than it has been in the Multi-State Proceeding. Therefore, the Commission orders that the last sentence in the Facilitator's proposed language for SGAT § 12.2.9.3.5 be stricken from Qwest's SGAT. Replacement SGAT language shall await our resolution of the issue of recovery of OSS testing costs in the process of our consideration of the recovery of OSS costs in general in Utility Case No. 3495.

E. UNE-P/Combinations Issues Resolved During Workshop Three

48. The Facilitator determined that the following UNE-P/Combinations issues were fully resolved during Workshop Three and should be considered closed:

1) *Availability of Switch Features with UNE-Platforms*;
2) *Features Available with UNE-P-PBX, UNE-P-DSS, and UNE-P-ISDN*;
3) *Migrating from Centrex Services to UNE-P*;
4) *High Speed Data with UNE-P-POTs and UNE-P-ISDN*;
5) *Converting From Resale to UNE-P*;
6) *Definition of Access*;
7) *Restrictions on UNE Combinations*;
8) *Use Restrictions*;
9) *Non-Separation of Combined Elements*;
10) *"Glue" Charges for Combinations*;
11) *Ordering Equipment Ancillary to UNE Combinations*;
12) *Loop and Multiplexing Combinations*;
13) *CLEC Loop Terminations*;
14) *UNE Combination Forecasts*; and
15) *Delays From Loading CLEC Billing Rates into Qwest's Systems.*[66]

49. The Facilitator concluded that two UNE-P/Combinations issues should be considered closed in part with the remaining disputed aspects of each issue addressed as disputed issues in the *UNE Report* or a subsequent workshop; these issues are: *Restricting Available UNE Combinations* and *Combining Qwest Provided UNEs With Other Elements or Services.*

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[66] *UNE Report* at 31-35.

50. Finally, although placed in the category of "resolved" UNE-P/Combinations issues, concerning *Nonrecurring Charges* for UNE combinations the Facilitator observed, "[t]hese workshops have not included evidence in support of any particular charges; consideration of pricing issues has been generally deferred to separate cost dockets."[67] The Commission thus construes the Facilitator's resolution respecting *Nonrecurring Charges* as recommending deferral of the issue to state cost dockets.

51. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing in the parties' post-*UNE Report* briefing and having hereby found and concluded that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 2, the Commission accepts and adopts the Facilitator's recommendations respecting the respecting the eighteen resolved UNE-P/Combinations issues.

52. No UNE-P/Combinations issues remained in dispute at the close of Workshop Three.

F. Provisional Conclusion Regarding Compliance With Checklist Item 2[68]

53. Consistent with the foregoing findings and conclusions, the Commission provisionally concludes that Qwest be found in compliance with section 271(c)(2)(b)(ii) of the Act. However, the Commission's recommendation to the FCC regarding checklist item 2 is and shall be subject to (a) Qwest's continuing compliance with this *Order*, (b) Qwest modifying its SGAT in conformity with the abovementioned directions as well as the Commission's procedure for consideration of Post-Report SGAT revisions, and (c) the Commission's consideration of any and all

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[67] *Id.* at 38.

[68] *See infra* note 182 and accompanying text.

ROC OSS testing issues and Qwest Performance Assurance Plan ("QPAP") issues pertaining to checklist item 2.

II. Checklist Item 4 – Unbundled Loops, Line Splitting, and Network Interface Devices

54. Section 271(c)(2)(B)(iv) of the Act requires that Qwest and other BOCs provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[69] The FCC originally defined the loop as "a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises."[70] The FCC later modified the definition of the loop to include "all features, functions and capabilities of the transmission facilities, including dark fiber and attached electronics (except those used for the provision of advanced services, such as DSLAMs) owned by the incumbent LEC, between an incumbent LEC's central office and the loop demarcation point at the customer premises."[71]

55. *The UNE* Report also addressed two subsidiary issues as checklist item 4 issues: (i) line splitting (enabling competing carriers to provide both voice and data services over a single loop provided by an incumbent LEC)[72] and (ii) the network interface device ("NID").[73]

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[69] 47 U.S.C. § 271(c)(2)(B)(iv).

[70] *Local Competition First Report and Order*, 11 FCC Rcd at 15691, ¶ 380.

[71] *UNE Remand Order*, 15 FCC Rcd at 3772, ¶ 167.

[72] *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*, Memorandum Opinion and Order, CC Docket No. 00-65, 15 FCC Rcd 18354, 18515-18517, ¶¶ 323-329 (rel. June 30, 2000) (*SWBT Texas Order*).

[73] The NID is defined in the *UNE Remand Order* "to include any means of interconnection of customer premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device used for that purpose." 15 FCC Rcd at 3801, ¶ 233.

B. Unbundled Loops

1. Deferred loop issues

56. The Facilitator deferred two loop issues: *Accepting Loop Orders With "Minor" Address Discrepancies* and *Resolving Conflicts Between the SGAT and Parallel Documents*.[74] Resolution of these issues was deferred until, respectively, the completion of OSS testing and the General Terms and Conditions Workshop.[75] The Commission will address the deferred loop issues in accordance with the Facilitator's recommendations.

2. Loop issues resolved during Workshop Three

57. The Facilitator determined that the following loop issues were fully resolved during Workshop Three and should be considered closed:

1) *Definition of Loop Demarcation Point*;
2) *Digital versus Digital-Capable Loops*;
3) *Parity in Providing Unbundled Loops*;
4) *Limiting Available Analog Loop Frequency*;
5) *Method for Providing Unbundled IDLC Loops*;
6) *Choosing Loop Technology Types*;
7) *CLEC Authorization for Conditioning Charges*;
8) *Access to Loop Features, Functions, and Capabilities*;
9) *Charges for Unloading Loops*;
10) *DS1 and DS3 Loop Specifications*;
11) *Coordinated Installation*;[76]
12) *Limits on Loop Testing Costs*;
13) *Obtaining Multiplexing for Unbundled Loops*;
14) *Transmission Parameters*;
15) *CLEC/End User Disagreements about Disconnecting or Connecting Loops*;
16) *Qwest Access to Qwest Facilities on CLEC Customer Premises*;

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[74] *UNE Report*, at 36-37.

[75] AT&T expresses its concern about capturing "address validation problems that either have not surfaced or have not been resolved during the course of ..." ROC OSS testing. AT&T's Exceptions, at 20. AT&T nevertheless "has agreed to defer this issue to the ROC OSS test." *Id.*

[76] Although AT&T insists the Facilitator "completely misstates the [*sic*] AT&T's issue on coordinated installations and the negotiated outcome, AT&T nevertheless reports that given Qwest's addition of SGAT § 9.2.2.9.7, which is reflective of the "extensive amendment to AT&T's interconnection agreement that addressed coordinated installations and operational problems that AT&T had encountered", this issue can be considered "closed." AT&T's Exceptions, at 21.

17) *Points of CLEC Access to Unbundled Loops*;
18) *Relinquishing Loops on Loss of End Use Customers*;
19) *CLEC Right to Select From Available Loop Technologies*;
20) *Miscellaneous Charges*;
21) *Unforecasted Out-of-Hours Coordinated Loop Installations*;
22) *Overtime for Out-of-Hours Installations*;
23) *Proofs of Authorization*;
24) *ICB Intervals for Large Loop Orders*;
25) *Firm Order Confirmations*;
26) *Conditions Excusing Compliance With Loop Installation Intervals*; and
27) *Maintenance and Repair Parity*.[77]

58. AT&T maintains that two of the aforementioned issues, *Charges for Unloading Loops* and *Overtime for Out-of-Hours Installation* were not completely resolved during Workshop Three.

59. Regarding *Charges for Unloading Loops*, AT&T states that it objected to this charge in subsequent workshops "on the grounds that Qwest is already recovering the cost of conditioning in its UNE loop charge."[78] Consequently, AT&T contends the issue of *Charges for Unloading Loops* is a matter more appropriately addressed in a cost docket.

60. Qwest responds by pointing to the Facilitator's finding that the FCC, bolstered by a recent federal district court opinion, has explicitly determined that incumbent LECs may charge for conditioning loops of less than 18, 000 feet.[79] Qwest contends that inasmuch as AT&T did not raise its recovery argument during or upon the close of the Workshop Three proceedings, AT&T effectively forfeited its request for deferral of this matter to state cost dockets.[80] Thus, Qwest would have the Commission find that the cost of removing load coils and bridge taps is, as the Facilitator

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[77] *Id* at 37-47.

[78] AT&T's Exceptions, at 20.

[79] Qwest's Proposed Findings, at 18.

[80] *Id*

found, "a legitimate cost of doing business" that should be paid by "the CLEC" irrespective, apparently, of whether the incumbent LEC is or may be recovering the cost already in its loop rates.[81]

61. While the Commission generally looks askance at and specifically disapproves of belated attempts at broaching issues that should have been raised earlier in proceedings before us, we are not persuaded that such is the case in this instance, particularly given the manner in which the issue appears to have been framed in Workshop Three. The Commission also notes Qwest sidestepped AT&T's assertion that the cost of unloading or conditioning loops – a cost we agree should be borne by the party for whom such unloading or conditioning is done – is *already* being recovered by Qwest in its loop rates.[82] Therefore, the Commission agrees with AT&T that the cost recovery issue pertaining to conditioning or deloading loops should be referred to the Commission's cost docket, Utility Case No. 3495.

62. Regarding *Overtime for Out-of-Hours Installation*, AT&T points out the Facilitator did not address the issue it raised regarding the propriety of different and, presumably, higher Qwest

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[81] *Id. See UNE Report*, at 40.

[82] *See In the Matter of the Consideration of the Adoption of a Rule Concerning Costing Methodologies*, Phase II Order Reconsideration Order, Docket No. 96-310-TC, at 23, ¶ 105 (1999) ("Because this activity [*i.e.*, loop conditioning or deloading] will be performed to satisfy the requirements of a particular end-user, the Commission believes that it is appropriate to recover the customer specific costs from the customer who requested the activity. In response to AT&T's concern regarding the possibility of double recovery for loop conditioning, we note that the rate in Paragraph 208 of the *Phase II Order* was established with that concern in mind"); Supplemental Findings of Fact Conclusions of Law and Order ("*Phase II Order*"), Docket No. 96-310-TC, at 39, 40, ¶¶ 206, 208 (1998) (wherein at paragraph 206 the Commission observed, in pertinent part: "U S WEST already recovers the cost of loop conditioning through maintenance expenses it relies upon to calculate the recurring rate for the unbundled loop. U S WEST admits that an NRC imposed in addition to the loop charge would result in double recovery if the maintenance factors are not revised", and wherein at paragraph 208 the Commission found: "Because U S WEST's unloading and bridge tap NRC cost study is unreasonable and because the imposition of the proposed loop conditioning NRC results in double recovery, the Commission finds that the non-recurring charges for deloading or grooming should be determined in a two step process. First, the retail tariffed ISDN NRC rate should be reduced by the wholesale discount factor. The NRC for OSS should then be added to this product").

rates for installations occurring after 5 p.m.[83] AT&T thus avers the issue of when the "out-of-hours" rate is applicable should be deferred to state cost dockets. Qwest does not contest AT&T's point, observing only that "[i]f AT&T wishes to pursue this issue further, it should do so in [*sic*] appropriate cost proceeding."[84] The Commission agrees that the "out-of-hours" issue raised by AT&T should be taken up in our cost docket.

63. Apart from those issues raised by AT&T that are addressed above, no party took issue with the Facilitator's findings and conclusions respecting any of the other resolved loop issues.

64. The Facilitator concluded that five resolved loop issues should be considered closed in part with the remaining aspects of each issue addressed as disputed issues in the *UNE Report*, deferred for consideration in the General Terms and Conditions Workshop, or referred for consideration by each state in its cost docket; these issues are: *Offering High Capacity and Fiber Loops on an Individual Case Basis*, *Extension Technology to Give Loops ISDN Functionality*, *Installation Hours*, *Specifying Repair Intervals in the SGAT*, and *Responsibility for Repair Costs*.[85]

65. The Facilitator also listed two issues as resolved, but did not expressly label them as closed; these issues are: *Access to Digital Loops Where Available* and *Loop Installation Process*.[86] The Commission notes that AT&T raised both of these issues in Workshop Three. However, in its post-*UNE Report* Exceptions, AT&T did not raise or brief these two issues or include them in its listing of disputed loop issues.

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[83] AT&T's Exceptions, at 21.

[84] Qwest's Proposed Findings, at 20.

[85] *Id.* at 39-40, 45, 47-48.

[86] *Id.* at 41.

66. Consistent with the foregoing discussion, the Commission finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 4. Accordingly, the Commission accepts and adopts the Facilitator's recommendations, as expressly modified and/or elaborated on above, respecting the thirty-four resolved loop issues.

3. Loop issues remaining in dispute

67. Nine loop issues remained at impasse at the conclusion of Workshop Three.[87]

a. Disputed loop issues no longer in controversy

68. Two of the nine disputed loop issues, *Reciprocity of Trouble Isolation Charges*[88] and *Cooperative Testing Problems*,[89] were not addressed in any of the parties' post-*UNE Report* briefs.

69. Inasmuch as we deem these issues to no longer be in controversy and we hereby find and conclude that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 4, the Commission adopts and accepts the Facilitator's resolutions respecting *Reciprocity of Trouble Isolation Charges* and *Cooperative Testing Problems* and directs Qwest to revise its SGAT in accordance with the language proposed by the Facilitator in resolving the former issue.[90]

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[87] *See Id.* at 45-46.

[88] *Id.* at 52.

[89] *Id.* at 53-54.

[90] *Id.* at 52.

b. Disputed loop issues still in controversy

Disputed Issue 1 – *Standard Loop Provisioning Intervals*

70. The Report notes that "AT&T sought to change a number of the standard loop intervals that are set forth in SGAT Exhibit C. AT&T argued that the length of some intervals would not provide CLECs a meaningful opportunity to compete, were discriminatory or anticompetitive, violated state law in some cases, and would preclude CLECs from being able to meet the service quality standards of some of the participating states."[91]

71. The Facilitator rejected the objections and suggestions posited by AT&T concerning the intervals set out in Exhibit C and found that, absent state commission findings of special circumstances or needs there, the Exhibit C standards would otherwise adequately serve the competitive needs and the public interest in all seven of the participating states and should be accorded substantial weight as they were previously established on the basis of presentations and dialogues by and among participants to the ROC process, which presumably considered the issues relevant under the Act.[92]

72. Staff mostly agrees with the Facilitator's findings and urges the Commission to adopt them. However, Staff urges the Commission to reject the Exhibit C provisioning intervals that conflict with the Designed Services intervals for existing facilities set forth in our Quality of Service Standards. As Staff points out, NMAC 17.11.22.14(C) requires Qwest to install, for instance, one or more DS1s ordered within 5 business days in high-density zones and within 8 business days in low-density zones. This interval is shorter than the one proposed by Qwest in Exhibit C.[93] Staff therefore

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[91] *UNE Report*, at 48.

[92] *Id.* at 49-51.

[93] Staff's Proposed Findings, at 14-15.

requests that Qwest be instructed to file a New Mexico specific Exhibit C to its SGAT that is fully consistent with the intervals required by NMAC 17.11.22.14(C).[94]

73. AT&T argues that the Facilitator's resolution of this issue ignores evidence presented by AT&T and the Joint CLECs concerning the weight to be given to Qwest's Exhibit C. AT&T contends the Exhibit C intervals should not have been accorded the substantial weight the Facilitator gave them.[95] According to AT&T, "[t]he evidence is unrefuted that the SIG [Qwest's "Service Interval Guide"] was never presented to the ROC TAG for its approval."[96] Nor, AT&T argues, did the ROC TAG formally approve any of the standard intervals in the SIG.[97] Finally, AT&T states "[t]he reason the SIG was not presented to the ROC TAG is because the ROC TAG does not control the approval of standard intervals."[98]

74. AT&T avers, moreover, that the Facilitator's conclusion that AT&T cited no evidence that would demonstrate that the intervals do not give it a meaningful opportunity to compete is inappropriate. AT&T stresses the burden should be on Qwest to first establish that the Exhibit C intervals are at parity with those intervals it provides to itself, its affiliates or its retail customers. AT&T asserts that in the absence of parity measure, Qwest must establish that these intervals provide CLECs a meaningful opportunity to compete. AT&T contends that the Facilitator's decision inappropriately shifts this burden to CLECs.[99] AT&T proceeds to argue that the Facilitator's resolution also ignored evidence presented by AT&T as to why the disputed intervals are

[94] *Id.* at 16.

[95] AT&T's Exceptions, at 22.

[96] *Id.* at 24.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 25.

inappropriate, discriminatory, do not provide the CLECs a meaningful opportunity to compete, do not comply with state-approved intervals, and do not put the CLECs in a position to be able to comply with state-approved intervals.[100]

75. AT&T concludes by urging the Commission to reject the Facilitator's recommendations in their entirety and to revise the disputed intervals in the manner proposed by AT&T.[101]

76. For its part, Qwest disagrees with AT&T's characterization of the process establishing the Exhibit C intervals, contending that the intervals in its SIG, which forms the basis of the Exhibit C intervals, were negotiated and agreed upon in the ROC-established performance indicator definition ("PID") negotiations and that those negotiations benefited from full, open, and substantial participation by the CLEC community.[102] As a consequence, Qwest continues, the Facilitator was perfectly justified in conferring the Exhibit C intervals the weight he did.[103]

77. Qwest additionally maintains that AT&T failed to present any evidence that would show that the intervals in Exhibit C are discriminatory or deprive it of a meaningful opportunity to compete. Furthermore, in response to AT&T's claims that Qwest must prove that its intervals provide a meaningful opportunity to compete, Qwest asserts it satisfied its obligation by presenting the evidence from the ROC negotiations. In addition, Qwest states that it also presented evidence, not rebutted by AT&T, on the intervals offered by other BOCs.[104]

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[100] *Id.* at 25-26.

[101] *Id.* at 39.

[102] Qwest's Proposed Findings, at 20-21.

[103] *Id.* at 22.

[104] *Id.*

78. Concerning the state-specific interval issue raised by Staff, Qwest urges the Commission to find that the DS1 intervals proposed in Exhibit C are at parity with what Qwest offers its retail customers and to adopt those intervals in place of the ones the Commission previously adopted in NMAC 17.11.22.14(C).[105]

79. Qwest concludes by urging the Commission to reject AT&T's arguments in their entirety and to adopt the Facilitator's recommendations on this issue.[106]

80. Consistent with the Facilitator's findings, our investigation into this matter leaves us firmly convinced that AT&T's characterization of the ROC process is inaccurate. AT&T did, in fact, have ample opportunity within the ROC process to critique the intervals it takes issue with here. The Commission therefore concludes that the Facilitator was correct in according Qwest's Exhibit C the weight he gave it in his analysis and so, with the exception of the Exhibit C intervals that are inconsistent with those codified at NMAC 17.11.22.14(C), the Commission accepts and adopts the Facilitator's resolution of *Standard Loop Provisioning Intervals*.

81. Concerning the state-specific intervals issue, in Utility Case No. 3437 we adopted "Designed Services" installation intervals for existing facilities that are codified at NMAC 17.11.22.14(C).[107] We do not find persuasive Qwest's assertion that its pertinent Exhibit C intervals are entirely "at parity" with those required by NMAC 17.11.22.14(C). The Commission's concern is that Qwest is required, by our rules, to provision, for example, DS1s ordered by Qwest's own retail customers more quickly than it may be willing, under Exhibit C, to provision DS1s ordered at

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[105] *Id.* at 23.

[106] *Id.* at 22-23.

[107] *In the Matter of the Adoption of a Rule Establishing Consumer Protection and Quality of Service Standards for Telecommunications Service in New Mexico Pursuant to House Bill 400*, Final Order Adopting 17.11.16 NMAC and 17.11.22 NMAC, Utility Case No. 3437 (Dec. 12, 2000).

wholesale by CLECs for their retail customers. Such an occurrence clearly would not be consistent with the requirements of the Act. Indeed, section 251(c)(3) requires BOCs such as Qwest to provide any requesting telecommunications carrier nondiscriminatory access to network elements "on rates, terms and conditions that are just, reasonable and *non-discriminatory* ..."[108]

82. The Facilitator recognized that "special circumstances or needs" of the states participating in the Multi-State Proceeding might warrant different provisioning standards than the Exhibit C intervals that he found to be generally adequate.[109] Consequently, the Facilitator recommended that the provisioning intervals set forth in Qwest's proposed SGAT Exhibit C would adequately serve the competitive needs and the public interest in the seven participating states in the absence of unique state requirements.

83. The unique state requirements to which the Facilitator alluded exist in New Mexico in the form the Quality of Service Standards we recently adopted in Utility Case No. 3437. Therefore, the Commission finds that, to the extent that the provisioning intervals appearing in Exhibit C to Qwest's SGAT are inconsistent with those codified in our Quality of Service Standards, Qwest's proposed SGAT Exhibit C does not adequately serve the competitive needs and the public interest in New Mexico. Accordingly, the Commission directs Qwest to file a New Mexico-specific Exhibit C to its SGAT that is reflective of and fully consistent with the intervals required by NMAC 17.11.22.14(C).

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[108] 47 U.S.C. § 251(c)(3) (emphasis added).

[109] *UNE Report*, at 51.

Disputed Issue 2 – *Loop Provisioning and Repair Intervals – Utah*

84. As indicated by the Facilitator, this disputed issue was specific to the state of Utah and need not be resolved here beyond the resolution of *Standard Loop Provisioning Intervals* discussed above.

Disputed Issue 4 – *Delays in the Roll-Out of ADSL and ISDN Capable Loops*

85. This issue goes to the undisputed fact that Qwest has been slow in making ADSL and ISDN capable loops available to CLECs, thus potentially impeding the development of competition in that sector. The Facilitator appeared to conclude that Qwest's Frozen SGAT for this grouping of issues is adequate and may remain unchanged if and only if Qwest deals with the need to respond quickly when it receives requests for low-demand products, an issue purportedly to be addressed in the General Terms and Conditions section of the Facilitator's *Group 5 Report.*[111]

86. In its 10-day comments filed in this docket on August 30, 2001, Qwest stated:

> Consistent with this recommendation, Qwest...will move in an expeditious manner as outlined in the report. This topic will be addressed in greater detail in the workshop and resulting report and comments relating to General Terms and Conditions.[112]

87. The Facilitator noted that Qwest had not disputed the fact that these delays occur. Instead, Qwest suggested delays were due to the low demand for ADSL and ISDN capable loops.[113]

88. The Commission is concerned that Qwest has not disputed that these delays in provisioning requested services occur. We believe that such delays will impede the development of

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[111] *Id.* at 51-52.

[112] *Id.* at 53.

[113] *Qwest's Comments*, at 12.

[114] *UNE Report*, at 53.

competition for products that depend on ADSL and ISDN capable loops. This is, apparently, a concern shared by the Facilitator, who noted that:

> Qwest has many times in these workshops justified the lack of certain standard offerings by citing low demand for them. If Qwest continues to seek to avoid prior identification of terms and conditions for low-demand offerings, it is essential that it be prepared to respond quickly in the future to CLEC requests for access to non-standard UNEs. The general process for doing so is scheduled to be addressed in the workshop covering General Terms and Conditions.[114]

The Facilitator proceeded to observe that the

> circumstances surrounding this issue warrant as well a formal expression of Qwest's intent with respect to moving as expeditiously as possible to respond to non-standard offerings. Therefore, Qwest should do so in its comments to the commissions on this report, in order to permit consideration of that issue in the context of the report to come, which will address general terms and conditions, including the promptness with which Qwest will be prepared to respond to proper, but nonstandard CLEC requests in the future."[115]

89. Staff also shares these concerns.[116]

90. For these reasons, the Commission conditionally accepts and adopts the Facilitator's resolution of *Delays in the Roll-Out of ADSL and ISDN Capable Loops* and looks forward to a more fully articulated and programmatic "...expression of Qwest's intent with respect to moving as expeditiously as possible to respond to non-standard offerings..." in our upcoming consideration of the *Group 5 Report*.

91. The Commission notes that our conditional approval of the Facilitator's resolution of this issue should not be construed to connote a finding of compliance with this aspect of checklist

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[114] *Id.*

[115] *Id.*

[116] Staff's Proposed Findings, at 12-13.

item 4. Consistent with our conclusion below that the number of matters remaining to be fully and satisfactorily addressed and/or completed by Qwest – coupled with the importance of the outstanding matters such as this one to fully and irreversibly opening the local telecommunications market in New Mexico to meaningful competition – militates against a finding of compliance with checklist item 4 at this juncture in the proceedings, the Commission cannot consider Qwest to be in compliance with checklist item 4 unless and until this issue is adequately resolved.

Disputed Issue 6 – *Spectrum Compatibility*

92. Spectrum compatibility generally means the ability of multiple carriers to send signals through a common cable without causing each other's signals to degrade past an acceptable point. As to this matter, the Facilitator concluded that three issues required resolution: (a) treatment of T1s, (b) remote DSL and repeater deployment, and (c) provision of NC/NCI codes on LSRs.[117]

Treatment of T1s

93. Regarding the treatment of T1s, the Facilitator proposed changes to Qwest's SGAT so as to better clarify Qwest's obligation to: (i) to place T1s in binder groups that minimize interference possibilities and (ii) to replace T1s that are causing disturbances with another technology, wherever possible.[118]

94. Staff endorses the Facilitator's resolution of the T1 issue.[119]

95. AT&T for the most part accepts the Facilitator's resolution concerning T1, but requests that the language be modified to read: "Qwest also agrees that any future "known disturber"

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[117] *UNE Report*, at 57.

[118] *Id.* at 57-58.

[119] Staff's Proposed Findings, at 13-14.

defined by the FCC or the Commission will be managed as required by the FCC rules and orders and industry standards."[120]

96. Qwest disagrees with AT&T's suggested modification on the grounds that the Facilitator's language, "required by the FCC rules", adequately responds to AT&T's request that Qwest also comply with FCC "orders."[121] Qwest contends, moreover, that AT&T has not sufficiently described the industry standards to which Qwest would be required to adhere or the industry group(s) that would issue such standards.[122]

97. On this issue, we find ourselves in partial agreement with AT&T. With respect to the SGAT modification AT&T suggests, our modification differs from AT&T's in a minor but nonetheless important respect. That is, the Commission believes the last sentence of the Facilitator's proposed SGAT § 9.2.6.4 language should be revised to read "Qwest will spectrum manage this technology as defined in its spectrum policy and agrees that any future "known disturber" defined by the FCC or the Commission will be managed as required by FCC Rules *and Orders*." (Our ordered modification is italicized). However, we reject the industry standard language suggested by AT&T, as we believe that this language, as Qwest points out with justification, is too amorphous.

98. Accordingly, as modified above, we accept and adopt the Facilitator's resolution respecting the T1 issue and direct Qwest to modify its SGAT § 9.2.6.4 accordingly.

Remote DSL and Repeater Deployment

99. With respect to remote DSL and repeater deployment, the Facilitator proposed addressing the concerns raised by the parties by adding SGAT language obligating Qwest to

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[120] AT&T's Exceptions, at 30.

[121] Qwest's Proposed Findings, at 25.

[122] *Id.*

undertake reasonable actions when given specific information about network locations where its own repeater use or remote DSL deployment could disrupt central office based CLEC DSL services.[123] The Facilitator noted that his "resolution should be considered interim and subject to reconsideration at such time as the FCC takes any material action in connection with the advice and consent it expects to receive by January 2002 from the NRIC."[124]

100. Staff endorses the Facilitator's resolution regarding remote DSL and repeater deployment.[125]

101. AT&T maintains that the Facilitator's resolution of this issue misses the point, which it believes is to establish rules now that set the ground rules for ensuring that this nascent area of competition is allowed to flourish and is not encumbered by Qwest's actions in deploying remote DSL and repeaters.[126] AT&T asserts the Facilitator's resolution leaves CLECs with "...the Hobson's choice of disclosing competitively sensitive business information with which Qwest can, and has the incentive to, use to it [*sic*] competitive advantage in responding in the market, in order to gain Qwest's commitment to do what it should already be doing: not install facilities that will interfere with CLEC services."[127] AT&T thus contends that, at a minimum, the Commission should require Qwest to deploy remote DSL technology in a manner that will minimize spectrum compatibility issues in the future.[128] Therefore, AT&T asks the Commission to require that Qwest discontinue

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[123] *UNE Report*, at 60.

[124] *Id.*

[125] Staff's Proposed Findings, at 13-14.

[126] AT&T's Exceptions, at 31.

[127] *Id.* at 33.

[128] *Id.* at 32.

deployment of known disturbers in its remote deployments, and eliminate the obligation the Facilitator places on CLECs to disclose competitively sensitive business information to Qwest.[129]

102. Qwest urges the Commission to reject AT&T's proposals. Qwest points out that there are currently no FCC rules in place regarding deployment of remote DSLs and that the FCC is awaiting the results of the NRIC report on this issue, due out in January 2002. Until the FCC adopts industry-wide guidelines for deployment of remote DSLs, Qwest sees no reason for the Commission to forge ahead with SGAT language that dictates network requirements for all carriers at this time.[130]

103. We believe the Facilitator's resolution regarding remote DSL and repeater deployment constitutes a valiant attempt to resolve a complex issue. On the whole, the Commission agrees with his resolution. However, the Facilitator's proposed SGAT language can and should be strengthened in two ways.

104. First, the Commission directs Qwest to incorporate into SGAT § 9.2.6 language that strictly limits Qwest's remote DSL deployment to cases where there can be no interference with CLEC central-office based DSL services. This limitation should be temporary, lasting only until the NRIC recommendation on remote deployment of DSL is issued.[131]

105. Second, the Commission believes the Facilitator's proposed § 9.2.6 subsection should be revised to reflect that Qwest should bear the burden of proving why it should not absorb the cost of resolving spectral incompatibility issues in those instances where it can be shown that remote DSL

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[129] *Id.* at 33.

[130] Qwest's Proposed Findings, at 25.

[131] This modification merely acknowledges and ratifies Qwest's commitment to "...only remotely deploy DSL at locations far from central offices, in locations where CLEC central-office based DSL will not even function." (*UNE Report*, at 56) Moreover, Qwest has "...also agreed to include in SGAT Section 9.2.6.1 a commitment to implement the final NRIC recommendation on remote deployment of DSL." (*Id.*)

equipment was deployed in a manner inconsistent with current guidelines that would ensure compatibility, such as the NRIC issue T1.417 guidelines.[132]

106. Therefore, the Commission directs Qwest to modify the SGAT subsection proposed by the Facilitator for § 9.2.6 to read as follows:

> Where a CLEC demonstrates to Qwest that it has deployed central-office based DSL services serving a reasonably defined area, it shall be entitled to require Qwest to take appropriate measures to mitigate the demonstrable adverse effects on such service that arise from Qwest's use of repeaters or remotely deployed DSL service in that area. It shall be presumed that the costs of such mitigation will not be chargeable to any CLEC or to any other customer; however, Qwest shall have the right to rebut this presumption, which it may do by demonstrating to the Commission by a preponderance of the evidence that the incremental costs of mitigation would be sufficient to cause a substantial effect upon other customers (including but not limited to CLECs securing UNEs) if charged to them; *and, for those instances where remote xDSL equipment has been deployed in a manner inconsistent with current guidelines that would ensure compatibility (such as the NRIC issue T1.417 guidelines), Qwest shall have the right to rebut this presumption, which it may do by demonstrating to the Commission by a preponderance of the evidence that it should not bear the cost of resolving spectral incompatibility issues for remote xDSL equipment deployed in such a fashion.* Upon *either* such a showing, the Commission may determine how to apportion responsibility for those costs, including, but not limited to CLECs taking services under this SGAT.[133]

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[132] We were moved to order this SGAT modification upon noting that Qwest has previously stated: "T1E1.4 recently issued its first set of recommendations, T1.417, in which, among other things, it recommended the use of nine spectrum classes to identify types of advanced services. T1E1 then charged the Common Language Group with establishing NCI codes to match the nine spectrum classes." Qwest's Legal Brief Regarding Disputed Workshop #3, Session 6 Issues: Checklist Item 4 (Unbundled Loops), at 38. Qwest then goes on to report that it "...is in the process of implementing the NC/NCI codes established by the Common Language Group for spectrum management purposes." *Id.* We view Qwest's implementation of the T1.417 guidelines for NC/NCI codes as indicative of Qwest's willingness to "forge ahead" with the adoption of the network-wide standards, dictating network wide requirements as suggested by the T1.417 standard, at least insofar as it suits Qwest. This being the case, we see no reason why Qwest should not then also be held accountable for not adopting the xDSL deployment standards also suggested by T1.417.

[133] The Commission's revisions are indicated in italics and strikethrough.

107. Accordingly, as expressly modified above, the Commission accepts and adopts the Facilitator's resolution of *Remote DSL and Repeater Deployment* and directs Qwest to make both aforesaid modifications to its SGAT § 9.2.6.

NC/NCI codes on LSRs

108. Regarding the provision of NC/NCI codes on LSRs, the Facilitator found that "...the SGAT Section 9.2.6.2 provision requiring submission of the information on LSRs (or equivalent ordering document) is appropriate. However, it should be made clear, in a manner consistent with other SGAT treatment of confidential or proprietary information, that the NC/NCI information is sensitive, that its use must be limited to spectrum management purposes, and that only those needing to know the information for that purpose shall have access to it."[134]

109. Staff endorses the Facilitator's resolution respecting the provision of NC/NCI codes on LSRs.[135]

110. AT&T asserts the Facilitator's decision requiring disclosure of its NC/NCI codes to Qwest on LSRs when it orders service from Qwest is wrong on several grounds, these being, according to AT&T:

> 1) Spectral Mask data is proprietary, disclosing this data would reveal competitively sensitive CLEC customer service provision data to it rival Qwest;
> 2) Spectral mask data is highly unreliable, becoming meaningless when the incumbent LEC changes feeder plant as a matter of routine maintenance; and
> 3) The FCC requirement cited by Qwest was an interim policy that has no binding or precedential effect and is now unnecessary.[136]

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[134] *Id.* at 61.

[135] Staff's Proposed Findings, at 13-14.

[136] AT&T's Exceptions, at 34.

111. AT&T proceeds to argue that, to the extent CLECs must provide spectral mask data to Qwest, FCC rules require Qwest to provide spectral mask information to CLECs.[137]

112. Qwest responds that there is no support for AT&T's claim that these requirements are "interim" and non-binding. According to Qwest, the FCC has provided clear statements in opposition to this assumption in its *Line Sharing Order*.[138] Qwest argues, moreover, that the FCC has promulgated rules requiring disclosure of this information in 47 C.F.R. § 51.231(b) and (c) and that these rules are not characterized anywhere as "interim" in nature.[139] Qwest also disagrees with AT&T's assertion that it must provide spectral mask data to CLECs other than in the event of spectral interference. Qwest asserts that AT&T made this demand during the workshop process and it is not clear from the record why CLECs would need this information from Qwest in determining what technology to deploy in Qwest's network.[140] Finally, regarding AT&T's point regarding the proprietary nature of spectral mask information, Qwest argues that its modification of the SGAT to protect the proprietary and confidential nature of this information adequately addresses AT&T's concerns.[141]

113. Our reading of the relevant FCC orders indicates that CLECs must provide spectral mask information to incumbent LECs, but that incumbent LECs are not required to provide the same

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[137] *Id.* at 35.

[138] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*).

[139] Qwest's Proposed Findings, at 25-26.

[140] *Id.* at 26.

[141] *Id.*

information to CLECs, except in cases where spectral interference is suspected and/or when a CLEC's request to provide advanced service is rejected."[142]

114. Accordingly, the Commission accepts and adopts the Facilitator resolution respecting *NC/NCI codes on LSRs*. Consistent with the Facilitator's resolution of this issue, Qwest is directed to modify its SGAT § 9.2.6.2 to state explicitly that confidential and proprietary NC/NCI code information provided by CLECs will be used for network purposes only and that only those with a need to know the information for such purposes will have access to it.

Disputed Issue 7 – *Conditioning Charge Refund*

115. In resolving this issue, the Facilitator recommended that the following language be added to Qwest's SGAT § 9.2.2.4:

> *Where Qwest fails to meet a due date for performing loop conditioning, CLEC shall be entitled to a credit equal to the amount of any conditioning charges applied, where it does not secure the unbundled loop involved within three months of such due date. Where Qwest does not perform conditioning in accord with the standards applicable under this SGAT, CLEC shall be entitled to a credit of one-half of the conditioning charges made, unless CLEC can demonstrate that the loop as conditioned is incapable of substantially performing the functions normally within the parameters applicable to such loop as this SGAT requires Qwest to deliver it to CLEC. In the case of such fundamental failure, CLEC shall be entitled to a credit of all conditioning charges, except where CLEC asks Qwest to cure any defect and Qwest does so. In the case of such cure, CLEC shall be entitled to the one-half credit identified above.*[143]

116. Staff endorses the Facilitator's resolution of this issue.[144]

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[142] *See, e.g., In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, 14 FCC Rcd 4761, 4801, ¶¶ 61-77 (released Mar. 31, 1999) (*Advanced Services First Report and Order*); *Line Sharing Order*, 14 FCC Rcd at 21004, ¶ 204.

[143] *UNE Report*, at 62.

[144] Staff's Proposed Findings, at 13-14.

117. AT&T takes issue with the Facilitator's language requiring Qwest to credit the CLEC conditioning charge where the CLEC does not secure the UNE Loop within three months of the due date. According to AT&T, three months is an unreasonably long period of time for CLEC to be out both the loop it requested and the conditioning charges it paid.[145]

118. AT&T suggests that the time period should be shortened to 15 days following the due date. In so suggesting, AT&T notes Qwest's interval for conditioning a loop is 15 days and that if Qwest fails to meet that time frame, the CLEC customer's expectation, based on the interval and established due date, is already shattered. AT&T further maintains that to give Qwest three additional months before the liquidated damages provision is triggered defeats the purpose, which AT&T believes is to provide an incentive for Qwest to meet its obligations.[146] AT&T therefore urges the Commission to modify the Facilitator's suggested SGAT language addition by reducing, from three months to 15 days, the time frame for reimbursement to a CLEC by Qwest for Qwest's failure to meet a due date for performing loop conditioning.[147]

119. Qwest counters that AT&T's demand to further revise the Facilitator's recommended language is a thinly veiled attempt to impose penalties on Qwest. Qwest believes that the Facilitator's adoption of the three-month time period is part of the mechanism devised by the Facilitator to balance equities. According to Qwest, the Facilitator's reasoning was that if a CLEC does not receive the conditioned loop within 3 months, it is more likely that the delay is Qwest-related rather than customer- or CLEC-related.[148]

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[145] AT&T's Exceptions, at 36.

[146] *Id.*

[147] *Id.*

[148] Qwest's Proposed Findings, at 27.

120. We consider the Facilitator's reasoning on this issue to be reasonable and that the SGAT language proposed by him is an appropriate and sensible solution to the problem at hand. Accordingly, the Commission rejects AT&T's proposed SGAT language modifications and accepts and adopts the language proposed by the Facilitator in resolution of the *Conditioning Charge Refund* issue and Qwest is directed to modify its SGAT accordingly.

121. Our resolution of this issue notwithstanding, we also find merit in AT&T's position that Qwest should be given an incentive to meet its loop conditioning obligations in a timely fashion. To this end, the Commission requests that the parties to be prepared to discuss the issue of the performance penalties or other incentive-fostering measures, if any, that could and/or should be imposed on Qwest for failing to meet the 15-day interval for loop conditioning during our upcoming oral argument regarding the Facilitator's final companion reports, *Report on Qwest's Performance Assurance Plan* and *Public Interest Report.*

Disputed Issue 8 – *Pre-Order Mechanized Loop Testing*

122. Mechanized loop testing ("MLT") enables a carrier to test an actual loop and retrieve information regarding the loop length and performance metrics. The Facilitator denied AT&T's request that Qwest be required to allow CLECs to perform MLTs, in order to provide the CLECs with actual loop length and performance information.[149]

123. Staff supports the Facilitator's resolution of this issue.[150]

124. AT&T argues that the Facilitator's rationale for rejecting its MLT request ignores evidence that Qwest has performed MLTs for itself, that the record demonstrates that Qwest can

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[149] *UNE Report*, at 64.

[150] Staff's Proposed Findings, at 12.

easily implement such testing for its own retail customers, and that the information made available to CLECs via Qwest's Raw Loop Data Tool is insufficient because it does not provide the full range of data associated with MLT. AT&T asserts, moreover, the FCC in the *UNE Remand Order* mandated access to the full range of data associated with MLT.[151]

125. AT&T further contends that Qwest's claim that MLT is invasive and disruptive to service is a red herring because Qwest has admitted that the test lasts less than a minute. AT&T states that a "...CLEC can tell when the customer is on the line and can avoid disruption through a check and by performing MLT at times when customers are less likely to be using their phone."[152] AT&T also maintains the fact that Qwest performed the system-wide MLTs discussed above demonstrates that this is a non-issue.[153]

126. AT&T thus urges the Commission to Order Qwest to allow CLECs to perform MLTs in order to provide the CLECs with actual loop length and performance information or to level the playing field by restricting Qwest's ability to ever perform such pre-order MLTs for its own use in the future.[154]

127. Qwest responds that because it does not perform MLTs on a pre-order basis for itself, and because the information CLECs seek is available from other sources, Qwest should not be obligated to perform MLTs for CLECs. Qwest also asserts that permitting CLECs to perform MLTs on a pre-order basis is inadvisable given the potential disruption to the service of end users of other

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[151] AT&T's Exceptions, at 37-39.

[152] *Id.* at 39.

[153] *Id.* at 40.

[154] *Id.*

carriers as a result of the testing demanded.[155] Qwest further argues that AT&T's reference to Qwest's one-time MLT on all copper loops in Qwest's system is irrelevant as the information from that test is readily available to CLECs as well as to Qwest.[156] For these reasons Qwest urges the Commission to reject AT&T's request and to adopt the Facilitator's resolution.[157]

128. As AT&T noted, the FCC has declared that access to filtered information in loop qualification databases is insufficient for section 271 approval. What is relevant, rather, is whether CLECs have access to the *same* underlying information that an incumbent LEC has in any of its own databases or internal records.[158] Also pertinent in this regard is the FCC's statement that

> under our existing rules, the relevant inquiry is not whether the retail arm of the incumbent has access to the underlying loop qualification information, but rather whether such information exists anywhere within the incumbent's back office and can be accessed by any of the incumbent LEC's personnel. Denying competitors access to such information, where the incumbent (or an affiliate, if one exists) is able to obtain the relevant information for itself, will impede the efficient deployment of advanced services.[159]

129. Our review of the record persuades us that Qwest's Loop Qualification Tool does not provide full and complete access to the range of information available through an MLT. It is also apparent from the record that Qwest: (i) has previously performed extensive MLTs on its own copper loops for the purposes of obtaining information relevant to the provision of its retail Megabit service, and (ii) continues to use MLTs as part of its ongoing repair and service maintenance processes. Hence, Qwest is technically capable of conducting MLTs.

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[155] Qwest's Proposed Findings, at 28.

[156] *Id.*

[157] *Id.*

[158] AT&T's Exceptions, at 38-39.

[159] *UNE Remand Order*, 15 FCC Rcd at 3886-3887, ¶ 430.

130. Qwest has voiced a concern regarding alleged disruption of service resulting from conducting MLTs. Qwest's concern is unwarranted. The MLT lasts less than a minute and a CLEC can and should discern when the customer is on the line and, thus, can and should avoid disruption through a check and by performing MLT at times when customers are less likely to be using their phones. Furthermore, Qwest's previous system-wide performance of an MLT persuades us that disruption of service is indeed a non-issue.

131. For these reasons, we grant AT&T's request for MLTs. A CLEC would only endeavor to undertake its own MLT if it believes that the information being provided to it from Qwest's database is not adequate, or is unavailable. Moreover, the advantage of permitting this pre-order MLT is that by so testing, a CLEC may be able to identify a problem that would impede the provision of the type of service that it wants to offer the end-user.

132. Accordingly, Qwest hereby is directed to revise its SGAT to permit CLECs to perform pre-order mechanized loop testing.

Disputed Issue 9 – *Access to LFACs and Other Loop Information Databases*

133. The Facilitator concluded that the evidence revealed that LFACs does not have the capability to provide the information that AT&T seeks. The Facilitator therefore found that, given Qwest's assertions that a number of other tools are available that appear better suited to AT&T's needs, the preferable course would be to assure AT&T access to such tools in order to determine if they will suffice. To this end, the Facilitator proposed additional SGAT language.[160]

134. Staff endorses the Facilitator's resolution of this issue.[161]

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[160] *UNE Report*, at 65-66.

[161] Staff's Proposed Findings, at 13-14.

135. AT&T notes that the Facilitator has acknowledged Qwest's obligation to provide access to this information. However, AT&T asserts that, because of uncertainty surrounding where loop and loop plant information may reside, the Facilitator's recommended language should be modified to include a provision that states "CLEC's [*sic*] shall have the ability to audit Qwest's company records, back office systems and databases in each of the relevant states to determine that Qwest is providing the same access to loop and loop plant information to CLECs that Qwest's employees have access."[162]

136. According to AT&T, the FCC has made it abundantly clear that CLECs must have access to this loop and loop plant information for loop qualification purposes. For this reason, AT&T urges the Commission to eliminate the limitation placed by the Facilitator on CLEC access to loop and loop plant information and to revise the Facilitator's proposed SGAT language along the lines proposed by AT&T.[163]

137. Qwest responds that it has agreed to include the Facilitator's proposed language at SGAT § 9.2.2.2.1.1. Qwest notes that the only specific request AT&T made during the workshops was for information on spare facilities. Qwest states it has agreed to provide that information by incorporating the Facilitator's recommended SGAT language. Qwest maintains, moreover, that it is already in the process of enhancing its Raw Loop Data tool to include spare facility information. According to Qwest, these actions ought to alleviate AT&T's concerns as expressed during the workshop.[164]

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[162] AT&T's Exceptions, at 42.

[163] *Id.* at 42-43.

[164] Qwest's Proposed Findings, at 30.

138. Regarding the matter of auditing, Qwest argues that AT&T's request is untimely and inappropriate. Qwest asserts that AT&T did not make this request in the Workshop Three process and did not submit any evidence or testimony to support it. Furthermore, Qwest contends AT&T cites no provision of the Act or FCC order that would require a BOC to submit to such an audit as a condition of section 271 approval. In addition, Qwest points out that as part of the ROC Master Test Plan, the ROC will be examining the loop qualification tools Qwest provides to ensure that Qwest provides access to loop qualification information to CLECs at parity with itself. Thus, according to Qwest, an "audit" process is already in place.[165]

139. While we agree that the FCC requires that CLECs be granted the same access to loop and loop plant information that Qwest grants to itself, we reject the "audit" language proposed by AT&T. An audit of the type requested by AT&T would be a duplication of effort, particularly in light of the fact that the ROC Master Plan Test calls for an examination as to whether Qwest is or is not providing access to loop qualification information to CLECs in parity with itself.

140. However, we do agree with AT&T that unmediated and non-discriminatory access to loop qualification information on parity with the manner that an incumbent LEC provides such information to itself *is* called for by the FCC.[166] Therefore, we adopt AT&T's request that the Facilitator's language regarding mediated access be eliminated and that substituted in its stead should be AT&T's language regarding the limited purposes for which the material may be used; to wit: "The use by the CLEC of any information obtained under this section shall be limited to performing loop qualification and spare facilities checks."

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[165] *Id.* at 30-31

[166] *See UNE Remand Order*, 15 FCC Rcd at 3885, ¶ 427.

141. For these reasons, the Commission alters the Facilitator's proposed SGAT language, found on page 66 of the *UNE Report*, to read as follows:

> In areas where Qwest has deployed amounts of IDLC that are sufficient to cause reasonable concern about a CLEC's ability to provide service through available copper facilities on a broad scale, the CLEC shall have the ability to gain access to Qwest information sufficient to provide CLEC with a reasonably complete identification of such available copper facilities. ~~Qwest shall be entitled to mediate access in a manner reasonably related to the need to protect confidential or proprietary information.~~ *The use by the CLEC of any information obtained under this section shall be limited to performing loop qualification and spare facilities checks.* CLEC shall be responsible for Qwest's incremental costs to provide such information ~~or access mediation~~.

142. The Commission directs Qwest to modify its SGAT accordingly.

C. Line Splitting

1. Line splitting issues resolved during Workshop Three

143. The Facilitator determined that the following line splitting issues were fully resolved during Workshop Three and should be considered closed: *Presumptions About the "Lead" CLEC*, *Pre-Provisioning of the Splitter in the End User's Central Office*, *Limits on the Uses of High- and Low-Frequency Loop Portions* and *Charges for OSS Modifications*.

144. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing in the parties' post-*UNE Report* briefing and having hereby found and concluded that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 4, the Commission accepts and adopts the Facilitator's recommendations respecting the four resolved line splitting issues

2. Line splitting issues decided in earlier workshops

145. The Facilitator deemed two line splitting issues, *Line-At-A-Time Access to Splitters* and *Discontinuing Megabit Service*, to have been decided in previous workshops.

146. The Facilitator decided *Line-At-A-Time Access to Splitters* had been addressed adequately in the *Emerging Services Report* and that no new information had been presented to persuade him otherwise.[167]

147. AT&T disputes the Facilitator's decision. AT&T asserts that what has changed since the Emerging Services and Loop Workshops is that Qwest has finally revealed the type of splitters it is deploying in its central office. According to AT&T, based upon record evidence presented in subsequent workshops, it is clear that it is technically feasible for CLECs to access Qwest's splitters on at least a shelf-at-a-time basis. AT&T believes that Qwest should be directed to provide such access.[168]

148. AT&T points out that the FCC has ruled, "...CLECs purchasing UNE Loops or UNE combinations are entitled to 'all capabilities of the loop including the low and high-frequency spectrum portions of the loop.'"[169] AT&T also asserts that the FCC has also determined that incumbent LECs must afford CLECs access to all of the UNE's "features, functions, and capabilities, including attached electronics, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element,

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[167] *UNE Report*, at 67.

[168] AT&T's Exceptions, at 43-44.

[169] *Id.* at 44-45 (quoting 47 C.F.R. § 51.319(a)(1)).

specifically including DSL services."[170] According to AT&T "[u]nder these determinations of the FCC, the splitter is a feature, function or capability of the loop that must be provided to CLECs."[171]

149. AT&T further maintains that Qwest's reliance on the *SWBT Texas Order* is misplaced because there the FCC specifically declined to comment on the requirement that an incumbent LEC provide access to an incumbent LEC-owned splitter, as this was a matter deferred to consideration in a future order that has, of yet, not been issued.[172] AT&T draws the Commission's attention to the fact that the Texas Public Utilities Commission, in a recent arbitration decision, concluded that requiring SWBT Texas to provide access to its splitters was within the authority of the Commission and was sound public policy.[173]

150. For these reasons, AT&T asks that the Commission require to Qwest to modify its SGAT to indicate its commitment to provide access to its splitters on a shelf-at-a-time basis.[174]

151. Qwest counters that AT&T's request that Qwest be obligated to provide access to "outboard" (i.e., splitters that are not integrated into the DSLAM) splitters in its central offices and remote terminals is founded on a misinterpretation of Qwest's testimony on the subject. Qwest maintains that its witness testified that it does not use "outboard" splitters. Furthermore, Qwest contends the Colorado workshop testimony cited by AT&T shows that Qwest splitters are integrated with the DSLAM on a one-to-one basis; in other words, they are cabled to the backplane and are not independent of the DSLAM.[175]

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[170] *Id.* (citing 47 C.F.R. § 51.307 and the *UNE Remand Order*, at 15 FCC Rcd at 3772-3773, ¶¶ 166-67).

[171] *Id.*

[172] *Id.* (citing *SWBT Order*, 15 FCC Rcd at 18517, ¶ 328).

[173] *Id.* at 46-47.

[174] *Id.* at 49.

[175] Qwest's Proposed Findings, at 32.

152. Qwest closes by reminding us that the Facilitator rejected AT&T's claims twice and urges the Commission to do so as well. Qwest also notes that Commission's task in this proceeding is to determine whether Qwest complies with existing and binding FCC rules. According to Qwest, the controlling rules clearly state that incumbent LECs are not required to provide CLECs with access to their splitters.[176]

153. The question ownership of, and access to, splitters was a topic of the previous *Emerging Services Workshop and Report*. As the Commission noted in its *Order Regarding Emerging Services Report*, "One disputed issue, *Ownership of and Access to Splitters*, is no longer in dispute as no party contested the Facilitator's resolution."[177] We are of the opinion that AT&T's request for access to splitters is untimely; the appropriate time to have raised this issue was in its exceptions to the Facilitator's *Emerging Services Report* and that time has long since passed.

154. Therefore, the Commission agrees with the Facilitator's finding that no new evidence or arguments have been advanced to make a compelling case for revisiting the Commission's previous resolution of this issue. Accordingly, we reject AT&T's exceptions and accept and adopt the Facilitator's determination that *Line-At-A-Time Access to Splitters* was previously decided in the *Emerging Services Report*.

155. The Commission also agrees with the Facilitator that his resolution of *Discontinuing Megabit Service* in the context of line sharing in the *Report on Emerging Services* is "equally applicable" to line splitting.[178]

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[176] *Id.* at 33

[177] *Order Regarding the Emerging Services Report*, at 5.

[178] *UNE Report*, at 67

156. In our interim order regarding Emerging Services, the Commission concluded that Qwest's policy of disconnecting its Megabit service from any of its end users electing to take voice service from a CLEC through line sharing was non-compliant with section 271, especially the public interest requirements.[179] We proceeded to expand on the Facilitator's recommendation to deem it unacceptable and inconsistent with the public interest for Qwest to discontinue its provision of Megabit or other DSL services to end users whether such discontinuation is directed at existing Qwest customers or new lines put into service by Qwest.[180] We therefore directed Qwest to submit new proposed SGAT language reflective of our holding and we further instructed Qwest to include in such language that its commitment to refrain from discontinuing its provision of Megabit or any other DSL service should apply to both customers switching over to a CLEC providing service over UNE-P and resale, or to explain why its commitment should not apply to resale CLECs.[181]

157. The Commission fully expects Qwest to comply with our directions and reminds Qwest that the Commission's actual or, as described in past interim orders issued in this case, "final" recommendations to the FCC regarding compliance with line sharing and line splitting, as with all of the checklist items and other requirements of section 271, are expressly conditioned on, among other things, compliance with the Commission's orders.[182]

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[179] *Order Regarding Emerging Service Report*, at 7.

[180] *Id.*

[181] *Id.* at 7-8 (the Commission gave other parties the opportunity to review and file comments on Qwest's proposed SGAT language, all such responsive comments being due within fourteen days of service of Qwest's proposal).

[182] *Id.* at 13. On the matter of "recommendations," we offer the following point of clarification: what we previously termed "provisional recommendations" in our prior interim orders function as and are, in actuality, nothing more nor less than provisional, *i.e.* conditional, findings and conclusions; this clarification is incorporated, *infra*, at the end of our analysis of each checklist item. The amplification we present here reflects the reality that the only "recommendations" we are called on to make and ultimately will be making in this case shall be in the form of the evaluation we will submit to the FCC regarding Qwest's compliance and/or non-compliance with the various requirements of section 271 of the Act *after* Qwest files its application with the FCC for authorization to provide in-region, interLATA services in New Mexico.

3. Line splitting issues remaining in dispute

158. Two line splitting issues remained at impasse as the conclusion of Workshop Three.[88]

a. Disputed line splitting issue no longer in controversy

159. One of the two issues, *Liability for Actions By an Agent*, was not addressed in any of the parties' post-*UNE Report* briefs.

160. Inasmuch as we deem this issue to no longer be in controversy and we hereby find and conclude that the Facilitator's recommendation is appropriate, reasonable and resolved in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 4, the Commission adopts and accepts the Facilitator's resolution respecting *Liability for Actions By an Agent*.

b. Disputed line splitting issue still in controversy

Disputed Issue 1 – *Limiting Line Sharing to UNE-P*

161. The Facilitator notes that AT&T commented that SGAT § 9.21.1 impermissibly limited line sharing to cases where CLECs gained access to Qwest loops through the use of UNE-P; line sharing should be available in other configurations as well (e.g., unbundled loops, EELs, and resold voice services). The Facilitator also noted that while Qwest had agreed to loop splitting, it did not recognize an obligation to do so, nor was it aware of any other incumbent LEC that was providing it. The Facilitator concluded by rejecting AT&T's arguments and finding that the existing SGAT language on this issue was adequate and that, provided that Qwest can demonstrate at the time of its filing to the FCC that it has made substantial progress in defining the specific terms and

[88] *UNE Report*, at 68-70

conditions applicable to loop splitting, it is reasonable to conclude that it has met its obligations under section 271.[184]

162. Staff concurs with the Facilitator's resolution of this issue.[185]

163. AT&T asserts the Facilitator failed to address the main dispute between the parties. According to AT&T, the key dispute goes to Qwest's assertion that its obligation to provide line splitting does not extend to all loops versus AT&T's assertion that the FCC confirmed that the requirement to provide line sharing and line splitting applies to the entire loop, not just loops provided via UNE-P.[186]

164. AT&T's contends Qwest's refusal to acknowledge its obligation to provide line splitting on all loops and loop combinations is contrary to controlling law. AT&T thus argues Qwest should be required to acknowledge, through an affirmative statement in its SGAT, that it is required to provide line splitting on all loop types.[187] AT&T therefore asks the Commission to require Qwest to revise SGAT § 9.21 to set forth its obligation to provide line splitting on all loops and loop combinations. In addition, AT&T urges the Commission to require Qwest to revise its SGAT to provide that Qwest will offer EEL splitting as a standard offering and to state the terms and conditions of such an offering.[188]

165. Qwest counters that AT&T's demands exceed Qwest's legal obligations concerning the availability of line splitting. Qwest argues that in spite of AT&T's claims that loop splitting is

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[184] *UNE Report*, at 68-69.

[185] Staff's Proposed Findings, at 18.

[186] AT&T's Exceptions, at 49.

[187] *Id.* at 50.

[188] *Id.* at 52.

required, industry standards do not exist and Qwest is unaware of any BOC in the country that is provisioning loop splitting.[189]

166. Regarding AT&T's request for EEL splitting, Qwest argues that AT&T has neither sufficiently defined EEL splitting nor adequately expressed its need for EEL splitting. Furthermore, Qwest asserts the relevant FCC orders cannot be read as extending line splitting to "EEL splitting." Qwest also notes that it has agreed to make EEL splitting available through the Special Request Process.[190] Qwest therefore requests that the Commission reject AT&T's attempt to force Qwest to broaden the SGAT to allow for line sharing/line splitting in other configurations.[191]

167. As the Facilitator found, and as AT&T has acknowledged, Qwest has agreed to expand line sharing to loops by adding a new SGAT § 9.24 to address loop splitting.[192] We note with particular interest in this regard the Facilitator's following conclusion: "provided that Qwest can demonstrate at the time of its filing to the FCC that it has made substantial progress in defining the specific terms and conditions applicable to loop splitting, it is reasonable to conclude that it has met its obligations under Section 271."[193] This conclusion should put Qwest, along with the other parties, on notice that, as these proceedings progress, the Commission expects Qwest to demonstrate satisfactory progress in defining the specific terms and conditions applicable to loop splitting.

168. We also note with particular interest the Facilitator's conclusion that "...should Qwest remain willing to make split EELs available on a special request basis now, and to develop a

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[189] Qwest Proposed Findings, at 33-34.

[190] *Id.* at 34.

[191] *Id.* at 35.

[192] *UNE Report*, at 68.

[193] *Id.* at 69.

standard offering at such time as any commission determines that demand justifies one, Qwest should be deemed to have satisfied its obligations to provide line splitting in this context."[194] The Commission interprets this to mean that Qwest's section 271 obligations will only be considered to be fulfilled so long as Qwest continues to make split EELs available on a special request basis now and commits itself to developing a standard offering at such time as any commission determines that demand justifies one.

169. With these clarifying comments, the Commission accepts and adopts the Facilitator's resolution of *Limiting Line Sharing to UNE-P* and directs Qwest to revise its SGAT accordingly.

D. NID

1. NID Issues Resolved During Workshop Three

170. The Facilitator determined that the following NID issues were fully resolved during Workshop Three and should be considered closed:

1) *Access to All NID Features*;
2) *Smart and MTE NIDs*;
3) *Availability of NIDs When CLEC Provides Loop Distribution*;
4) *Other Kinds of Permissible NID Access*;
5) *NID Ownership*; and
6) *Rates for Other Than Single-Tenant NIDs*.[195]

171. The Facilitator identified one additional NID issue, *NID Ordering Documents*, as being closed, but noted "Qwest should provide, should CLECs request it, a report of status in designing and implementing the new NID ordering process."[196]

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[194] *Id.*

[195] *Id.* at 70-72.

[196] *Id.* at 72.

172. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing in the parties' post-*UNE Report* briefing and having hereby found and concluded that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 4, the Commission accepts and adopts the Facilitator's recommendations respecting the seven resolved NID issues.

2. NID Issues Remaining in Dispute

173. Three NID issues remained at impasse at the conclusion of Workshop Three.[197]

a. Disputed NID issue no longer in controversy

174. One of the three disputed issues, *CLEC Use of Qwest's NID Protector Without Payment*, is no longer in dispute as no party contested the Facilitator's resolution in its post-*UNE Report* briefs.

175. Inasmuch as we deem this issue to no longer be in controversy and we hereby find and conclude that the Facilitator's recommendation is appropriate, reasonable and resolved in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 4, the Commission adopts and accepts the Facilitator's resolution respecting *CLEC Use of Qwest's NID Protector Without Payment*.

b. Disputed NID issues still in controversy

176. In the *Local Competition First Report and Order*, the FCC defined the NID as "a cross-connect device used to connect loop facilities to inside wiring."[198] In the *UNE Remand Order*,

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[197] *Id.* at 72-74.

[198] 11 FCC Rcd at 15697, ¶ 392, n.852.

the FCC modified the definition "to include all features, functions, and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism."[199] Consequently, the FCC's rules now define the NID as follows:

> The network interface device network element is defined as any means of interconnection of end-user customer premises wiring to the incumbent LEC's distribution plant, such as a cross connect device used for that purpose. An incumbent LEC shall permit a requesting telecommunications carrier to connect its own loop facilities to on-premises wiring through the incumbent LEC's network interface device, or at any other technically feasible point."[200]

177. The disputed NID issues go to (i) the precise nature of the NID and the most appropriate definition of this network element and (ii) whether a CLEC can request that Qwest remove its connections from the protector field at a NID. We will address these two issues in turn.

Disputed Issue 1 – *NID Definition*

178. The Facilitator noted that this dispute resumes a debate he moderated in resolving the first disputed subloop unbundling issue, *Subloop Access at MTE Terminals*, in his *Report on Emerging Services*. According to the Facilitator, neither AT&T, nor Qwest added anything new to the debate.[201] The Facilitator did allow, however, that in his opinion, Qwest's interpretation of what the FCC meant better accords with the context and construct of the language.[202]

179. The Facilitator concludes by noting,

> We dealt with the one set of specific circumstances that the parties chose to expose in that earlier workshop. That resolution remains

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[199] 15 FCC Rcd at 3801, ¶ 233.

[200] 47 C.F.R. § 51.319(b).

[201] *UNE Report*, at 72.

[202] *Id.* at 73.

> valid and it also remains true that the continuation of the definitional debate between AT&T and Qwest has failed to disclose any other cases and circumstances sufficiently to address them. It should remain the case, therefore, that experience between them in the future will determine whether there is a later need to define access conditions further and make additional exceptions to collocation or NID access procedures and requirements (or the lack thereof) past today."[203]

180. Staff agrees with the Facilitator's resolution of this issue.[204]

181. AT&T argues that, contrary to what the Facilitator found, AT&T merely is attempting to ensure that Qwest does not eliminate, through its narrowing of the FCC's broad definition of NIDs, access that is contemplated by the FCC in its unbundling rules. AT&T maintains that what it is seeking is to ensure that all NID components – including all features and functions of the NID – are made available to CLECs.[205]

182. According to AT&T, the FCC's "...definition of the NID 'include[s] all the features functions and capabilities of the facilities used to connect loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism.'"[206] AT&T asserts, moreover, "...the FCC made clear that '[a]lthough the physical structure of the NID is widely available, it is access to the function, rather than the hardware itself, that competitors rely upon.'"[207] According to AT&T, this means, "...all components of the NID must be made available to CLECs, not merely the NID 'terminal.'"[208]

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[203] *Id.*

[204] Staff's *Proposed Findings*, at 18-19.

[205] AT&T's Exceptions, at 53.

[206] *Id.* (quoting the *UNE Remand Order*, 15 FCC Rcd at 3801, ¶ 233).

[207] *Id.* (quoting the *UNE Remand Order*, 15 FCC Rcd at 3801, ¶ 232).

[208] *Id.* at 56.

183. AT&T therefore requests that the Commission require Qwest to revise the definition of the NID in its SGAT to be consistent with the FCC's definition and that the remainder of SGAT § 9.5 be conformed, as well, to the definition it seeks.[209]

184. Qwest agrees with the Facilitator that the resolution of this issue is governed by his prior resolution of *Subloop Access at MTE Terminals*.[210] Qwest maintains AT&T's allegations that Qwest's NID definition does not comply with the FCC definition are erroneous. According to Qwest, its definition actually expands the FCC requirements to explicitly include NIDs that provide access to Qwest premises wiring in addition to end-user customer premises wiring.[211] Qwest therefore asks the Commission to adopt the Facilitator's resolution of this issue.[212]

185. We, like the Facilitator, have visited this issue once before in our *Order Regarding Emerging Services Report*. There, we concluded that the NID definition adopted by the Facilitator was sound and reasonable.[213] Our review of the rehabilitated debate surrounding definition of the NID has not persuaded us to alter our previous conclusion. Accordingly, we accept and adopt the Facilitator's resolution of the *NID Definition*.

Disputed Issue 2 – *Protector Connections*

186. This issue addresses whether CLECs can request that Qwest remove its connections from the protector field at a NID. The Facilitator recommended keeping the SGAT language as it stands. According to the Facilitator, AT&T's requested SGAT revision is based on a technical

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209 *Id.* at 55-56.

210 Qwest's Proposed Findings, at 36.

211 *Id.*

212 *Id.* at 37.

213 *Order Regarding Emerging Services Report*, at 21.

document that was presented for the first time as an attachment to AT&T's post-Workshop Three brief. The Facilitator concludes by stating, "Apart from the irregularity of its introduction into the record here, the request of AT&T fails for being inadequate in explanation and for seeking (absent further explanation, which is untimely in any event) unmediated access to facilities other than the Qwest NID."[214]

187. Staff endorses the Facilitator's resolution of this issue.[215]

188. AT&T, supported by WorldCom, contends that the removal and "capping off" of Qwest's connections from the protector field of the NID is not in violation of the National Electrical Safety Code ("NESC") or the National Electric Code ("NEC"). AT&T cites a prior Bell System practice in support of its contention that such capping off is permitted. AT&T maintains such action is necessary to free up capacity on the NID so that CLECs can provide service to customers. AT&T therefore requests that the Commission adopt AT&T's proposed modification of the last sentence of SGAT § 9.5.2.1, which reads as follows: "At no time should either Party remove the other Party's loop facilities from the other Party's NID without appropriately capping off the other Party's loop facilities."[216]

189. Qwest responds that AT&T's exceptions should be dismissed on both procedural and substantive grounds.[217] The procedural grounds were noted above. As to the substantive grounds, Qwest observes, "...a safety and/or reliability issue is clearly present that would render AT&T's

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[214] *UNE Report*, at 74.

[215] *Staff's Proposed Findings*, at 19

[216] *AT&T's Exceptions*, at 56-59.

[217] *Qwest's Proposed Findings*, at 39

demand technically infeasible."[218] Qwest asserts the Facilitator agreed with its position, noting that "AT&T did not respond to the Qwest testimony on this issue, even though Qwest's testimony raised significant safety issues, such as how a removed Qwest NID could be grounded unless someone provided the additional NID capacity for doing so."[219] For these reasons, Qwest argues, AT&T's exceptions should be rejected.[220]

190. The Commission is troubled by AT&T's request concerning this matter, based as it is on an untimely introduction into the record of a document that no other party had a prior chance to review or comment upon. We believe, moreover, that it would be inappropriate to have one carrier making material changes in the physical plant owned by another carrier, particularly when such changes may involve safety issues. The carrier owning the physical plant is ultimately responsible for the integrity and safety of the plant that it owns. Additionally, the carrier requesting the rearrangement or modification should be financially responsible for such construction activity. For these reasons, we reject AT&T's exceptions and accept and adopt the Facilitator's resolution respecting *Protector Connections*.

E. Provisional Conclusion Regarding Compliance as to Checklist Item 4[221]

191. Consistent with the foregoing findings and conclusions, the number of matters remaining to be fully and satisfactorily addressed and/or completed by Qwest – coupled with the significance of these outstanding matters to affording competing carriers a meaningful and lasting opportunity to compete in the local telecommunications market in New Mexico – militates against a

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218 *Id.*

219 *Id.* (quoting the *UNE Report*, at 73)

220 *Id.*

221 *See supra* note 182 and accompanying text.

finding of compliance with checklist item 4 at this juncture in these proceedings. Accordingly, the Commission concludes that Qwest is not at this time in compliance with section 271(c)(2)(B) of the Act. A provisional conclusion of compliance with checklist item 4 will require Qwest to resolve the outstanding matters addressed above to the satisfaction of the Commission and otherwise continue compliance with this *Order*. Accordingly, the Commission will hold open the matter of checklist item 4 for further consideration following the requisite showing by Qwest that it is in full compliance with the applicable provisions of this *Order*.

III. Checklist Item 5 – Unbundled Local Transport and Enhanced Extended Links

192. Section 271(c)(2)(B)(v) of the Act requires Qwest and other BOCs to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services."[222] The FCC has required BOCs to provide both dedicated and shared transport to requesting carriers.[223]

193. The Facilitator also addressed Enhanced Extended Links ("EELs") as a checklist item 5 issue. In the *UNE Remand Order*, the FCC defined an EEL as consisting "of a combination of an unbundled loop, multiplexing/concentrating equipment, and dedicated transport."[224]

194. As he did in dealing with checklist items 2 and 4, the Facilitator performed separate analyses of transport and EEL issues.

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[222] 47 U.S.C. § 271(c)(2)(B)(v).

[223] *See Application of BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region InterLATA Services in Louisiana*, CC Docket 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20719, ¶ 201 (1998) (*Second BellSouth Louisiana Order*).

[224] 15 FCC Rcd at 3707 (¶ 15, under "Executive Summary").

A. Local Transport

1. Transport Issues Resolved During Workshop Three

195. The Facilitator found that the following transport issues were fully resolved during Workshop Three and should be considered closed: *Available Dedicated Transport Routes, Requiring Multiplexers for Access to Transport* and *Cross Connecting UDIT and EUDIT*.[225]

196. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing in the parties' post-*UNE Report* briefing and having hereby found and concluded that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 5, the Commission accepts and adopts the Facilitator's recommendations respecting the three resolved transport issues.

2. Transport Issues Resolved in Earlier Workshops.

197. The Facilitator identified two transport issues that he deemed to have been raised and decided in the *Emerging Services Report* and further determined that his earlier resolutions remained "equally appropriate" in the context of checklist item 5; the issues are: *Access to the Facilities of Qwest Affiliates* and *Access to Dark Fiber in Qwest's Joint-Build Arrangements*.[226] The Commission notes that by approving the Facilitator's resolution of both issues, we required Qwest to modify its SGAT to include the language proposed by the Facilitator in resolving both issues.[227]

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[225] *UNE Report*, at 75-76.

[226] *Id.* at 76.

[227] *Order Regarding Emerging Services Report*, at 41-46 (the Facilitator's recommended language appears in italics at pp. 54-55 of the *Report on Emerging Services*).

198. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing in the parties' post-*UNE Report* briefing and having hereby found and concluded that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 5, the Commission accepts and adopts the Facilitator's recommendations respecting the two previously decided transport issues. Qwest therefore is directed to revise its SGAT in conformity with the Facilitator's recommendations and is reminded that a recommendation of compliance with this and all other checklist items is and shall be contingent on, among other things, Qwest modifying its SGAT in conformity with the Commission's directions and our procedure for consideration of Post-Report SGAT revisions.[228]

3. Transport Issues Remaining in Dispute

199. Four transport issues remained at impasse at the conclusion of Workshop Three.[229]

a. Disputed transport issues no longer in controversy

200. Three of the four disputed transport issues are no longer in dispute; these are: *SONET Add/Drop Multiplexing*, *Commingling UNEs and Interconnection Trunks* and *Applying Local Use Restrictions to Unbundled Transport*.

201. The latter two issues were not addressed in any of the parties' post-*UNE Report* briefs.

202. However, AT&T did offer comments concerning *SONET Add/Drop Multiplexing*. AT&T reports that it did not brief this issue because Qwest and AT&T agreed to language that

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[228] *See supra* note 4.

[229] *UNE Report*, at 76-80.

resolves this issue. AT&T goes on to state that Qwest agreed to add the following sentence to § 9.6.1.2: "SONET add/drop multiplexing is available on an ICB basis where facilities are available and capacity exists." Because this language is contained in the frozen SGAT, AT&T considers the issue to be resolved.[230]

203. Qwest concurs with AT&T's conclusions concerning this issue,[231] as does Staff.[232]

204. Given the parties' concurrence, the Commission agrees that the aforementioned addition to SGAT § 9.6.1.2 resolves the *SONET Add/Drop Multiplexing* issue.

205. Therefore, inasmuch as we deem these disputed transport issues to no longer be in controversy and we hereby find and conclude that the resolutions of them are appropriate, reasonable and determined in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 5, the Commission adopts and accepts the resolutions respecting *SONET Add/Drop Multiplexing*, *Commingling UNEs and Interconnection Trunks* and *Applying Local Use Restrictions to Unbundled Transport* and directs Qwest to revise its SGAT accordingly.

b. Disputed transport issue still in controversy

Disputed Issue 2 – *EUDIT/UDIT Distinction* and *Adding Electronics to EUDIT*

206. The only transport matter still in dispute concerns the propriety of drawing a distinction between unbundled dedicated interoffice transport ("UDIT") and extended unbundled interoffice transport ("EUDIT") for purposes of establishing rates, terms and conditions of interconnection. Also in issue is whether Qwest should be required to provide electronics in association with providing a transport UNE.

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[230] AT&T's Exceptions, at 60.

[231] Qwest's Proposed Findings, at 40.

[232] Staff's Proposed Findings, at 20.

207. With respect to the contested distinction, the Facilitator decided, "...this forum is not the right one for determining whether the flat-rated pricing for EUDIT is or is not appropriate. Thus, with Qwest's agreement that UDIT and EUDIT are not separate UNEs, but rather, at most a single UNE with two distinct pricing components, nothing more is required."[233] With respect to the issue of providing electronics in association with providing a transport UNE, the Facilitator decided that no such obligation exists.[234] We will address the Facilitator's recommendations regarding these issues separately.

EUDIT/UDIT Distinction

208. Staff supports the Facilitator's recommendation that UDIT and EUDIT effectively are a single UNE with two distinct pricing components.[235]

209. AT&T demurs, asserting that the entire dedicated transport link should be based on a distance sensitive, flat rate charge and that the proposed EUDIT pricing structure's average rate would violate the FCC's general rule that the recovery of costs should reflect the manner in which they are incurred. AT&T contends some CLECs will pay more than their cost, others will pay less and, as a consequence, AT&T maintains the incentive to build facilities to a meet point or elect to build closer to Qwest wire centers will be lost under Qwest's proposal. AT&T further claims Qwest's proposal is discriminatory, because when Qwest connects with other incumbent LECs, it does so via meet point arrangements and not through the provision of loop facilities. CLECs, also being carriers, consequently are relegated to an inferior status.[236] Consequently, AT&T requests that

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[233] *UNE Report*, at 78.

[234] *Id.* at 79.

[235] Staff's Proposed Findings, at 21.

[236] AT&T's Exceptions, at 60-63.

the Commission order Qwest to eliminate the EUDIT/UDIT distinction and provide dedicated transport between all required locations on a flat rate, distance-sensitive basis.[237]

210. Qwest agrees with Facilitator's recommendation, which it maintains is in conformity with its argument that the distinction between UDIT and EUDIT, concededly a single UNE as found by the Facilitator, preserves "historic pricing differences" and that AT&T's argument to the contrary speaks to costing and pricing issues that are beyond the scope of this proceeding."[238]

211. The Commission notes Qwest has agreed that the UDIT and the EUDIT are not separate UNEs but a single UNE; therefore, AT&T's request that the distinction be eliminated appears to have been satisfied. However, the Commission is not persuaded by Qwest's related contention that this single UNE is necessarily comprised of two distinct pricing components. As the Facilitator correctly observed, the question of UNE pricing is one that is more properly addressed in a cost case docket wherein parties are better able to consider the detailed cost information necessary to derive such prices.[239] It is, of course, the case that such cost information has neither been presented for assessment in this proceeding. This being the case, a significant question lingers regarding how to price the single UDIT/EUDIT until such time as the price is determined in our cost docket.

212. The Commission is of the opinion that in the interim, pricing for the UDIT/EUDIT UNE (the entire dedicated transport link between points) should be based on a distance sensitive, flat rate charge, modeled on Qwest's current UDIT rate structure. Qwest will have the option in our cost docket of revising its UDIT/EUDIT rates to reflect the difference in the cost of service (assuming

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[237] *Id.* at 60-62.

[238] Qwest's Proposed Findings, at 41.

[239] *Id.* at 78.

such a showing can be made). Qwest is directed to modify its SGAT to reflect the Commission's determination.

Adding Electronics to EUDIT

213. Staff agrees with the Facilitator's recommendation that Qwest has no obligation to provide electronics in association with provisioning a transport UNE.[240]

214. AT&T contends, "the [Qwest-defined] EUDIT does not have electronics on the CLEC end."[241] AT&T maintains, however, that Qwest supplies electronics at both ends of UDIT dedicated transport, which is what AT&T asserts it should be getting in QWEST-CLEC dedicated transport situations.[242] AT&T consequently asks the Commission to require Qwest to provide the electronics on dedicated transport terminating at a CLEC wire center.[243]

215. Qwest argues that this is a subset of the obligation to build UNEs issue, decided above, and that it agrees with the Facilitator's conclusion that the FCC authority cited by AT&T does not address the obligation to construct or augment capabilities or functions and that AT&T's request does not fall within a reasonable interpretation of Qwest's obligation to modify facilities.[244]

216. The arguments advanced by AT&T regarding adding electronics to EUDIT are analogous to the arguments that it advanced respecting Qwest's purported obligation to add electronics to dark fiber. Just as we believed that AT&T misinterpreted the FCC respecting the former issue, we believe so here as well. While AT&T is correct in noting that the *UNE Remand*

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240 Staff's Proposed Findings, at 21.

241 AT&T's Exceptions, at 64.

242 *Id.* at 64-65.

243 *Id.* at 65.

244 Qwest's Proposed Findings, at 12; *UNE Report*, at 79.

Order concluded that CLECs would be impaired if they had to incur the costs of self provisioning dedicated transport, AT&T mistakenly applies that metric to the distinct issue of provisioning electronics at the CLEC end of a EUDIT. Our reading of the paragraph of the *UNE Remand Order* on which AT&T relies,[245] read together with the paragraphs surrounding it, convinces us that the FCC's concern spoke to preventing CLECs from having to incur the much more significant costs of fiber deployment, trenching, right-of-way purchasing, and the like.[246]

217. The Commission believes that, in the context of considering whether an incumbent LEC has an obligation to provide electronics at the CLEC end of dedicated transport from an incumbent LEC wirecenter, the impair standard on which AT&T relies must be viewed in the fullness of its definition, which would include an analysis of the availability of elements outside the incumbent's network, including those available from self-provisioning. Indeed, as the Facilitator pointed out, there is no reason to suppose that CLECs are not as capable of installing electronics at their end of a EUDIT as Qwest is of installing the same at its end.[247]

218. For these reasons, the Commission concludes the Facilitator correctly concluded that Qwest is under no obligation to provide electronics at the CLEC end of an EUDIT and, therefore, accepts and adopts his recommendation on this issue.

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[245] 15 FCC Rcd at 3856.

[246] *UNE Remand Order*, 15 FCC Rcd at 3855-3859, ¶¶ 355-360.

[247] *UNE Report*, at 79.

B. EELs

1. EEL Issues Resolved During Workshop Three

219. The Facilitator found that the following EEL issues were fully resolved during Workshop Three and should be considered closed: *Waiver of Local Use Requirements for Particular EELs*, *Ways of Meeting the Local Use Requirements* and *Audits of Local Use Certifications*.[248]

220. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing in the parties' post-*UNE Report* briefing and having hereby found and concluded that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 5, the Commission accepts and adopts the Facilitator's recommendations respecting the three resolved EEL issues.

2. EEL Issues Remaining in Dispute

221. Five EEL issues remained at impasse at the conclusion of Workshop Three.[249]

222. Three of the five disputed EEL issues are no longer in dispute as no party contested the Facilitator's resolution of them in their post-*UNE Report* briefing; these issues are: *Limiting Local Use Requirements to Existing Special Access Circuits*, *Waiving Local Use Restrictions on Private Lines Purchases in Lieu of EELs* and *Counting ISP Traffic Toward Local Use Requirements*.

223. Inasmuch as we deem these disputed EEL issues to no longer be in controversy and we hereby find and conclude that the resolutions of them are appropriate, reasonable and determined in a manner that is consistent with the public interest and the requirement that Qwest comply with

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[248] *Id* at 80-81.

[249] *Id* at 81-89.

checklist item 5, the Commission adopts and accepts the resolutions respecting the three disputed PEL items no longer in controversy.

b. Disputed transport issue still in controversy

Disputed Issue 2 – Allowing Commingling Where Qwest Refuses to Construct UNEs

234. AT&T argued that Qwest should not be permitted to refuse commingling UNEs and tariffed services in certain instances where Qwest refuses to construct UNEs. Qwest countered that applicable FCC orders prohibit commingling of UNEs with tariffed special access services.

235. Finding that avoidance of access charges was not the motivating factor for CLECs here, and that, in any event, the result would not be to avoid access charges (because rate or price arbitrage will not be permitted), the Facilitator proposed SGAT language allowing, under "specified circumstances", the connection of UNEs that CLECs want.[250]

236. Staff approves of the language proposed by the Facilitator.[251]

237. AT&T finds the Facilitator's language generally acceptable. However, AT&T states that although it used the example of a DS1 Loop to support its arguments, there may be times where AT&T may purchase a DS3 or higher bandwidth service as a retail service that it may wish to convert to UNE transport. For this reason, AT&T requests that the words *or other high-capacity* be inserted after the word "DS1" in the first sentence of the Facilitator's proposed language.[252]

238. Qwest agreed to incorporate the Facilitator's proposed language in its SGAT and did not address AT&T's requested modification.[253]

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[250] *Id.* at ¶ 84.

[251] Staff's Proposed Findings, at 32.

[252] AT&T's Exceptions, at 65-66.

[253] Qwest's Proposed Findings, at 43.

229. The Commission deems the Facilitator's recommended SGAT language in resolution of *Allowing Commingling Where Qwest Refuses to Construct UNEs* to be appropriate, reasonable and consistent with the public interest and, therefore, accepts and adopts his resolution of this issue. Moreover, the Commission finds that AT&T's suggested modification to the Facilitator's proposed SGAT language is likewise appropriate, reasonable and consistent with the public interest and, accordingly, orders its adoption. Therefore, the first sentence of the Facilitator's proposal, as the same appears on page 84 of the *UNE Report*, should be modified to read as follows:

> Where a CLEC has been denied access to a DS1 or other high capacity loop as a UNE due to lack of facilities, and where the CLEC has requested and been denied the construction of new facilities to provide such loop, a CLEC may connect a tariffed service that it secures in lieu of that UNE to a transport UNE that it has secured from Qwest.

The remainder of the Facilitator's language shall remain unchanged. Qwest is directed to modify its SGAT accordingly.

Disputed Issue 3 – *Waiver of Termination Liability Assessments for EELs*

230. The Facilitator resolved this issue by modifying a proposal made by Qwest to waive termination liability assessments ("TLAs") under certain circumstances. The Facilitator's proposed language essentially waives TLAs for circuits ordered as special access circuits between February 17, 2000, the effective date of the *UNE Remand Order*, and May 16, 2001, provided the CLEC identifies the circuits and notifies Qwest.[254]

231. Staff supports the Facilitator's proposed language on this issue.[255]

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[254] *UNE Report*, at 87.

[255] Staff's Proposed Findings, at 22.

232. AT&T takes issue with the Facilitator's adoption of the effective date of the *UNE Remand Order*, arguing that Qwest has been obligated to provide combinations of UNEs since the date of the *Local Competition First Report and Order*, or August 8, 1996. AT&T contends that, although this order was the subject of an appeal, the obligation to provide combinations was never stayed. AT&T, moreover, avers that although the Eighth Circuit vacated the incumbent LEC obligation to combine UNEs, the United States Supreme Court in *AT&T Corp. v. Iowa Utilities Board*[256] upheld the rule prohibiting incumbent LECs from separating UNEs, and many states implemented their own requirement mandating CLECs to combine UNEs. For these reasons AT&T argues the Facilitator's proposed language should be amended by striking "February 17, 2000" and inserting, in its stead, "August 8, 1996."[257]

233. Qwest accepts the Facilitator's proposed language and urges the Commission to reject AT&T's proposed amendment.[258]

234. We conclude that the Facilitator crafted a balanced and judicious resolution of this issue. Accordingly, the Commission accepts and adopts the Facilitator's resolution of *Waiver of Termination Liability Assessments for EELs* and directs Qwest to incorporate the SGAT language proposed by the Facilitator at an appropriate location in its final SGAT.

D. Provisional Conclusion Regarding Compliance With Checklist Item 5[259]

235. Consistent with the foregoing findings and conclusions, the Commission provisionally concludes that Qwest be found in compliance with section 271(c)(2)(b)(v) of the Act.

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[256] 525 U.S. 366, 393-94 (1999).

[257] AT&T's Exceptions, at 66-67.

[258] Qwest's Proposed Findings, at 43-44.

[259] *See supra* note 182 and accompanying text.

However, the Commission's recommendation to the FCC regarding checklist item 5 is and shall be subject to (a) Qwest's continuing compliance with this *Order*, (b) Qwest modifying its SGAT in conformity with the abovementioned directions as well as the Commission's procedure for consideration of Post-Report SGAT revisions, and (c) the Commission's consideration of any and all ROC OSS testing issues and QPAP issues pertaining to checklist item 5.

IV. Checklist Item 6 – Unbundled Local Switching

236. Section 271(c)(2)(B)(vi) of the Act requires Qwest and other BOCs to provide "[l]ocal switching unbundled from transport, local loop transmission, or other services."[260] The FCC first identified local switching as an unbundled network element in its *Local Competition First Report and Order*.[261] The FCC confirmed its unbundling of local switching in the *UNE Remand Order*: "[w]e require incumbent LECs to provide local switching as an unbundled network element."[262] However, the FCC carved out an exception to the general unbundling rule for specific and limited large market circumstances:

> We find that, where incumbent LECs have provided nondiscriminatory, cost-based access to combinations of loop and transport unbundled network elements, known as the enhanced extended link (EEL), requesting carriers are not impaired without access to unbundled switching for end users with four or more lines within density zone 1 in the top 50 metropolitan statistical areas (MSAs).[263]

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[260] 47 U.S.C. § 271(c)(2)(B)(vi).

[261] *Local Competition First Report and Order*, 11 FCC Rcd at 15705-15713, ¶¶ 410-426.

[262] *UNE Remand Order*, 15 FCC Rcd at 3808, ¶ 253.

[263] *Id.* 15 FCC Rcd at 3808-09, ¶ 253.

A. Unbundled Switching Issues Resolved During Workshop Three

237 The Facilitator determined that the following unbundled switching issues were fully resolved during Workshop Three and should be considered closed:

1) *Specifying Additional Types of Switch Access*;
2) *Availability of Switch Features*;
3) *Unbundling Switch Centrex Management and Control Features*;
4) *Notice of Switch Changes and Upgrades*;
5) *Unbundling Tandem Switches*;
6) *Definition of Tandem Switching Element*; and
7) *Tandem to Tandem Connections*.[264]

238 There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing in the parties' post-*UNE Report* briefing and having hereby found and concluded that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 6, the Commission accepts and adopts the Facilitator's recommendations respecting the seven resolved unbundled switching issues.

B. Unbundled Switching Issues Remaining in Dispute

239 Four unbundled switching issues remained at impasse at the conclusion of Workshop Three.[265]

1. Disputed unbundled switching issues no longer in controversy

240 Two of the disputed unbundled switching issues, *Access to AIN-Provided Features*[266]

[264] *UNE Report*, at 90-92.
[265] *Id.* at 92-96.
[266] *Id.* at 93-95.

and *Basis for Line Counts in Applying the Four-Line Exclusion*[267] were not addressed in any of the parties' post-*UNE Report* briefs.

241. Inasmuch as we deem these issues to no longer be in controversy and we hereby find and conclude that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest and the requirement that Qwest comply with checklist item 6, the Commission adopts and accepts the Facilitator's resolutions respecting the disputed unbundled switching issues no longer in controversy.

2. Disputed unbundled switching issues still in controversy

Disputed Issue 2 – *Exemption from Providing Access to Switching in Large Metropolitan Areas*

242. Although the Facilitator addressed a number of contested issues under this item, AT&T focuses its post-*UNE Report* argument solely on whether Qwest may restrict CLECs from access to unbundled switching in Density Zone 1 wire centers in the top 50 Metropolitan Service Areas (MSAs) when EELs are not available. While the Facilitator considered this matter closed, AT&T contends he did not adequately address the specific point raised by AT&T regarding the availability of unbundled switching where an EEL is not available.[268]

243. Staff agrees with the Facilitator's resolution of this issue.[269]

244. AT&T asserts that Qwest's SGAT provision concerning the FCC's unbundled switching exception is overbroad because the FCC spelled out specific requirements, not in the SGAT, which must be met before Qwest may be excused from offering unbundled switching. AT&T maintains the FCC has provided that, in Density Zone 1, a CLEC has to purchase its own

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[267] *Id* at 95-96.

[268] *Id* at 95.

[269] Staff's Proposed Findings, at 24.

switch if, and only if, an EEL is available. If an EEL is not available, AT&T maintains, "the cost to the CLEC of purchasing multiple switches in zone 1 does impair a CLEC. The ILEC must make unbundled switching available to the CLEC in zone if Qwest cannot provide an EEL ordered by CLEC."[270] AT&T therefore avers that Qwest is not in compliance with checklist item 6 if Qwest does not make unbundled switching available where an EEL is not available. AT&T consequently requests that the Commission adopt language that makes clear that unbundled switching should be made available when Qwest cannot make an EEL available to a CLEC.[271]

245. Qwest offers the general observation that the Facilitator previously rejected arguments raised by AT&T during the workshops and in AT&T's brief addressing this issue. Qwest does not otherwise respond to the specific point raised by AT&T in its Exceptions. Qwest urges the Commission to adopt the Facilitator's resolution.[272]

246. While the Facilitator noted that the only wire center in the seven states that could qualify for the exemption is the Salt Lake City Main wire center, the Commission nevertheless takes this opportunity to agree with AT&T's conclusion that the Facilitator did not adequately address the issue of whether or not the exclusion from unbundled switching should apply in those instances where an EEL is not available.

247. The FCC has found that switch capacity, distance-sensitive transport costs, and collocation costs significantly impair a requesting carrier. Given this finding, and our reading of the FCC's Orders in this regard, particularly paragraphs 253 and 288 of the *UNE Remand Order*,[273] we

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[270] AT&T's Exceptions, at 67-69.

[271] *Id.* at 69-70.

[272] Qwest's Proposed Findings, at 45.

[273] 19 FCC Rcd at 3808, 3828.

believe Qwest should not enjoy the exemption from the requirement relating to unbundled switching in Density Zone 1 unless a CLEC can obtain an EEL from Qwest as a local transport alternative on a basis at parity with Qwest's self-provisioned local transport alternatives.

248. While this is a matter factually applicable at this time only in one state, Utah, among the seven states participating in the Multi-State Proceeding, we nevertheless agree with AT&T that, consistent with the *UNE Remand Order*, Qwest should make available unbundled switching when Qwest cannot make an EEL available to a CLEC. Qwest is directed to submit new proposed SGAT language for § 9.11.2.5 that complies with and reflects the Commission's determination respecting the correct and limited parameters of the unbundled switching exception. However, except as so modified, the Commission accepts and adopts the remainder of the Facilitator's resolution respecting *Exemption from Providing Access to Switching in Large Metropolitan Areas*.

Disputed Issue 4 – *Providing Switch Interfaces at the GR-303 and TR-008 Level*

249. AT&T reports that the language pertaining to § 9.11.1.1.2 contained in Qwest's Brief[274] resolves the matter for AT&T and that the issue therefore can be considered closed. AT&T goes on to note, however, that the frozen SGAT fails to include the language proposed by Qwest in its Brief. AT&T requests that the Commission take note of this and instruct Qwest to modify its final SGAT so as to include § 9.11.1.1.2.[275]

250. Qwest asserts that its frozen SGAT actually contains the language at issue for SGAT § 9.11.1.1.2 and that the issue should be considered closed.[276]

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[274] *See* Qwest's Legal Brief Regarding Disputed Issues: Checklist Items 2 (UNEs), 5 (Transport), And 6 (Switching) ("Qwest's Brief") (May 31, 2001), at 40 and Exhibit A.

[275] AT&T's Exceptions, at 70.

[276] Qwest's Proposed Findings, at 46.

251. Since the parties appeared to have reached a mutually satisfactory resolution of this issue, the Commission considers this issue closed, with the understanding that Qwest's final SGAT §9.11.1.1.2 must conform to the language agreed upon by the parties as the same appears in Qwest's Legal Brief at page 40.

C. Provisional Conclusion Regarding Compliance With Checklist Item 6[277]

252. Consistent with the foregoing findings and conclusions, the Commission provisionally concludes that Qwest be found in compliance with section 271(c)(2)(b)(vi) of the Act. However, the Commission's recommendation to the FCC regarding checklist item 6 is and shall be subject to (a) Qwest's continuing compliance with this *Order*, (b) Qwest modifying its SGAT in conformity with the abovementioned directions as well as the Commission's procedure for consideration of Post-Report SGAT revisions, and (c) the Commission's consideration of any and all ROC OSS testing issues and QPAP issues pertaining to checklist item 6.

IT IS THEREFORE ORDERED:

A. The Commission provisionally concludes, in accordance with the foregoing pertinent findings and conclusions, that Qwest be found in compliance with section 271(c)(2)(b)(ii) of the Act. However, the Commission's recommendation to the FCC regarding checklist item 2 is and shall be subject to (a) Qwest's continuing compliance with this *Order*, (b) Qwest modifying its SGAT in conformity with the abovementioned directions as well as the Commission's procedure for consideration of Post-Report SGAT revisions, and (c) the Commission's consideration of any and all ROC OSS testing issues and QPAP issues pertaining to checklist item 2.

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[277] *See supra* note 182 and accompanying text.

B. The Commission concludes, in accordance with the foregoing pertinent findings and conclusions, Qwest is not at this time in compliance with section 271(c)(2)(b)(iv) of the Act. A provisional conclusion of compliance with checklist item 4 will require Qwest to fully and satisfactorily address and/or complete the outstanding matters addressed in our discussion of checklist item 4, *supra*, and otherwise continue compliance with this *Order*. Accordingly, the Commission hereby holds open the matter of checklist item 4 for further consideration following the requisite showing by Qwest that it is in full compliance with the applicable provisions of this *Order*.

C. The Commission provisionally concludes, in accordance with the foregoing pertinent findings and conclusions, that Qwest be found in compliance with section 271(c)(2)(b)(v) of the Act. However, the Commission's recommendation to the FCC regarding checklist item 5 is and shall be subject to (a) Qwest's continuing compliance with this *Order*, (b) Qwest modifying its SGAT in conformity with the abovementioned directions as well as the Commission's procedure for consideration of Post-Report SGAT revisions, and (c) the Commission's consideration of any and all ROC OSS and QPAP issues pertaining to checklist item 5.

D. The Commission provisionally concludes, in accordance with the foregoing pertinent findings and conclusions, that Qwest be found in compliance with section 271(c)(2)(b)(vi) of the Act. However, the Commission's recommendation to the FCC regarding checklist item 6 is and shall be subject to (a) Qwest's continuing compliance with this *Order*, (b) Qwest modifying its SGAT in conformity with the abovementioned directions as well as the Commission's procedure for consideration of Post-Report SGAT revisions, and (c) the Commission's consideration of any and all ROC OSS testing issues and QPAP issues pertaining to checklist item 6.

E. This *Order* is effective immediately.

F. Copies of this *Order* shall be served on all persons listed on the attached Certificate of Service.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 20th day of November 2001.

NEW MEXICO PUBLIC REGULATION COMMISSION

TONY SCHAEFER, CHAIRMAN

HERB H. HUGHES, VICE-CHAIRMAN

RORY McMINN, COMMISSIONER

JEROME D. BLOCK, COMMISSIONER

LYNDA M. LOVEJOY, COMMISSIONER

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF QWEST CORPORATION'S SECTION 271 APPLICATION AND MOTION FOR ALTERNATIVE PROCEDURE TO MANAGE THE SECTION 271 PROCESS.	)	Utility Case No. 3269

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **Order Regarding Facilitator's Report on Checklist Item 2 (Access to Unbundled Network Elements), Checklist Item 4 (Access to Unbundled Loops), Checklist Item 5 (Access to Unbundled Local Transport) and Checklist Item 7 (Access to Unbundled Local Switching)** issued November 20, 2001, was mailed by first-class mail, postage prepaid to the following on November 21, 2001:

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and hand-delivered to:

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DATED this 21st day of November, 2001.

NEW MEXICO PUBLIC REGULATION COMMISSION

Mona Varela

Mona Varela, Administrator

EXHIBIT D

Exhibit D

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of QWEST CORPORATION, fka US WEST Communications, Inc., for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B)	)	DOCKET NO. 00-049-08 REPORT ON CHECKLIST ITEM 2 (ACCESS TO UNBUNDLED NETWORK ELEMENTS), CHECKLIST ITEM 4 (ACCESS TO UNBUNDLED LOOPS), CHECKLIST ITEM 5 (ACCESS TO UNBUNDLED LOCAL TRANSPORT) AND CHECKLIST ITEM 6 (ACCESS TO UNBUNDLED LOCAL SWITCHING)

ISSUED: March 25, 2002

By The Commission:

The Public Service Commission of Utah ("Commission") is participating in a multi-state collaborative Section 271 proceeding ("Multi-State Proceeding") with the state commissions of Idaho, Iowa, Montana, New Mexico, North Dakota, and Wyoming to evaluate the compliance of Qwest Corporation ("Qwest") with the requirements of 47 U.S.C. § 271.

In this Order the Commission addresses whether we will recommend to the FCC that Qwest has complied with the requirements of Checklist Item 2 (Unbundled Network Elements), Checklist Item 4 (Access to Unbundled Loops), Checklist Item 5 (Access to Unbundled Local Transport) and Checklist Item 6 (Access to Unbundled Local Switching).[1] These checklist items were covered in Workshop 3 of the Multi-State Proceeding. In January 2001, Qwest filed the direct testimony, as well as supporting exhibits, stating that Qwest complies with the requirements of Checklist Items 2, 4, 5, and 6, and that Qwest is providing and

[1] 47 U.S.C. § 271(c)(2)(B)(ii), (iv), (v), and (vi).

stands ready to provide these checklist items to CLECs at an acceptable level of quality and in amounts that they may reasonably demand. Testimony was filed by the New Mexico Public Regulatory Commission's Advocacy Staff ("Staff"), AT&T Communications of the Mountain States, Inc./AT&T Communications of the Midwest, Inc./AT&T of the Pacific Northwest, Inc. (collectively "AT&T"), XO Utah, Inc. ("XO Utah"), Electric Lightwave, Inc. ("ELI"), and The Association of Communications Enterprises ("ASCENT") regarding Qwest's compliance with these checklist items in February 2001. Qwest filed rebuttal testimony responding to the issues raised by these parties and proposing additional modifications to its Statement of Generally Available Terms ("SGAT") to resolve issues. Thereafter, AT&T, Rhythms NetConnections, Inc. ("Rhythms") and XO Utah filed additional testimony. Briefs were filed on or about May 31, 2001 and June 4, 2001 by the following parties: Qwest, AT&T, XO Utah/ELI, Rhythms, and the Wyoming Consumer Advocate Staff. On June 18, 2001, Qwest and AT&T filed supplemental briefs addressing a single loop impasse issue that had been deferred for supplemental briefing at a later date.

On August 20, 2001, the Commission's Staff issued the Staff Report on Checklist Item 2 (Unbundled Network Elements), Checklist Item 4 (Access to Unbundled Loops), Checklist Item 5 (Access to Unbundled Local Transport) and Checklist Item 6 (Access to Unbundled Local Switching), and recommendations (the Staff Report). On August 30, 2001, AT&T and XO Utah/ELI filed comments or exceptions to certain recommendations in the Staff Report. Qwest filed comments agreeing to adopt the Staff's recommendations.

The Commission has reviewed the record of Workshop 3, the Staff Report, and the comments of the parties in response to the Staff Report. Having considered the record the Commission makes the following specific findings.

CONTINUATION

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FINDINGS OF FACT

I. Introduction

Where none of the participants raised concerns regarding SGAT language, the Commission accepts the proposed language. Where participants have raised concerns regarding SGAT language, and the participants have reached consensus, the Commission accepts the consensus language. Where participants have raised concerns regarding SGAT language and Qwest has responded but the other participants did not reply the Commission accepts the proposed language. Where participants have raised concerns regarding SGAT language and the participants have not resolved the issue, the Commission accepts the resolution suggested in the Staff Report except for the issues explained below.

The Commission recognizes that satisfactory performance in the Regional Oversight Committee's ("ROC") operational support systems' ("OSS") test for applicable performance measures is essential in order to demonstrate that the agreements reached in these workshops are actually implemented. All recommendations of checklist compliance are conditional on the successful completion of all relevant portions of the ROC OSS test.

II. Checklist Item 2 – Access to Unbundled Network Elements

A. Deferred Items

During the workshops on Group 4, the parties submitted testimony and comments regarding the bona fide request ("BFR") process for handling requests for non-standard forms of interconnection or unbundled network elements ("UNEs"). The BFR process is of general applicability to the SGAT; therefore, Staff determined that this process should be addressed in the workshop on General Terms and Conditions. The Commission resolved these issues in its Report and Order regarding SGAT issues.

B. Resolved Items

Staff reported that the following issues had been resolved during the Workshops: Definitions, Changes in Law Regarding Access to UNEs, General Obligation to Provide UNE Access, UNE use restrictions, UNE Demarcation Points, UNE Testing, UNE Provisioning Intervals, Notice of Changes Affecting UNE Transmission Parameters, UNE Rates (such as Miscellaneous Charges, Construction Charges for Ancillary and Finished Services, Unbundled Customer Controlled Rearrangement Element ("UCCRE"), UNE Demarcation Point (ITP) costs), Access to Newly Available UNEs and UNE Combinations, and Information Access When Customers Change Service Providers. The Commission finds that Qwest is in compliance with respect to these issues.

C. Issues Decided Earlier in the Process - UNEs Generally

Staff Report stated that the following issues had been resolved previously: LIS in the Definition of Finished Services, Marketing During Misdirected Calls, and Regeneration Charges. The Commission's earlier Orders in this Docket and in Docket Number 00-049-106 rejected the Staff's recommendation regarding regeneration charges; we make no changes in our policy with respect to regeneration in this Order. The Commission finds that when Qwest has fully implemented our (00-049-106) decision with regard to this issue Qwest will be in compliance on this issue.

D. Issues Remaining in Dispute-UNEs Generally

1. Construction of New UNEs

ELI argued that SGAT Section 9.19 should be amended to require Qwest to construct UNEs and unbundled high capacity loops under similar terms and conditions to those that apply when Qwest constructs UNEs or loops to provide service to its own customers.

AT&T argued that Qwest should be obliged to build new facilities to provide UNEs for CLECs under the same terms and conditions that it would construct them for its own end users or itself. ELI objected to the SGAT Section 9.23.1.4, Section 9.23.1.5, Section 9.23.1.6, and Section 9.23.3.7.2.12.8, which limit Qwest's obligation to provide EELs to existing and available facilities. XO Utah/ELI argued that it would be discriminatory for Qwest to refuse to construct new facilities for the use of CLECs in those circumstances (and under those terms and conditions) where it would construct new facilities to serve its end users. XO Utah/ELI asserted that Qwest subjects CLEC requests for new facilities to different standards. XO Utah also testified that SGAT Section 9.2.4.3.1.2.4 should not allow Qwest to reject a CLEC order for unbundled loops for lack of facilities, unless Qwest was entitled to reject a similar order from one of its end users. XO Utah argued that the SGAT should provide for parity between CLECs and Qwest's or between CLECs and Qwest's own end users.

Qwest argued that it had no obligation to build a network for CLECs, claiming that both the FCC's *UNE Remand Order*[2] and the Eighth Circuit Court's holding in *Iowa Utilities Bd. v. FCC* support this position.[3]

The United States Court of Appeals for the Eighth Circuit, the court charged with interpreting the Act and the FCC's local competition regulations, has held that incumbent LECs are not required to construct new superior UNEs for CLECs at the TELRIC prices. Interpreting the Act, the Eighth Circuit held that "subsection 251(c)(3) implicitly requires unbundled access

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[2] *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Dkt. No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) ("*UNE Remand Order*").

[3] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *reversed in part on other grounds and remanded on other grounds, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

only to an incumbent LEC's *existing* network—*not to a yet unbuilt superior one*."[4] The question here is what is meant by the words existing network. Clearly the Court's explanatory phrase "*not to a yet unbuilt superior one*" implies that ILECs are not required to construct facilities that exceed the quality of the ILECs' existing networks; however, it does not necessarily imply there is no obligation to build facilities that match the quality of the existing network.

We find a clear conflict between the concept of parity between what the ILEC provides to itself or its retail customers and the concept of TELRIC prices for new construction. The risk of recovering investment in facilities is real. Certainly there is no a priori reason to suspect that the financial analysis a CLEC (who could cease leasing a given UNE facility with no financial penalty if the construction obligation policy is adopted) would undertake would be the same as what Qwest would undertake. Given this potential disparity in analysis, scenarios of over-investment (with its associated financial loss for Qwest) are likely. In a case of over investment that results from a CLEC ordering, briefly using, and then returning to Qwest a UNE facility, Qwest will not recover its investment as is required for valid TELRIC prices. Therefore we decline to impose a general obligation on Qwest to build new facilities for CLECs at TELRIC prices. However, we do require Qwest to build facilities for CLECs on the same terms and conditions that Qwest builds new facilities for its own customers.

Notwithstanding the above finding and direction, Qwest's commitment in SGAT Section 9.1.2 to construct facilities to meet its carrier-of-last-resort obligations will require Qwest to build new UNE facilities for basic service orders at TELRIC prices. We direct Qwest to modify its SGAT to reflect these findings.

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[4] *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813 (emphasis added).

This issue and related ones are before the FCC and the federal courts. We expect that Qwest will promptly modify its SGAT to reflect any clarifications or expansions of its obligation to build facilities that may result from FCC or federal court decisions.

On a related issue we agree with the Staff Report's conclusion that Qwest is not required to add electronics to UNEs, whether dark fiber or any other UNE. AT&T, or any CLEC, can gain access to the dark fiber, or other UNE, and install its own electronics, using its rights of access to Qwest's poles, ducts, conduits, and rights of way.[5] For EUDIT, Qwest has apparently agreed that where spare electronics exist it will allow termination to permit EUDIT to have the full features and functionalities of the electronics. The Commission finds that Qwest is in compliance with respect to these issues.

2. OSS Testing

AT&T raised concerns alleging a lack of SGAT language regarding testing the ability of Qwest's OSS to support large-scale market entry by CLECs. Qwest responded by proposing SGAT Section 12.2.9.3 in Exhibit WS3-QWE-KAS-7. AT&T then proposed changes to make that language more comprehensive. Qwest argued that AT&T's detailed proposal for comprehensive production testing was unnecessary and duplicative. It also objected to several of AT&T's other changes to SGAT Section 12.2.9.3.1 through 12.2.9.3.4.

Specifically, Qwest argued that AT&T's addition at various places of the phrase "CORBA and other application-to-application interfaces" should not be accepted because the SGAT should not make commitments regarding non-standard or unidentified interfaces. Qwest asserted that its agreeing to AT&T's last sentence in proposed Section 12.2.9.3.1 was adequate to

[5] Staff Report at 25.

address connectivity-testing needs for new interfaces. We find that Qwest's proposal is adequate on this point.

Qwest also argued that AT&T's proposed sentences in Section 12.2.9.3.2 and 12.2.9.3.3 (those beginning with "While separate...") require testing and production results to be identical, and that that standard was vague and impossible to meet. As proposed, the AT&T language would require that test pre-order inquiries be subject to the same edits as production orders. Qwest argued that this was not possible, because the edits are based on real customer data in Qwest's systems, the fictional customers used for purposes of this test had no such information available. To the extent that parity of treatment cannot be designed into the test we accept Qwest's point. However, language should be added to the SGAT that requires parity of treatment unless Qwest shows that parity is not technically possible.

AT&T proposed additions as the last sentence of the first paragraph of Section 12.2.9.3.2 and of Section 12.9.3.3 ("When CLEC is testing its interface with a new Qwest release...") and the third sentence of Section 12.9.3.4 ("When Qwest migrates its OSS interfaces..."). Qwest argued that its current language in Section 12.2.9.4.1 and 12.2.9.4.2 of the SGAT adequately addressed new software releases and upgrades. We accept Qwest's argument on this point.

The Staff Report proposed language to address circumstances where a CLEC desires a different level of testing than is already contemplated by the SGAT:

> Upon request by a CLEC, Qwest shall enter into negotiations for comprehensive production test procedures. In the event that agreement is not reached, the CLEC shall be entitled to employ, at its choice, the dispute resolution procedures of this agreement or expedited resolution through request to the state commission to resolve any differences. In such cases, CLEC shall be entitled to testing that is reasonably necessary to accommodate identified business plans or operations needs, accounting for

> any other testing relevant to those plans or needs. As part of the resolution of such dispute, there shall be considered the issue of assigning responsibility for the costs of such testing. Absent a finding that the test scope and activities address issues of common interest to the CLEC community, the costs shall be assigned to the CLEC requesting the test procedures.

The proposed language does not address the core issue of what the baseline level of testing should be. Certainly testing must be of a sufficient level to prove that any approved interfaces will be adequate at significant levels of market entry. We accept the Staff revised language for section 12.2.9.3.5 above and AT&T's other requested changes (those not rejected above) to Section 12.9.2.3 and its subparts (as shown in WS3-ATT-MFH-2). It is our understanding that Qwest has already added the Staff's proposed language to the SGAT with one modification. Qwest inserted the phrase "in addition to the testing set forth in Section 12.2.9.3," we find this acceptable. Further we understand that Qwest has revised other provisions to reflect language subsequently negotiated between Qwest, AT&T and other CLECs during the General Terms and Conditions Workshop. These revisions are also acceptable. We anticipate that details on the level of baseline testing will still need to be addressed by the parties. With the exception on that outstanding issue we find that Qwest is in compliance with respect to this issue.

E. Issues Resolved During This Workshop - UNE Platform and Other Combinations

Staff reported that the following issues were resolved in the Workshop: Availability of Switch Features with UNE-Platforms, Features Available with UNE-P-PBX, UNE-P-DSS, and UNE-P-ISDN, Migrating from Centrex Services to UNE-P, High Speed Data with UNE-P-POTS and UNE-P-ISDN, Converting From Resale to UNE-P, Definition of Access, Restrictions on UNE Combinations, Use Restrictions, Combining Qwest Provided UNEs With Other Elements or Services, Non-Separation of Combined Elements, "Glue" Charges for

Combinations, Ordering Equipment Ancillary to UNE Combinations, Restricting Available UNE Combinations, Loop and Multiplexing Combinations, CLEC Loop Termination, UNE Combination Forecasts, Nonrecurring Charges, and Delays From Loading CLEC Billing Rates into Qwest's Systems. According to the Staff Report there were no outstanding impasse issues concerning UNE-P at the conclusion of the Workshop, based on that understanding the Commission finds that Qwest is in compliance with respect to these issues.

F. Checklist Item Number 2 Recommendation on Compliance

The Commission finds that Qwest is in compliance with checklist item 2 subject to satisfactory performance in the ROC OSS testing process, Qwest implementing the Commission's policy with respect to regeneration charges, and adding SGAT language that guarantees testing parity when it is technically possible.

III. Checklist Item 4 – Access to Unbundled Loops

Qwest addressed compliance with the requirements of this checklist item in the direct and rebuttal testimony of Jean M. Liston. AT&T, Rhythms, and XO Utah/ELI submitted testimony or comments.

A. Issues Deferred

1. Accepting Loop Orders with "Minor" Address Discrepancies

AT&T claimed that Qwest was rejecting service orders with minor differences between end user information on the local service request ("LSR") and information contained in Qwest's systems. Both Qwest and AT&T presented testimony on this issue. The Commission notes that AT&T in its exceptions states that prior to submission of briefing on this issue, it requested deferral of this issue to the ROC OSS test process. Accordingly, the parties did not brief this issue.

The Commission agrees that this issue should be addressed as part of the ROC OSS test and notes that no party disagrees.

2. Resolving Conflicts Between the SGAT and Parallel Documents

AT&T alleged that a number of other documents (e.g., technical publications) conflict with the SGAT. Qwest disagreed and the parties agreed to defer to the General Terms and Conditions workshop the issue of determining how to resolve any potential conflicts between the SGAT and other documents referred to therein or otherwise used by Qwest in implementing the SGAT. In its Order on the General Terms and Conditions Workshop the Commission clarified that the documents in force at the time an interconnection agreement is signed will govern that agreement.

B. Issues Resolved During the Workshop – Loops

Staff reported that the following issues were resolved in the Workshop: Definition of Loop Demarcation Point, Digital versus Digital-Capable Loops, Parity in Providing Unbundled Loops, Limiting Available Analog Loop Frequency, Method for Providing Unbundled IDLC Loops, Choosing Loop Technology Types, CLEC Authorization for Conditioning Charges, Access to Loop Features, Functions, and Capabilities, Offering High Capacity and Fiber Loops on an Individual Case Basis, Charges for Unloading Loops, Extension Technology To Give Loops ISDN Functionality, DS1 and DS3 Loop Specifications, Access to Digital Loops Where Available, Loop Installation Process, Coordinated Installation, Limits on Loop Testing Costs, Obtaining Multiplexing for Unbundled Loops, Transmission Parameters, CLEC/End User Disagreements about Disconnecting or Connecting Loops, Qwest Access to Qwest Facilities on CLEC Customer Premises, Points of CLEC Access to Unbundled Loops, Relinquishing Loops on Loss of End User Customers, CLEC Right to Select From Available

Loop Technologies, Miscellaneous Charges, Installation Hours, Unforecasted Out-of-Hours Coordinated Loop Installations, Overtime for Out-of-Hours Installations, Proofs of Authorization, ICB Intervals for Large Loop Orders, Firm Order Confirmations, Conditions Excusing Compliance with Loop Installation Intervals, Maintenance and Repair Parity, Specifying Repair Intervals, and Responsibility for Repair Costs.

AT&T disagreed that all issues surrounding Charges for Unloading Loops had been resolved. AT&T objected to the requirement set forth in SGAT Sections 9.2.2.4 and 9.2.2.5 that CLECs pay the costs of unloading for loops of less than 18,000 feet in length. AT&T also objected to paying for the removal of bridge taps. In its exceptions to the Staff Report, AT&T stated that in other workshops, it argued that Qwest recovered its conditioning costs in its loop rates and asked to have this issue deferred to the cost docket proceedings.

The Commission has this issue under consideration in Docket No. 00-049-105. Qwest will be expected to comply with the decision in that Docket with respect to this, and all related, issues.

AT&T disagreed that all issues surrounding Charges for Coordinated Installations had been resolved. AT&T proposed alternative SGAT language concerning Qwest's processes for coordinating the cutover of loops with number porting. In addition, AT&T proposed changes to SGAT Sections 9.2.2.9.3 and 9.2.2.9.4 in order to: (a) secure an explanation of the process for cutovers; (b) specify the time frames within which CLECs could delay loop cutovers without fear of service disruptions; (c) assure that Qwest was obligated to perform tests sufficient to determine a cutover loop's digital service capability; and (d) provide for a charge-waiver and rescheduling provisions to deal with cases where Qwest was unable to meet appointment dates.

Qwest agreed to accommodate only three of these four requests: (a) it agreed to provide process flow descriptions for cutovers; (b) it declined to specify the time frames within which CLECs could delay loop cutovers without fear of service disruptions; (c) Qwest pointed out that the SGAT requires the performance of tests adequate to assure that the loop is within the required parameters and the submission of confirming test results to CLECs; and (d) Qwest agreed to waive nonrecurring charges when it failed to meet appointments and to specify in the SGAT its rescheduling obligations. We find that the second point in the list above is a reasonable request and direct Qwest to accommodate it.

In its exceptions with regard to this issue, AT&T states that its primary concern is related to its desire to include a negotiated process for coordinated installation based on an amendment to AT&T's interconnection agreement. AT&T further notes that Qwest agreed to provide this process in SGAT Section 9.2.2.9.7 and the issue was closed based on that understanding. The Commission finds that Qwest is in compliance with respect to the issue of Coordinated Installations subject to the addition of language making clear the time frames noted above.

AT&T also disagrees with the Staff Report that the issue of Overtime for Out-of-Hours Installations was resolved. AT&T objected to the application of overtime rates to all out-of-hours installations in SGAT Section 9.2.3.7.5 because it did not follow that all out-of-hours work would require premium pay for Qwest workers. AT&T preferred that this section merely refer to SGAT Exhibit A for such charges. XO Utah made a similar comment.

The Staff Report notes that Qwest made a change to the section in an attempt to address this concern. In its exceptions, AT&T explains that it questions the basic assumption that rates should be higher for an out-of-hours installation. AT&T asserted that Qwest had failed

to prove it incurs higher costs simply because an installation occurs after 5 p.m. AT&T suggested that this issue should be deferred to a cost case. The Commission finds that AT&T's and XO's comments that the issue should be referenced to SGAT Exhibit A have merit. We direct Qwest to submit changes to the SGAT implementing this position. Further we agree that costs should be examined in cost dockets. The Commission finds that once acceptable language has been submitted by Qwest to address these issues, it will be in compliance with respect to the issue of Overtime for Out-of-Hours Installations.

The Commission finds that Qwest is in compliance for the remaining unbundled loop issues listed as resolved in the Staff Report.

C. Disputed Issues – Loops

Where no party filed exceptions to Staff's recommended resolution of an issue that was in dispute at the close of the Workshop, we adopt Staff's recommendation on that issue as set forth in the Staff Report. We address below the remaining disputed Loop issues for which Utah parties filed exceptions to the Staff Report.

1. Standard Loop Provisioning Intervals

This disputed issue relates to the intervals for loop installation in Exhibit C to the SGAT. AT&T challenged several of these intervals and claimed that despite negotiations in the ROC process, it should be permitted to challenge the Exhibit C intervals in the workshop process.

Staff reported that in its opinion AT&T cited no evidence that would demonstrate that the installation intervals do not give it a meaningful opportunity to compete. Qwest did present evidence that its intervals compare favorably to those of other BOCs and that intervals based upon parity mirror Qwest's retail intervals.

At issue is whether the PID negotiations in the ROC OSS test should be binding for the State specific SGAT. In short did the participants in the ROC OSS test PID discussions have the same motivations and constraints that parties to these workshops have? We find it reasonable to conclude that since the parties are the same, the motivations and constraints were the same. Therefore, until such time as parties bring forth evidence that shows the intervals should be changed, the PID intervals established in the ROC OSS testing process are generally acceptable. There are however, specific problems with some of the proposed intervals. With respect to maintenance and repair, the MR-3 and MR-4 PIDs use precisely the same intervals as in Exhibit C. However, as AT&T points out the intervals may leave insufficient time for AT&T to perform its own work and still have the overall interval be at a parity level.

The Commission finds that the ROC OSS PID intervals should be the starting point for interval definition. Parties may negotiate other intervals. If agreement cannot be reached the parties may bring their proposals and evidence before the Commission for determination.

On a related (loop) issue we note that AT&T reported that Qwest would not agree to provide "Quick Loop" with number portability at the time briefs were filed. However, we understand that Qwest has subsequently committed to provide number portability with Quick Loop.

We find that the intervals proposed for loops in Exhibit C constitute a reasonable starting point which parties that desire other intervals may begin negotiating from. Accordingly, the Commission finds that subject to acceptable negotiations taking place on exact intervals Qwest is in compliance with respect to this issue.

2. Loop Provisioning and Repair Intervals – State-Specific Rules.

In their exceptions, AT&T and XO Utah/ELI claim that the Exhibit C loop installation intervals must conform to Utah service quality guidelines in Utah Admin. Code R746-365-4. As we have stated in previous reports in this Docket, Utah Rules preempt any regional standards. Qwest must comply with or exceed the intervals contained in Utah's Rules. To the extent that there are conflicts between Exhibit C intervals and Utah Rules where Qwest's intervals exceed the Utah intervals Qwest should submit language to adjust their intervals.

It appears that the primary discrepancies are for DS-1 loops and OCn facilities. Exhibit C provides a nine-day interval for DS-1 loops, while the Utah Rules require a five-day interval. The nine-day Exhibit C interval for DS-1 loops is the same interval Qwest provides for its retail customers. Thus, the interval in Exhibit C is at parity. Therefore a conflict exists between the parity provisions and the provisions of the Act requiring that RBOCs be in compliance with State Laws and Rules. We find that Qwest's proposed DS-1 interval is not in compliance with the State Rules. With respect to OCn facilities, the analysis is different. Qwest provides OCn facilities to its retail customers in most states on an ICB basis. Thus, an ICB interval in Exhibit C may provide CLECs with parity. The Utah guidelines provide that for OC-4 and higher, the interval is 15 days "or a negotiated due date." Thus, Qwest's ICB interval may be consistent with the "negotiated due date" provision of the Utah guideline.

The Commission finds that Qwest's proposed intervals are not currently in compliance with State Rules. Qwest should either adjust the DS-1 interval, or submit new language to be considered in a Rule Making proceeding.

3. Spectrum Compatibility

Spectrum management concerns loop plant administration and deployment practices that are designed to result in spectrum compatibility or to prevent interference between services and technologies that use pairs in the same cable group. The Staff Report addresses three disputed issues relating to spectrum management: (a) Qwest's practice for managing T-1 facilities; (b) whether Qwest should implement draft procedures relating to remote deployment of DSL; and (c) whether CLECs must disclose NC/NCI codes to Qwest.

As to the first issue under this topic, Qwest has agreed to two specific measures to control potential interference from T-1 facilities and made these commitments reasonably concrete by adding specific language to Section 9.6.2.4 of the SGAT.

As to the topic of remote DSL deployment, Staff recommended the addition of specific language to section 9.2.6 requiring Qwest to take appropriate steps to mitigate "demonstrable adverse effects" on CLECs' central-office based DSL service arising from Qwest's use of repeaters or remotely deployed DSL service. Qwest has made the requested change in Section 9.2.6.6.

The final spectrum issue addressed by the Staff Report was disclosure of NC/NCI codes by CLECs in the ordering process. CLECs opposed this requirement on grounds that the information is proprietary. Qwest countered that it needed such information to resolve spectrum disputes and that FCC orders required disclosure of this information.

Staff suggests resolving this issue in Qwest's favor. To respond to CLEC claims regarding the confidentiality of this information, Staff stated that "it should be made clear, in a manner consistent with other SGAT treatment of confidential or proprietary information, that the NC/NCI information is sensitive, that its use must be limited to spectrum management purposes,

and that only those needing to know the information for that purpose shall have access to it."[6] Although Staff did not recommend specific SGAT amendments, it is our understanding that Qwest has added language to reflect the requirement to maintain the confidentiality of this information in Section 9.2.6.2.

The Commission accepts the Staff's recommendations on these disputed spectrum management issues. Although we note that simply putting in place standards that define the allowable types of interference (that all carriers would be subject to) would solve the problem without any of the above requirements.

The Commission declines to modify the proposed language Staff suggested to resolve the issues relating to T-1 facilities. Qwest has agreed to incorporate Staff's recommended language, which requires Qwest to comply with future FCC rules, and we find that language reasonable and consistent with the requirements of the Act. We believe Staff's requirement that Qwest comply with FCC rules adequately responds to AT&T's request that Qwest also comply with FCC "orders." With respect to AT&T's request that Qwest comply with "industry standards," AT&T has not sufficiently described the industry standards to which Qwest would be required to adhere or the industry group(s) that would issue such standards. Although we again note that this approach is a better approach to solving the management and interference issues we cannot compel Qwest to adopt it.

The Commission declines to adopt AT&T's exceptions to the requirement that CLECs provide Qwest with NC/NCI codes at this time. The Commission does not find that these (FCC) requirements are "interim" and non-binding. We note that in addition to its

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[6] Staff Report at 61.

statements in the *Line Sharing Order*,[7] the FCC has promulgated rules requiring disclosure of this information in 47 C.F.R. § 51.231(b) and (c). These rules do not appear to be interim in nature. However, if the FCC reverses its policy nothing in this Order shall be interpreted as requiring disclosure.

We do not find that Qwest must provide NC/NCI information to CLECs to permit them to determine what technology CLECs may deploy in the Qwest network. It is not clear on this record why or if CLECs need this information. Further, Qwest has agreed to provide this information to CLECs in the event of spectral interference. Based upon the inadequate record in the Workshop, we decline to adopt AT&T's recommendation in its exceptions. These issues are before the Commission in other Dockets where the record may contain further detail. We put the parties on notice that if a different conclusion is reached in those Dockets with respect to spectrum management or signal interference that all of the affected SGAT section will need to be revised.

The Commission understands that Qwest has attempted to address AT&T's concern that Qwest will use NC/NCI codes for competitive purposes by modifying the SGAT to protect the proprietary and confidential nature of this information. If any party believes this response to be inadequate the Commission invites them to raise the issue in a request for reconsideration.

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[7] Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 96-98, FCC 99-355 ¶ 204 (rel. Dec. 9, 1999) ("*Line Sharing Order*").

Based on the current record the Commission finds that Qwest's modifications discussed above are an acceptable method for addressing spectral interference. We find that Qwest is in compliance with respect to this issue.

4. Conditioning Charge Refund

This disputed issue involved AT&T's claim that Qwest should refund loop conditioning charges if, under certain conditions described in AT&T's proposed SGAT language, a CLEC customer failed to take DSL service from the CLEC. Qwest opposed both the AT&T language and the means for implementing it.

In an attempt to balance the competing interests of the CLECs and Qwest in situations where customers decide not to take the CLEC's service where Qwest has missed a due date, where Qwest has failed to condition a loop in accord with the standards otherwise applicable to the service, or where the CLEC can demonstrate that the conditioned loop is incapable of substantially performing normal functions, Staff recommended a scheme of credits to the CLEC ranging from partial to full credit for conditioning charges. Qwest has made the recommended change by adding Staff's proposed language as Section 9.2.2.4.1 of the SGAT.

The Commission finds that failure to provision an adequate loop, or missing the due date would significantly increase the likelihood that customers would cancel their order. Therefore the Commission finds that if a loop cannot perform adequately following conditioning, or where a customer cancels services within one week of a missed due date, or one week after an inadequate loop is provisioned, then a full refund is due. Otherwise the Staff's suggestions are appropriate. Qwest must revise the language in this section to reflect these findings.

> any other testing relevant to those plans or needs. As part of the resolution of such dispute, there shall be considered the issue of assigning responsibility for the costs of such testing. Absent a finding that the test scope and activities address issues of common interest to the CLEC community, the costs shall be assigned to the CLEC requesting the test procedures.

The proposed language does not address the core issue of what the baseline level of testing should be. Certainly testing must be of a sufficient level to prove that any approved interfaces will be adequate at significant levels of market entry. We accept the Staff revised language for section 12.2.9.3.5 above and AT&T's other requested changes (those not rejected above) to Section 12.9.2.3 and its subparts (as shown in WS3-ATT-MFH-2). It is our understanding that Qwest has already added the Staff's proposed language to the SGAT with one modification. Qwest inserted the phrase "in addition to the testing set forth in Section 12.2.9.3," we find this acceptable. Further we understand that Qwest has revised other provisions to reflect language subsequently negotiated between Qwest, AT&T and other CLECs during the General Terms and Conditions Workshop. These revisions are also acceptable. We anticipate that details on the level of baseline testing will still need to be addressed by the parties. With the exception on that outstanding issue we find that Qwest is in compliance with respect to this issue.

E. Issues Resolved During This Workshop - UNE Platform and Other Combinations

Staff reported that the following issues were resolved in the Workshops: Availability of Switch Features with UNE-Platforms, Features Available with UNE-P-PBX, UNE-P-DSS, and UNE-P-ISDN, Migrating from Centrex Services to UNE-P, High Speed Data with UNE-P-POTS and UNE-P-ISDN, Converting From Resale to UNE-P, Definition of Access, Restrictions on UNE Combinations, Use Restrictions, Combining Qwest Provided UNEs With Other Elements or Services, Non-Separation of Combined Elements, "Glue" Charges for

5. Pre-Order Mechanized Loop Testing

AT&T claimed in the workshop that it must be permitted to perform on demand a mechanized loop test ("MLT") on a pre-order basis, that is, before the customer has taken service from AT&T. Qwest countered that Qwest does not perform MLTs for itself on a pre-order basis, that all MLT information Qwest possesses is included in the Raw Loop Data tool already (from historical tests), that such a test is inappropriate on a pre-order basis, and that an MLT is a switch-based test that disrupts service momentarily while it is performed.

We agree that since Qwest does not perform MLTs on a pre-order basis for itself and the information, to the extent it exists, that CLECs seek is available to them from the same sources Qwest's retail personnel utilize, that general pre-order MLT cannot be required. We further agree that permitting CLECs to perform MLTs on a CLEC initiated pre-order basis is inadvisable given the potential disruption to the service of end-users.

It was shown that the only other time Qwest routinely performs an MLT is in the course of doing repair work. The information generated by this testing is available to both Qwest and CLECs equally. Even though only Qwest technicians have the ability to request a routine MLT test, a parity concern is not present because the CLECs are not responsible for repair of the line. Once a given line is leased as a UNE then a CLEC may initiate an MLT test. While there exists some small amount of disparity here, the Commission finds that since the Qwest retail service representatives cannot order MLTs the difference is not material.

Testimony also shows that Qwest undertook a general program of performing MLTs on a routine basis at the beginning of its DSL rollout. Testimony is unclear on the extent of this test. However, it is the Commission's understanding that all information generated through this "one-time" test is included in the Raw Loop Data tool. The existence of this one-

time test shows that when Qwest desires it can order MLTs, although the decision is not made at the sales representative level. This does show disparity between the CLECs' options and those Qwest retains for itself. We find that a reasonable solution is to allow CLECs to perform an MLT on any line for which they can obtain a letter of authorization from the owner of the account associated with that line. Then a customer who is considering switching or simply wants to know what services could be provisioned by a given CLEC can authorize the CLEC to undertake investigations on their line(s). Qwest could implement a similar policy if it so desires for its own customer agents.

Once Qwest submits SGAT language reflecting the above policy the Commission finds that Qwest will be in compliance with respect to this issue.

6. Access to LFACS and Other Loop Information Databases

Alleging past problems by other CLECs in unbundling IDLC loops for CLEC use as UNEs, AT&T sought to require Qwest to provide CLECs with direct access to the LFACs database, in the hopes that the database would provide information on spare loop facilities. What AT&T sought in the Workshop was a process to determine whether there are enough available copper facilities to allow CLECs to serve end users whose premises are served by IDLC.

Qwest asserted that the LFACS tool at issue was ill suited for the use CLECs desired. Qwest designed and uses LFACS to assign facilities that fit the specifications of a specific order. Because LFACS stops hunting for facilities when it finds a single set fitting the input parameters, significant work would be required to make LFACS useable to search for facilities. In addition, Qwest retail does not have access to LFACS on a pre-order basis. Qwest also alleged that allowing CLEC access to the database raised issues regarding the confidentiality of Qwest and CLEC information. Qwest further alleged that other BOCs only provide mediated

access to loop make up information, which is the same access Qwest provides. Qwest claimed that it has put in place enhancements to its loop qualification tools to include spare facility information.

The Commission finds that the information the CLECs seek is necessary for a market to develop. To the extent that Qwest's modifications of its loop qualifying tool adequately address the issue then the problem is solved. We assume that the modifications are adequate. We direct parties that disagree we our assumption that the modifications are adequate to submit evidence demonstrating the inadequacy of the loop qualification tool.

D. Resolved Issues – Line Splitting

Staff reported that the following issues were resolved in the Workshop: Presumptions about the "Lead" CLEC, Pre-Provisioning of the Splitter in the End User's Central Office, Limits on Uses of the High- and Low-Frequency Portions of the Loop, and Charges for OSS Modifications.

The Commission agrees with Staff's discussion regarding the issues resolved during the Workshop relating to line splitting. The Commission finds that Qwest is in compliance with respect to these issues.

E. Earlier-Decided Issues – Line Splitting

As noted in the Staff Report, issues relating to line-at-a-time access to splitters and discontinuation of MegaBit service have been resolved elsewhere. AT&T challenges only the first issue. We find, therefore, that the second issue relating to discontinuation of MegaBit service is resolved.

Regarding access to splitters, AT&T argued in the Workshop that Qwest should be obliged to provide access to "outboard" (i.e., splitters that are not integrated into the DSLAM)

splitters in its central offices and remote terminals. AT&T also asserted that CLECs should be able to gain access to them for a single line or a single shelf.

Staff felt that this issue was the same as the first unresolved issue (*Ownership of and Access to Splitters*) under *Line Sharing* in Staff's June 11, 2001 *Third Report – Emerging Services* in these workshops. Staff was not convinced by evidence or arguments to alter the resolution made of that issue. Accordingly, the Staff recommended that the same result should apply to line splitting.

AT&T filed exceptions on this issue, citing a recent Texas arbitration order requiring SBC to provide access to the splitters at issue. At issue for the Commission is whether the principles involved in this decision negate previous FCC pronouncements that appear to exempt incumbent LECs from providing access to their splitters to CLECs.[8]

Qwest testified that it does not use "outboard" splitters, and that its equipment was incompatible with the type of access AT&T requested. However, the type of equipment that Qwest uses does not change their legal obligations. Obviously Qwest, if required to do so, could install different equipment. What must be decided at this time is whether Qwest has an obligation to provide access to splitters as a UNE. Our task in this proceeding is to determine whether Qwest complies with applicable FCC and state laws and rules.[9] Current FCC opinions

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[8] *See* Memorandum Opinion and Order, *Application of 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*, CC Docket No. 00-65, FCC 00-238 at ¶¶ 326-28 (June 30, 2000) ("*SBC Texas Order*").

[9] *SBC Texas Order* ¶¶ 26-28.

appear to not require Qwest to provide CLECs with access to their splitters. Accordingly, we reject AT&T's exceptions and accept Staff's resolution of this issue.

The Commission finds that Qwest's compliance with the recommendations set forth in our previous Order support a finding here that Qwest is in compliance with respect to this issue to the extent Qwest has made the modifications required in our earlier Order. However, if the FCC (or the Courts) clarifies or changes its policy and requires access to splitters nothing in this Order should be read as contradicting that approach. While we find that Qwest is in current compliance our preference would be for Qwest to provide access to splitters as requested by AT&T.

F. Disputed Issues – Line Splitting

1. Limiting Line Splitting to UNE-P

AT&T claimed that Qwest improperly limited line splitting to UNE-P and loops, but did not allow for EEL splitting and resale splitting. Qwest contended that AT&T's demand exceeded Qwest's legal obligations and was unnecessary given the non-existent demand for EEL-splitting. Qwest agreed to provide EEL splitting on a special request basis and has included this commitment in the SGAT. However this does not address the issue of resale. In our earlier Order in this Docket we directed that Qwest may not cancel a customer's MegaBit service if they chose to use a CLEC for basic service. This of necessity requires Qwest to either provision another loop or split the resold loop. We direct Qwest to submit clarifying language to its SGAT that implements this requirement.

It is our understanding that Qwest has committed to make splitting available for unbundled loops, and for ELLs on a special request basis. AT&T claims that the Special

Request Process for EEL Splitting places a time consuming burden on the CLECs.[10] Qwest argued that there was uncertainty regarding the actual demand for EEL Splitting and that a standard product offering would be developed based on actual demand. We find the special request process to be a reasonable short-term approach. The Commission finds that Qwest must submit SGAT language to conform with our earlier Order regarding requiring MegaBit service to be offered to CLEC customers regardless of the method of competition (resale, UNEs, or physical facilities) to be in compliance.

2. Liability for Actions by an Agent

AT&T sought to expand the liability provision set forth in Qwest's SGAT Section 9.2.1.7.3 regarding information of a customer of record. Pointing out that Qwest's language already covered the only valid issue raised by AT&T's comments – wrongfully obtaining CLEC information – Staff recommended against expanding the scope of Qwest's liability.

We agree with Staff's suggested resolution of this issue. There is no change required to the SGAT. The Commission finds that Qwest is in compliance with respect to these issues.

G. Resolved Issues – NID

Staff found that the following issues were resolved in the Workshop. Access to all NID Features, Smart and MET NIDS, Availability of NIDs when CLEC Provides Loop Distribution, other kinds of Permissible NID Access, NID Ownership, Rates for other Single-Tenant NIDS, and NID Ordering Documents.

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[10] AT&T Exceptions and Comments at 51.

The Commission agrees with Staff's discussion regarding the issues resolved during the Workshop discussion of NIDs. The Commission finds that Qwest is in compliance with respect to these issues.

H. Disputed Issues – NID

I. NID Definition and Access to Terminals where Qwest Owns Facilities in Direction of End User

AT&T and Qwest disputed the definition of NIDs and the interplay of NIDs and subloops in the multi-tenant environment (MTE). AT&T claims in its exceptions that the Qwest NID definition does not comply with the FCC definition. The FCC definition states:

> The network interface device network element is defined as any means of interconnection of end-user customer premises wiring to the incumbent LEC's distribution plant for that purpose.[11]

SGAT Section 9.5.1 states:

> The Qwest NID is defined as any means of interconnection of on premises wiring and Qwest's distribution plant, such as cross connects used for that purpose.

Qwest's definition expands the FCC requirements to explicitly include NIDs that provide access to Qwest premises wiring in addition to end-user customer premises wiring. This is acceptable. The FCC definition further states:

> An incumbent LEC shall permit a requesting telecommunications carrier to connect its own loop facilities to on-premises wiring through the incumbent LEC's network interface device, or at any other technically feasible point.[12]

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[11] AT&T's Exceptions and Comments at 53.

[12] AT&T's Exceptions and Comments at 53.

SGAT Section 9.5.1 states:

> . . . Qwest shall permit CLEC to connect its own Loop facilities to on-premise wiring through Qwest's NID, or other technically feasible point. The NID carries with it all features, functions and capabilities of the facilities used to connect the Loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism . . . .

We find this SGAT language consistent with the FCC requirements.

AT&T's claim that it should be allowed access to an MTE terminal's NID functionality without the burdens of meeting the Act's collocation requirements is the central issue in this debate. The FCC definition requires allowing interconnection "at any other technically feasible point". This suggests that restrictive policies concerning interconnection points are on their face suspect. However, Qwest clearly allows access to NIDs, including all features and functionalities. The fundamental difference of opinion occurs when CLECs want to use the NID to access a subloop. Qwest argues that the subloop procedures set forth in the SGAT need to be utilized. AT&T argues that this is simply interconnection "at any other technically feasible point." The Commission finds that while the proposed connections are feasible, the argument is with the subloop provisions of the SGAT. Until evidence is presented to us that suggests the subloop provisions of the SGAT are inadequate we find that the approach advocated by Qwest is acceptable.

2. Protector Connections

AT&T argued that SGAT Section 9.5.2.1 impermissibly restricts CLECs to NID access in cases where space is available without requiring Qwest to remove its loop connections to the NID. AT&T sought to amend the SGAT and as support relied on an extra-record technical document identified as a part of "Bell System Policies." AT&T claims that Qwest does not

dispute that it is technically feasible for Qwest to remove its connections. Staff noted, however, that Qwest stated in its testimony that removal of its connections violates the National Electric Code and the National Electric Safety Code.[13] Therefore a safety or reliability issue is present that would nullify AT&T's claim of technical feasibility. Apparently AT&T did not respond to the Qwest testimony on this safety issue.[14] Until the technical issues are settled with respect to AT&T's proposal the Commission cannot adopt it. Therefore the Commission finds that Qwest is in compliance with respect to this issue subject to no parties being able to make a credible showing that the proposed connections are safe.

I. Recommendation on Compliance

The Commission finds that Qwest is in not in full compliance with checklist item 4. Qwest must submit the required amendments to SGAT language detailed above. In addition Qwest must be found to have satisfactory performance in the ROC OSS testing process for all items related to checklist item 4.

IV. Checklist Item 5 – Access to Unbundled Local Transport

A. Issues Resolved During This Workshop – Transport

Staff reported that the following issues had been resolved in the Workshop: Available Dedicated Transport Routes, Requiring Multiplexers for Access to Transport and Cross Connecting UDIT and EUDIT.

The Commission finds that Qwest is in compliance with respect to these issues.

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[13] Staff Report at 73, citing Liston Rebuttal at 80.

[14] Staff Report at 73.

B. Issues Decided in Earlier Workshop Reports – Transport

1. Access to Facilities of Qwest Affiliates

AT&T argued that the Commission should require the addition of SGAT language obligating QCI and its affiliates to unbundle dedicated transport, along with other in-region facilities. This is the same argument that AT&T made in the context of dark fiber, which is addressed in the first unresolved *Dark Fiber* issue *(Affiliate Obligations to Provide Dark Fiber)* in Staff's June 11, 2001 *Third Report – Emerging Services*. However, these issues are before the Commission in Docket Number 00-049-105. To the extent the final resolution is different than that advocated by Staff in the earlier Report, Qwest will need to amend the SGAT to be in compliance. The Commission finds that Qwest is currently in compliance with respect to this issue.

2. Access to Dark Fiber in Qwest's Joint-Build Arrangements

AT&T argued that Qwest is required to allow CLECs to lease dark fiber that exists in "joint build arrangements" with third parties.

This issue was addressed in the resolution of the second unresolved *Dark Fiber* issue *(Access to Dark Fiber in Joint Build Arrangements)* in Staff's June 11, 2001 *Third Report – Emerging Services* in these workshops. These issues are also before the Commission in Docket Number 00-049-105. To the extent the final resolution is different that that advocated by Staff in the earlier Report, Qwest will need to amend the SGAT to be in compliance. The Commission finds that Qwest is currently in compliance with respect to these issue.

C. Issues Remaining in Dispute – Transport

Where no party filed exceptions to Staff's resolution of an issue that was in dispute at the close of the Workshop, we adopt the Staff's recommendation on that issue as set

forth in the Staff Report. We address below the remaining disputed transport issues for which parties filed exceptions to the Staff Report.

1. SONET Add/Drop Multiplexing

AT&T asked that Qwest change Section 9.6.1.2 of the SGAT to add SONET add/drop multiplexing as a CLEC option. AT&T opined that CLECs commonly would need to go from OCn to DS3, and would therefore benefit if Qwest were to make such multiplexing available.

Qwest and AT&T agreed to language to resolve this issue. Qwest has added the following sentence to SGAT Section 9.6.1.2: "SONET add/drop multiplexing is available on an ICB basis where facilities are available and capacity exists." The Commission agrees with AT&T's position that this language resolves the issue and the issue should be closed. Therefore the Commission finds that Qwest is in compliance with respect to this issue.

2. UDIT/EUDIT Distinction

AT&T argued that dedicated transport consists of a single element; therefore, Qwest's attempts to distinguish UDIT and EUDIT were impermissible.

Qwest argued that the distinction between UDIT and EUDIT is made to preserve historic pricing differences.

We find that AT&T and Qwest's disputes on this issue are founded on costing and pricing issues that are beyond the scope of this proceeding, but note that these very pricing issues are before the Commission in Docket No. 00-049-105. Accordingly, we expect Qwest to comply with the forthcoming decisions in that Docket with respect to this issue. We make no compliance finding at this time.

3. Commingling UNEs and Interconnection Trunks

AT&T argued that Qwest's SGAT improperly applies a definition of "finished services" to preclude CLECs from connecting UNEs to trunks used for interconnection (called LIS Trunks). AT&T requested that LIS Trunks be excluded from the definition of "finished services" under the SGAT.

We agree with Staff Report's conclusion that with Qwest's changes to the SGAT and its recognition there is no SGAT prohibition on commingling UNEs and LIS Trunks on the same facilities, that this issue can be considered closed. To the extent that Qwest allows what AT&T is asking for, the Commission finds that Qwest is in compliance with respect to this issue.

D. Issues Resolved During This Workshop – EELs

Staff found that the following issues were resolved in the Workshop: Waiver of Local Use Requirements for Particular EELs, Ways of Meeting the Local Use Requirements, and Audits of Local Use Certifications.

The Commission agrees with Staff's discussion regarding the issues resolved during the Workshop discussions on EELs. The Commission finds that Qwest is in compliance with respect to these issues.

E. Issues Remaining in Dispute – EELs

Where no party filed exceptions to Staff's recommended resolution of an issue that was in dispute at the close of the Workshop, we adopt the Staff's recommendation. We address below the remaining disputed EEL issues for which parties filed exceptions.

1. Limiting Local Use Requirements to Existing Special Access Circuits

ELI/XO claimed in the Workshop that FCC local use restrictions applicable to EELs only apply to "existing" EELs, not "new" EELs. Referring back to the resolution of a similar issue relating to use of dark fiber in the *Third Report – Emerging Services* of June 11, 2001, Staff rejected the CLECs' attempt to avoid the FCC's local use certification requirements with regard to new EELs. Specifically, Staff asserted:

> "EELs, whether converted from special access circuits or not, are unbundled loop-transport combinations. Therefore, new EELs are subject to the same local use certification requirements as are converted special access circuits, as was more fully discussed in the *Third Report* from these workshops."[15]

In the *Supplemental Order Clarification*,[16] the FCC found that the local use restriction applies to *all* EELs:

> To reduce uncertainty for incumbent LECs and requesting carriers and to maintain the status quo while we review the issues contained in the Fourth FNPRM, we now define more precisely *the "significant amount of local exchange service" that a requesting carrier must provide in order to obtain unbundled loop-transport combinations.*[17]

This provision states that requesting carriers must meet the local use requirement to *obtain* EELs. CLECs obtain EELs irrespective of whether they purchase them new or convert an existing special access circuit. The FCC appears to distinguish special access circuits from EELs by virtue of whether there is a significant amount of local use on the circuit.

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[15] Staff Report at 81.

[16] Supplemental Order Clarification, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183, ¶¶ 21-22 (June 2, 2000) ("*Supplemental Order Clarification*").

[17] *Supplemental Order Clarification* at ¶ 21(emphasis added).

In their exceptions XO Utah/ELI rely upon paragraph 6 of the *Supplemental Order Clarification*.[18] However, the fact that in that one instance the FCC emphasized that carriers cannot convert special access circuits to EELs without meeting the local use requirements does not mean that the local use requirement does not apply to all EELs. The FCC's statements quoted in the preceding paragraphs appear to apply equally to new EELs and conversions of EELs. Therefore, the FCC's narrow statement that the local use restriction applies to conversions of EELs is both correct, and not mutually exclusive of its other statements that the local use restriction applies to all unbundled loop-transport combinations (EELs).

Accordingly, we accept the recommendation of the Staff Report on this issue. The Commission finds that Qwest is in compliance on this issue.

2. Allowing Commingling Where Qwest Declines to Construct UNEs

AT&T argued that Qwest should not be permitted to refuse commingling UNEs and tariffed services in certain cases where Qwest refused to construct UNEs. Qwest countered that applicable FCC orders prohibit commingling of UNEs with tariffed special access services. Qwest argued that the FCC has never required the connection of UNEs to the items listed in SGAT Section 4.23a as finished services. To the contrary, Qwest countered that connecting UNEs should be limited to services that are necessary for the provision of local exchange service which is consistent with the public policy goals of the Act.

Finding that the avoidance of access charges is neither the motive nor the result of the CLECs' request to commingle where Qwest refuses to construct UNEs, Staff recommended

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[18] *Id.* at ¶ 6; Comments of ELI and XO Utah on Staff Report at 7.

that the SGAT include specific language allowing "under controlled circumstances" the connection of UNEs that the CLECs want. The recommended language proposed by Staff states:

> Where a CLEC has been denied access to a DS1 loop as a UNE due to lack of facilities, and where the CLEC has requested and been denied the construction of new facilities to provide such loop, a CLEC may connect a tariffed service that it secures in lieu of that UNE to a transport UNE that it has secured from Qwest. Before making such connection, the CLEC shall provide Qwest with evidence sufficient to demonstrate that it has fulfilled all of the prior conditions of this provision. This provision shall be changed as may be required to conform to the decisions of the FCC under any proceedings related to the Public Notice referred to in document FCC 00-183.

Qwest has incorporated Staff's recommended SGAT language. The Commission finds that Qwest is in compliance with respect to this issue.

3. Waiver of Termination Liability Assessments for EELs

Qwest provides CLECs with special access circuits and, in many cases, the CLEC must pay a termination liability assessment ("TLA") for disconnecting the circuit early. The issue presented in the workshop was whether TLAs should apply for conversion of special access circuits to EELs.

Typically, when a termination liability exists it is due to a term and/or volume discount having been applied to the full rate for the service. Qwest applies the discount to the full rate for the service in return for a period of time commitment from the CLEC. To the extent a CLEC is now attempting to disconnect this rate, having had benefit of the discounted rate for some period of time that is less than agreed upon with Qwest, then termination liability should and does apply so that Qwest is not deprived of its benefit of the bargain in the contract. In its brief, Qwest presented a proposal regarding circumstances where Qwest would not apply TLA if certain conditions existed. Staff concluded that Qwest should eliminate two of the conditions

attached to Qwest's proposed TLA language. Qwest has implemented Staff's recommended changes to the SGAT. The Commission finds that Qwest is in compliance with respect to these issues.

4. Counting ISP Traffic Toward Local Use Requirements

XO Utah and ELI argued in the workshop that traffic bound for Internet service providers ("ISPs") should be counted toward the local use requirements under the SGAT. Staff asserted that the FCC's recent ruling on intercarrier compensation for traffic bound for ISPs in the *ISP Order on Remand*[19] plainly forecloses the CLECs' argument that any such traffic could be counted as "local usage."

In their exceptions, XO Utah/ELI asks the Commission to consider traffic bound for ISPs as local usage.[20] While we disagree with the FCC's ruling in the *ISP Order on Remand*, it seems to preclude such consideration at this time. The XO Utah/ELI argument appears to rely upon Commission orders issued prior to the *ISP Order on Remand* for the proposition that traffic bound for ISPs is local. The basis for those decisions may not be applicable to new agreements made subsequent to the FCC's most recent pronouncements on the topic.

Accordingly, no SGAT change is necessary at this time. However, the issue is before the courts. If the FCC is reversed, then our earlier Orders likely would become applicable and Qwest may be required to count ISP bound traffic as local. The Commission finds that Qwest is currently in compliance with respect to this issue.

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[19] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* and *Inter-Carrier Compensation for Internet-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, FCC 01-131 (Apr. 27, 2001) (*"ISP Order on Remand"*).

[20] Comments of ELI and XO Utah on Staff Report at 7-8.

F. Recommendation on Compliance

The Commission finds that Qwest is in not in full compliance with checklist item 5. Qwest must submit the required amendments to SGAT language detailed above. In addition Qwest must be found to have satisfactory performance in the ROC OSS testing process for all items related to checklist item 5.

V. Checklist Item 6 – Access to Unbundled Local Switching

A. Issues Resolved During This Workshop – Switching

Staff reported that the following issues had been resolved in the Workshop: Specifying Additional Types of Switch Access, Availability of Switch Features, Unbundling Switch Centrex Management and Control Features, Notice of Switch Changes and Upgrades, Unbundling Tandem Switches, Definition of Tandem Switching Element, and Tandem to Tandem Connections.

The Commission agrees with the Staff's discussion regarding the issues resolved during the Workshop discussions on Checklist Item 6. The Commission finds that Qwest is in compliance with respect to these issues.

B. Issues Remaining in Dispute – Switching

Where no party filed exceptions to Staff's resolution of an issue that was in dispute at the close of the Workshop, we adopt Staff's recommendation on that issue as set forth in the Staff Report. We address below the remaining disputed switching issues for which parties filed exceptions to the Staff Report.

1. Exemption from Providing Access to Switching in Large Metropolitan Areas

AT&T argued that SGAT Section 9.11.2.5 improperly limited the availability of unbundled switching in the 50 top Metropolitan Statistical Areas to end users with four or more access lines within a wire center. AT&T also argued that it should not be precluded from continuing to serve a customer through loop/switch combinations secured from Qwest where that customer begins below the four-access-line limit, but adds enough lines to pass beyond it. AT&T proposed a number of "clarifications" to Qwest's SGAT Section 9.11.2.5.3. Finally, AT&T sought to carve out three exceptions to the exclusion.

Qwest responded by saying that the FCC had determined in the aggregate that CLECs had sufficient alternatives to unbundled switching in the country's largest metropolitan areas. According to Qwest, the FCC did not limit its ruling to wire centers that did not face exhaust issues. Therefore, Qwest objected to AT&T's request to make the exclusion inapplicable in the three cited cases.

Staff was not persuaded by AT&T's arguments on all four counts. Staff asserted that Qwest's interpretation of the *UNE Remand Order* was reasonable. Therefore, Staff recommended no modifications to the SGAT. We agree with the Staff's reasoning and find that Qwest is in compliance with respect to these issues.

2. Providing Switch Interfaces at the GR-303 and TR-008 Level

In the Workshop, AT&T requested that Qwest provide switch interfaces at the GR-303 and TR-008 level. Qwest asserted in its brief that AT&T and Qwest had resolved the SGAT language relating to this issue, and Qwest attached that language to its impasse brief.

AT&T's brief, however, did not reflect an awareness of Qwest's latest language, which Staff believed addressed all of AT&T's concerns.

In AT&T's response to the Staff Report they state that the language Qwest cited in its brief on this issue is acceptable. The frozen SGAT does contain the required language so this issue is resolved.

C. Recommendation on Compliance

The Commission finds that Qwest in compliance with checklist item 6 subject to satisfactory performance in the ROC OSS testing process for all items related to checklist item 6.

CONCLUSIONS OF LAW

As explained above Qwest does not yet meet all of the requirements of Checklist Items 2, 4, 5, and 6, 47 U.S.C. § 271(c)(2)(B)(ii), (iv), (v), and (vi). All of our recommendations with respect to these and other checklist items are subject to satisfactory performance in the ROC OSS test.

DATED at Salt Lake City, Utah this 25th day of March 2002.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Richard M. Campbell, Commissioner

Attest:

/s/ Julie Orchard,
Commission Secretary

EXHIBIT E

Exhibit E

SERVICE DATE

JUL 2 4 2001

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into	)	
	)	
U S WEST COMMUNICATIONS, INC.'s	)	DOCKET NO. UT-003022
	)	
Compliance With Section 271 of the Telecommunications Act of 1996	)	
	)	DOCKET NO. UT-003040
	)	
In the Matter of	)	THIRTEENTH SUPPLEMENTAL ORDER
	)	INITIAL ORDER
U S WEST COMMUNICATIONS, INC.'s	)	(WORKSHOP THREE):
	)	
Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)	CHECKLIST ITEM NO. 2, 5, and 6
	)	

SYNOPSIS

1 This Order proposes resolution of issues raised in Workshop III relating to Qwest's expected application for approval under Section 271 of the Telecommunications Act of 1996 for authority to provide regional telecommunications services. This Initial Order proposes to find Qwest not in compliance with Checklist Item Nos. 2, 5, and 6.

BACKGROUND AND PROCEDURAL HISTORY

2 This is a consolidated proceeding to consider the compliance of Qwest Communications, Inc. (Qwest), formerly known as U S WEST Communications, Inc. (U S WEST),[1] with the requirements of Section 271 of the Telecommunications Act of 1996 (the Act),[2] and review and approval of Qwest's Statement of Generally Available Terms (SGAT) under Section 252(f)(2) of the Act. The general procedural history in included in the Eleventh Supplemental Order, entered March 30, 2001, and will not be repeated here.

3 The Commission held its third workshop in this proceeding in Olympia, Washington on March 12-15, 2001, addressing the issues of Checklist Items Nos. 2, 5, and 6, and provisions of Qwest's proposed SGAT addressing these issues. The Commission

[1] After this proceeding began, U S WEST merged and has become known as Qwest Communications, Inc. For consistency and ease of reference we will used the new name Qwest in this Order.

[2] Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

held a follow-up workshop on April 24 and 25, 2001, in Seattle, Washington to address unresolved issues from the March workshop session.

4 The parties filed briefs with the Commission on May 16, 2001, addressing their disputes. This Initial Order proposes resolution of the issues raised by the parties at the Workshop and in the briefs.

PARTIES AND REPRESENTATIVES

5 The following parties and their representatives participated in the Third Workshop: Qwest, by Lisa Anderl, attorney, Seattle, Washington, and John Munn and Andrew Crain, attorneys, Denver, Colorado; AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle (collectively AT&T), by Richard Wolters and Dominick Sekich, attorneys, Denver; WorldCom, Inc. (WorldCom) by Ann Hopfenbeck attorney, Denver; Electric Lightwave Inc. (ELI), Advanced TelCom Group, Inc. (ATG), and XO Washington, Inc. (XO) by Gregory J. Kopta, attorney, Seattle; Covad Communications Company (COVAD) by Brooks E. Harlow, attorney, Seattle; McLeod USA Telecommunications Services, Inc. (McLeod), by Marianne Holifield, attorney, Seattle; Sprint Corporation, by Barbara Young, Hood River, Oregon; and Public Counsel by Robert Cromwell, Assistant Attorney General, Seattle.

PROCESS

6 This docket has been conducted through the mechanism of workshops, in which affected participants engage on the record in the presentation of information and issues. Cross examination is conducted, and there ensues a relatively informal recorded discussion – often consisting of negotiations – during which the parties attempt to resolve the issues.

7 Many times the parties are successful at those negotiations. As to those, this Order merely acknowledges the agreements, which are generally memorialized in a newly-filed SGAT or Statement of Generally Available Terms. Any instances in which the parties' agreements are insufficient for Commission acceptance will be identified and the parties allowed to respond.

8 Items on which disagreement, or "impasse," remains following the workshops are described and resolved in this Order. Areas in which Qwest's performance or its provisions are insufficient to merit Commission approval are identified. This Order is an initial order and is subject to review and adoption, modification, or rejection by the Commission in a process adopted prior to the outset of this proceeding. While it is drafted in language that reflects a Commission decision, it is a proposal for Commission decision only, consistent with RCW 34.05.461(1)(c), RCW 80.01.060,

and WAC 480-09-780. Further information to parties is set out at the conclusion of this Order.

DISCUSSION:

CHECKLIST ITEM NO. 2 – UNBUNDLED NETWORK ELEMENTS

FCC and Washington State Requirements

In order to comply with the requirements of Checklist Item 2, a Bell Operating Company (BOC) such as Qwest must show that it is offering "nondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3)."[3] Section 251(c)(3) requires an incumbent LEC to "provide, to any requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[4] Section 251(c)(3) of the Act also requires incumbent LECs to offer unbundled network elements to requesting carriers in a manner that allows them to combine them to provide a telecommunications service.[5]

In its *Local* Competition *First Report and Order*,[6] the FCC applied its interpretation of the "necessary" and "impair" standards of section 251(d)(2) to the unbundling requirements of section 251(c)(3). Specifically, the FCC defined "necessary" to mean "an element [that] is a prerequisite for competition,"[7] and it defined "impair" to mean, "to make or cause to become worse; diminish in value."[8] The FCC also determined that a requesting carrier's ability to offer service is "impaired" or "diminished in value" if "the quality of the service the entrant can offer, absent access to the requested element, declines" or if "the cost of providing the service rises."[9] The FCC adopted rule 51.319, which sets forth the network elements that incumbent LECs were required to make available to requesting carriers on an unbundled basis.[10] Section 51.319 of the FCC's rules required incumbent LECs to offer unbundled access to the following network elements: (1) local loops; (2) network interface devices; (3) local switching; (4) interoffice transmission facilities; (5) signaling

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[3] 47 U.S.C. § 271(c)(1)(B)(ii).
[4] 47 U.S.C. § 251(c)(3).
[5] *Id.*
[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) *(Local Competition First Report and Order)*, aff'd in part and vacated in part sub nom, *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997)
[7] *Local Competition First Report and Order*, 11 FCC Rcd at 15641-42, para. 282.
[8] *Id.* at para. 285 (quoting Random House College Dictionary 665 (rev. ed. 1984)).
[9] *Local Competition First Report and Order*, 11 FCC Rcd at 15643, para. 285.
[10] *Id.* at 15683, para. 366.

networks and call-related databases; (6) operations support systems; and (7) operator services and directory assistance.[11] Section 51.317 of the FCC's rules allowed states to impose additional unbundling requirements pursuant to the Commission's interpretation of section 251(d)(2).[12]

11 Following adoption of the *Local Competition First Report and Order*, incumbent LECs and state commissions filed various challenges to the FCC's rules; these appeals were consolidated in the Eighth Circuit. Among the rules initially vacated by the Eighth Circuit Court of Appeals was the UNE combination rule, 47 C.F.R. Section 51.315(c)-(f). Later, the court also vacated 47 C.F.R. Section 51.315(b).[13] Rule 315(b) prohibits an ILEC from separating requested network elements that the incumbent currently combines. Rule 315(c)-(f) requires an ILEC to perform the functions necessary to combine other elements upon request. The Eighth Circuit invalidated Rule 315(b) using the same rationale it employed to invalidate Rule 315(c)-(f). The United State Supreme Court granted *writs of certiorari* for review of the Eighth Circuit Court decision. The Eighth Circuit's decision with regard to Rule 315(c)-(f) was not before the Supreme Court, however.

12 The Supreme Court rejected arguments by ILECs that the Act requires CLECs to combine network elements for themselves and reversed the Eighth Circuit's decision that Rule 315(b) violates the Act.[14] Although the Eighth Circuit Court presently is considering the validity of Rule 315(c)-(f), the U. S. Court of Appeals for the Ninth Circuit recently considered the Supreme Court's decision regarding UNE combinations in two separate decisions (the MFS and MCI cases).[15]

13 In the MFS case, Qwest appealed the decision of this Commission approving Qwest's Agreement with MFS and the decision of the federal district court granting summary judgment on all issues to the Commission and MFS, including the Commission's determination that Qwest has obligation to combine UNEs for interconnecting carriers. The Ninth Circuit Court relied on the Act and the Supreme Court's interpretation of the Act, and affirmed the provision in the MFS Agreement that broadly requires Qwest to combine elements at the request of MFS.[16] Most recently,

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[11] 47 C.F.R. § 51.319. *Local Competition First Report and Order*, 11 FCC Rcd at 15641-42, paras. 281-83.

[12] 47 C.F.R. § 51.317.

[13] Iowa Util. Bd. v. Federal Communications Comm'n, 120 F.3d 753, 813 (8th Cir. 1997)

[14] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S. Ct. 721, 736-738, 142 L. Ed. 834 (1999) (*AT&T Corp.*).

[15] *U S WEST Communications v. MFS Intelenet, Inc., et al.*, 193 F.3d 1112 (9th Cir. 1999) (MFS case) and *MCI Telecommunications Corporation, et al., v. U S WEST Communications, et al.*, 2000 U S App. LEXIS 3139 (March 2, 2000) (MCImetro case), respectively.

[16] *Id.* at 1121.

Qwest's petition for *writ of certiorari* in the MFS case was denied by the United States Supreme Court.[17]

14 In the MCI case, the Ninth Circuit Court again held that the Supreme Court's interpretation of the Act makes "absolutely clear" that a state requirement that Qwest combine network elements consistent with Rule 315(c)-(f) does not violate the Act.

15 In a recent arbitration proceeding between Qwest and American Telephone Technology, Inc. (ATTI), the Commission discussed the Ninth Circuit Court's MFS decision and ordered Qwest to perform the functions necessary to combine requested UNEs in any technically feasible manner either with other UNEs from Qwest's network, or in combination with network elements possessed by ATTI.[18]

16 The Ninth Circuit Court held in the MFS decision that under the Supreme Court's rationale in *AT&T Corp.*, it must affirm a requirement that Qwest combine unbundled network elements at MFS's request. In *AT&T Corp.*, the Supreme Court held that the statutory language requiring ILECs to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service" indicates that network elements may be leased in discrete parts, but "does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form."[19] The Ninth Circuit Court held in the MFS decision that it necessarily follows from *AT&T Corp.* that requiring Qwest to combine unbundled network elements is not inconsistent with the Act.[20]

17 The Ninth Circuit Court also stated,

> Although the Supreme Court did not directly review the Eighth Circuit's invalidation of 47 C.F.R. Section 51.315(c)-(f), the court's interpretation of 47 U.S.C. Section 251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. We must follow the Supreme Court's reading of the Act despite the Eighth Circuit's prior invalidation of the nearly identical FCC regulation.[21]

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[17] *U S WEST Communications v. MFS Intelenet, Inc., et al.*, 530 U.S. 1284, 120 S. Ct. 2741, 147 L. Ed. 2d 1005 (2000)

[18] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between American Telephone Technology, Inc., and U S WEST Communications, Inc.*, Commission Order Adopting Arbitrator's Report, In Part; Modifying Report, In Part; and Approving Negotiated and Arbitrated Interconnection Agreement, Docket No. UT-990385 (February 2, 2000) (ATTI case).

[19] *AT&T Corp.*, 119 S. Ct. at 737.

[20] *U S WEST v. MFS* at 1121.

[21] *Id.*

18 Likewise, the Commission's Order in the ATTI case acknowledges that we must follow the Ninth Circuit Court's decision. Qwest's petition for writ of certiorari to review the decision in the MFS case has been denied, and the Ninth Circuit Court's MFS decision is final and binding.

19 After the Commission entered its Order in the ATTI case, the Ninth Circuit decided *MCI v. U S WEST*.[22] In that case, the Commission approved an interconnection agreement that also required Qwest to combine separate network elements at MCIMetro's request. The Ninth Circuit Court noted that the Eighth Circuit's decision to vacate FCC Rule 315(c)-(f) still stands but, in light of the Supreme Court's *AT&T Corp.* decision, the Eighth Circuit's decision merely signifies that the Act does not currently mandate a provision requiring combination. The Ninth Circuit Court held that the Supreme Court's interpretation of the Act makes "absolutely clear" that a provision requiring UNE combinations is not inconsistent with the Act.

Washington State Evidentiary Requirements

20 The Commission has identified several general requirements and specific evidentiary requirements Qwest must meet to demonstrate its compliance with Checklist Item No. 2. *Supplemental Interpretive and Policy Statement, Appendix A.* The specific evidentiary requirements that Qwest must meet to establish compliance with Checklist Item No. 2 are:

21 (1) How is Qwest providing nondiscriminatory access to unbundled network elements at just and reasonable rates and in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of the Act?

22 (2) List each CLEC to which Qwest is selling network elements, the network elements provided, the volume of each network element provided, and the date the element was first provided.

23 (3) At current network capacity, what additional volume of each network element can Qwest provide to CLECs?

24 (4) Are there any network elements required by this Commission or the FCC that Qwest does not plan to offer? Please list them and explain why US West does not plan to offer them.

25 (5) For each element Qwest does not plan to unbundle, has Qwest demonstrated technical infeasibility and offered any alternative? For each such element,

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[22] *MCI Telecommunications Corporation v. U S WEST Communications, et al.*, 204 F.3d 1262 (9th Cir. 2000), *cert. denied, Qwest Corporation v. MCI WORLDCOM Network Servs.*, 531 U.S. 1001, 121 S. Ct. 504, 148 L. Ed. 2d 473 (2000).

please describe why they are technically infeasible and what alternatives have been offered.

(6) What methods can entrants use for physical access to UNEs?

(7) Is Qwest providing access to UNEs in a manner that allows requesting carriers to combine them? Describe the methods for these UNE combinations. Additionally, list all restrictions Qwest imposes on CLEC requests for combinations of UNEs. List the length of time needed for new entrants to obtain and combine network elements, e.g. time required to build collocation cages; loop cutover times, etc.

(8) Are there any UNE elements that Qwest will offer only in combination (unseparated)? If so, what are they, and why?

(9) Does Qwest intend to take the position that CLECs must obtain separate licenses from vendors when obtaining and using unbundled network elements from Qwest?

In compliance with the Supplemental Interpretive and Policy Statement, Qwest filed Exhibit 571 purporting to document Qwest's compliance with the general and specific evidentiary requirements for Checklist Item No. 2. AT&T filed responses to Appendix B questions for these checklist items in Exhibit 617.

Impasse Issues

During the workshops, Commission Staff prepared an issues log to document areas in which the parties agreed and those in which they were at impasse. The reference numbers following each issue below correspond to the number assigned to the issue in the issues log. For example, WA-TR-2 refers to Washington transport issue number 2.

At the end of the workshop and briefing process, the majority of issues were agreed. As to those issues, the Commission should find that, subject to the Commission's review of Qwest's performance and the OSS testing conducted by the ROC[23] Qwest is in compliance with the requirements of Section 271.

At the conclusion of the process, however, the parties remained at impasse with regard to the issues discussed below. This order proposes a resolution for each of the

[23] ROC stands for the Regional Oversight Committee, composed of representatives of the regulatory commissions in states in which Qwest provides local exchange service. The OSS tests are tests sponsored by the ROC on behalf of the states to verify operation of Qwest's OSS systems and the ability of interconnecting carriers to receive the service they need.

impasse issues, and finds as to each item whether the Qwest SGAT proposal complies with the Section 271 requirement, so as to earn a positive Commission recommendation to the FCC,[24] or fails to comply.

Checklist Item 2, Unbundled Network Elements

Premarket Testing – Issue WA-CL2-1

34 During the April workshops, Qwest and AT&T proposed separate SGAT sections on testing procedures at Exhibits 709 and 656, respectively. AT&T subsequently amended Exhibit 656 to include an additional section from Qwest's proposed SGAT language. Both proposals include Connectivity Testing, Stand-Alone Testing, Interoperability Testing, and Controlled Production Testing. *Ex. 656, 709.* AT&T proposed an additional type of testing called Comprehensive Production Testing, which would allow the CLECs to conduct pre-market testing using test accounts rather than actual customer accounts and would allow testing on a larger scale. *Tr. 3567.*

AT&T's Position

35 In responsive testimony, AT&T witness Michael Hydock discusses Qwest's lack of documented testing procedures and AT&T's difficulty in establishing testing processes in Minnesota. *Ex. 651T, at 3-5 and 6-10.* AT&T argues that testing of CLEC to ILEC interfaces is essential to ensure that CLECs can compete effectively. *Id. at 4.* AT&T asserts that it needs to perform testing at commercial volumes to determine that the interfaces will work in a real world environment. *Id.*

Qwest's Position

36 In rebuttal testimony, Qwest witness Karen Stewart argues that the testing procedures it proposes provide adequate testing opportunities for CLECs. *Ex.572T at 10.* Qwest states that the issue of the size of the test bed (number of lines tested) is being addressed through Qwest's Co-Provider Industry Change Management Process (CICMP) process, which includes input from CLECs. *Id.* Qwest asserts that, because Qwest's testing procedures are being reviewed through the ROC OSS testing of Qwest's CICMP, this issue should not be discussed further. *Id. at 10-11.*

37 Qwest objects to the scope of AT&T's Controlled Production Testing proposal, and asserts that it is duplicative of the OSS testing being performed by the ROC. Qwest states that it is willing to negotiate a comprehensive production test procedure under certain conditions. *Qwest Brief at 5; Tr. 3568.* Both WorldCom and AT&T dispute

[24] To earn a positive recommendation, Qwest must not only offer services in compliance with Section 271, it must provide those services in compliance.

Qwest's commitment to negotiate, citing difficulties in negotiating terms and conditions outside of the SGAT, and delays in negotiating testing procedures in another state. *Tr. 3568-3570.*

Discussion and Decision

38 The questions here are: (a) whether the testing provision proposed by Qwest is adequate, (b) whether AT&T's alternative language should be added to the SGAT; and (c) whether consideration of this issue should be deferred to the forum addressing the ROC OSS tests.

39 First, adequate testing is essential to providing CLECs a meaningful opportunity to compete. CLECs must be able to establish that their systems will interface properly with Qwest's in providing services to customers, before they enter the market. Second, the SGAT should include testing provisions. Qwest is including its proposed testing language as a topic for discussion in its testimony on CICMP, scheduled for Workshop 4.[25] The parties also acknowledge that some of Qwest's testing procedures will be examined during the ROC OSS testing. We believe it would be appropriate to consider the results of that testing, and evidence regarding the CICMP in Workshop 4, before deciding this issue. Parties at that workshop should be prepared to discuss in detail the scope of testing, including how the scope(s) proposed in this proceeding compare with those provided by RBOCs in other states that have received Section 271 approval.

Qwest Adherence to Wholesale and Retail Quality Standards – Issue WA-CL2-5b

40 Section 9.1.2 of Qwest's SGAT addresses nondiscriminatory access to unbundled network elements. Qwest states that it will provide access to elements in "substantially the same time and manner" as that which Qwest provides such access to itself or its affiliates. At the end of the section Qwest says "Qwest shall comply with all state wholesale service quality requirements." Issue CL 2-5(b) deals with whether the term should also include compliance with state retail service quality standards.

AT&T's Position

41 AT&T argues that Qwest should be required to comply with both wholesale and retail service quality standards. *AT&T Brief at 5.* AT&T states that in the *Local Competition Order* at 312, the FCC "note[d] that providing access or elements of lesser quality than that enjoyed by the incumbent LEC would also constitute an 'unjust' or 'unreasonable' condition." *AT&T Brief at 5 and 6.* According to AT&T, the FCC argued that section 251(c)(3) of the Act requires incumbent LECs to

[25] *See,* Direct Testimony of James H. Allen, filed May 16, 2001.

"provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete." *Id. at 6.* Therefore, AT&T claims that its request to add retail service quality standards is supported by FCC rules[26] and orders. *Id.*

Covad's Position

42 Covad concurs with AT&T. *Covad Brief at 11.*

Qwest's Position

43 Qwest argues that it has revised section 9.1.2 of the SGAT to address AT&T's concerns. However, Qwest maintains that retail service quality needs to be treated separately from the 271 process. *Qwest Brief at 7.* Qwest claims that there is no way to compare the performance of UNEs purchased by CLECs' with the performance of retail services Qwest provides to its customers. *Id. at 8.*

44 Qwest argues that both Qwest and the CLECs recognized there were no "retail analog[s] for most UNEs" and that "many UNEs were given benchmarks" for the ROC OSS Test performance requirements. Qwest believes that because of this distinction for UNEs, the performance measures set in the ROC process are more appropriate than retail service quality rules for assessing CLECs access to UNEs. *Id.*

Discussion and Decision

45 The ROC OSS Test collaborative process did provide a number of measurements as benchmarks, as Qwest pointed out in its brief. However, other measurements were kept at the retail analog. In essence, there are both wholesale and retail service quality standards that must be followed. By saying that "Qwest shall comply with all state wholesale service quality standards," Qwest completely omits any requirement to follow retail service quality standards. In the absence of such requirements, Qwest could with impunity provide elements that would prevent an interconnecting carrier from meeting applicable standards in its retail service. That is unacceptable. Qwest must make every effort to comply with both wholesale and retail service quality standards.

46 Qwest must modify the last sentence in section 9.1.2 of the SGAT so that it reads, "In addition, Qwest shall comply with all state wholesale *and retail* service quality standards."

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[26] 47 C. F. R. § 51.311 (a) and (b).

Restrictions on UNE Use; Connecting UNEs to "finished services" – Issues WA-CL2-6, WA-UNEC-4)

47 The proposed SGAT at section 9.23.1.2.2 states that UNE combinations will not be directly connected to a Qwest finished service, whether provided from a tariff or otherwise, without going through a collocation, unless otherwise agreed to by the parties. Notwithstanding the foregoing, a CLEC can connect its UNE combination to Qwest's directory assistance and operator services platforms. "Finished Services" as defined by agreement amongst the parties include voice messaging, Qwest-provided DSL, Access Services, private lines, retail services and resold services.[27] CLECs challenge this as inappropriate.

AT&T's Position

48 AT&T argues that no such general limitation exists in FCC orders or rules, and that the words "finished service" are not contained in the FCC orders or rules. *AT&T Brief at 12.* Section 251(c)(3) of the Telecom Act also allows interconnecting carriers access to UNEs at any technically feasible point[28] using any technically feasible method.[29] The FCC has held that "the use of the term 'feasible' implies that interconnecting or providing access to an ILEC network element may be feasible at a particular point even if such interconnection or access requires a novel use of, or some modification to, incumbent LEC equipment."[30] *Id. at 13.*

49 AT&T asserts that Qwest has not provided any evidence that accessing UNEs by connecting the UNE to a finished service is not technically feasible. In fact, the SGAT acknowledges that connecting finished services to UNEs is technically feasible by requiring such connection to be done in a CLEC's collocation,[31] which adds unnecessary expense and denies CLECs a meaningful opportunity to compete. *Id.*

50 AT&T argues that Qwest's restriction on connecting UNEs to finished services precludes a CLEC from aggregating traffic on the same trunk groups.[32] It contends that this is inefficient and expensive, and that it allows Qwest to control market entry by the CLECs by delaying the provisioning of facilities or improperly restricting the availability of UNE capacity. Qwest's restrictions simply make it more difficult for the CLECs to meaningfully compete with Qwest. *Id.*

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[27] SGAT 4.23 (a) includes more than "tariffed special access services."
[28] *See also* 47 C.F.R. § 51.307(a).
[29] *Id.*, § 51.321(a).
[30] *Local Competition Order*, para. 202.
[31] SGAT § 9.23.1.2.2. *See also* SGAT § 9.6.2.1.
[32] AT&T Ex. 630, TR 3589-3593 (April 25, 2001).

51 AT&T also points to Qwest's SGAT section 9.1.5 as allowing use of UNEs or combinations without restriction, except as required under existing rules. AT&T refers to Exhibit 715, which Qwest offered and later withdrew, as characterizing Qwest's interpretation of "existing rules," and asserts that Qwest's interpretation of SGAT section 9.1.5 must not allow restrictions unless specifically prohibited by the FCC. *AT&T Brief at 14.*

WorldCom's Position

52 WorldCom opposes the restriction against connecting UNE combinations to finished services, citing an FCC rule.[33] WorldCom also concurs in AT&T's arguments on brief. *WorldCom Brief at 5.*

Joint CLECs' Position

53 The Joint CLECs argue that the Commission should reject Qwest's proposal. Qwest's argument is wrong, they say, because it is based on the FCC's prohibition on "commingling" in the "significant local usage" certification requirements established for converting tariff services to EELs,[34] which remains in place pending further proceedings.[35] The FCC, however, uses the term "commingling" to refer to "combining loops or loop-transport combinations with tariffed special access services."[36] The FCC's stated concern in this context, like its "significant local usage" certification requirement in general, is to prevent "use of unbundled network elements by IXCs solely or primarily to bypass special access services." *Joint CLEC Brief at 10.*

Qwest's Position

54 Qwest relies for support of its position on the FCC's *Supplemental Clarification Order*, which contains the language at Paragraph 28, "whether unbundled network elements may be combined with tariffed services." Qwest contends that this implies that the commingling prohibition applies to all tariffed services. *Qwest Brief at 26.*

Discussion and Decision

55 The FCC prohibits commingling (*i.e.* combining loops or loop-transport combinations with tariffed special access services).[37] Qwest's proposed prohibition on connecting

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[33] See, 47 C.F. R. § 51.309(a).

[34] An EEL is an Enhanced Extended Loop.

[35] In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 00-183, Supplemental Order Clarification at para 28 (June 2, 2000) *("Supplemental Clarification Order").*

[36] *Id*

[37] *Id.*

UNEs to "finished services" does not comport with the FCC decision because the term "finished services" as defined at SGAT 4.23 (a) includes more than "tariffed special access services."

56 Therefore, SGAT Section 9.23.1.2.2 must be amended to delete the prohibition against combining UNEs with "finished services." In accordance with current FCC policy,[38] the only UNE combinations that are prohibited from combination with other services are loops or loop-transport combinations with tariffed special access services. Qwest may not prohibit connection of UNEs to "finished services" as currently defined at SGAT section 4.23.

Regeneration costs - Issues WA-CL2-11, WA-TR-6

57 In the terms and conditions for unbundled dedicated interoffice transport, SGAT section 9.6.2.1 states that to the extent that cross-connections are not ordered as part of a UNE combination, the CLEC is responsible for cross-connections, including any regeneration charges. Further, SGAT section 9.6.2.3 goes on to specify that when regeneration is required between either an Unbundled Dedicated Interoffice Transport (UDIT) or an Extended Unbundled Dedicated Interoffice Transport (EUDIT) termination point and the CLEC's collocation, the CLEC must order regeneration according to the general terms for unbundled network elements, SGAT section 9.1.4. In addition, SGAT section 9.1.10 defines the channel regeneration charge, required when the distance from the Qwest network to the leased physical space, the collocated equipment, or the interconnection distribution frame is of sufficient length to require regeneration.

AT&T's Position

58 AT&T claims that the SGAT should not require CLEC to order or provide regeneration. *Exhibit 616-T at 28.* This issue is similar to the regeneration issue in the collocation workshop (*See, Eleventh Supplemental Order; Initial Order Finding Noncompliance on Collocation Issues, pp. 21-23).* AT&T argues that the CLECs should not have to pay for regeneration costs within the Qwest wire center that result from the location of the CLEC collocation cage, which is generally determined by Qwest. *Tr. 3007.* Based on these decisions, regeneration may or may not be necessary, for all or some of the CLECs collocated in a central office. *AT&T Brief at 39.*

Covad's Position

59 Covad cites the FCC's *Second Report and Order* in CC Docket 93-162 as stating that regeneration should not be necessary, and that therefore Qwest should provide

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[38] *Supplemental Clarification Order at para. 28.*

regeneration required in cross-connects between itself and CLECs, unless such an arrangement is specifically requested by the CLEC. Covad goes on to argue that, as this Commission has done before, it should require that the SGAT be amended to eliminate direct or indirect imposition of channel regeneration charges. *Covad Brief at 4.*

Qwest's Position

60 Qwest does not accept the proposition that it must provide regeneration at no extra charge. UDIT cost studies do not include regeneration. *Exhibit 572-T at 8.*

61 Qwest urges that costs can be recovered in two ways, both of which are acceptable to Qwest. The cost of regeneration can be averaged across UDITs, or the cost of regeneration can be applied in a situation-specific fashion. *Qwest Brief at 9.*

Discussion and Decision

62 Qwest is entitled to recover its costs indirectly.

63 The Commission agrees with Qwest that it is entitled to recover its costs. The Commission also agrees with the Joint Intervenors that this issue is similar to the regeneration issue in collocation. CLECs should not pay for regeneration costs within the Qwest wire center that are caused by location decisions made by Qwest.

64 The Commission will allow Qwest to include non-CLEC-requested regeneration costs in indirect costs that are spread equitably to all users of its facilities, including itself. The Commission particularly observes the FCC's findings that regeneration should seldom, if ever, be necessary. Recovery as an indirect cost should result in Qwest's being indifferent to which facilities (CLEC or Qwest) are subject to regeneration.

Qwest's Obligation to Build – Issues WA-CL 2-15, WA-UNE-C-11, and WA-EEL-5

65 Issues CL 2-15, UNE C-11, and EEL-5 address whether Qwest is obligated to construct for CLECs unbundled network elements other than unbundled loops and line ports that would normally be used for basic primary service. The SGAT language in question appears in sections 9.1.2.1 and 9.1.2.2. Qwest recognizes that it is "legally obligated" to build certain facilities but believes certain unbundling, i.e. dedicated transport, is restricted to only its "existing" network. Also at issue is how to define an "existing" network.

AT&T's Position

66 AT&T argues that Qwest is obligated to build network elements on a nondiscriminatory basis for CLECs. AT&T, quoting from the FCC's *Local Competition Order* at paragraph 315 states

> [t]he duty to provide unbundled network elements on "terms, and conditions that are just, un(sic)reasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.

67 AT&T asserts that the FCC's rules also require incumbent LECs to provision elements on terms and conditions that are no less favorable to the terms and conditions the ILEC provides those elements to itself. *AT&T Brief at 8*

68 AT&T points out that Qwest's claim that it is not obligated to build is based on the FCC's exemption at paragraph 324 of the FCC's *Local Competition Order*[39] that was directed at protecting rural carriers. *AT&T Brief at 8.* AT&T contends that the FCC extended its exemption by holding that ILECs in general need not build transport for CLECs, but that section 251(f) of the Act provides relief only to rural carriers from having to provide other network elements. AT&T's argument continues that although ILECs are given relief from interoffice facilities, the FCC did not grant them relief from building other network elements. *Id.*

69 AT&T notes that, at paragraph 268 of the FCC's *Local Competition Order*, the FCC requires ILECs to replace defective UNEs that are being provided to CLECs, and that this replacement criterion is essentially the same as an obligation to build UNEs. *AT&T Brief at 8; 47 C.F.R. Section 51.309(c).* AT&T notes that Qwest has agreed to build network elements, if it has a legal obligation to do so, but will only provide DS0 loops (*Tr. 3217 [March 14, 2001]*). AT&T states that this offer does not go far enough and does not comply with the Act and FCC rules. AT&T recommends that Qwest strike the language "provided that facilities are available" from SGAT sections 9.23.1.4, 9.23.1.5, 9.23.1.6, and 9.23.3.7.2.12.8. *AT&T Brief at 12.*

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[39] Rural Telephone Coalition contends that incumbent LECs should not be required to construct new facilities to accommodate new entrants. We have considered the economic impact of our rules in this section on small incumbent LECs. In this section, for example, we expressly limit the provision of unbundled interoffice facilities to existing incumbent LEC facilities. We also note that section 251(f) of the 1996 Act provides relief for certain small LECs from our regulations under Section 251. *Local Competition Order* at para. 324.

70 AT&T argues that the Commission should also require that Qwest make clear in its SGAT under section 9.1.2 that Qwest is "obligated to build UNEs, except dedicated transport, on a nondiscriminatory basis at cost-based rates under section 252(d). AT&T also contends that the first sentence in section 9.19 should be amended to read, "Qwest will conduct an assessment of any request which requires construction of network capacity, facilities, or space for access to or use of unbundled loops. *AT&T Brief at 12.*

WorldCom's Position

71 WorldCom objects to the use of an "individual financial assessment" in paragraph 9.19 of the SGAT as does AT&T. WorldCom insists that Qwest should not be allowed to make a unilateral determination on the feasibility of a project for constructing access to UNEs without giving CLECs the opportunity to challenge Qwest's decision. *WorldCom Brief at 6.*

Joint CLECs' Position

72 The Joint CLECs maintain that the Telecommunications Act of 1996 requires Qwest to provide access to UNEs "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." *47 U.S.C. 251(c)(3).* The Joint CLECs point out that Qwest currently provides facilities for customers requesting service under the terms and conditions established in its tariffs, but that Qwest's SGAT allows it to refuse to provide service to a CLEC if no facilities are available except under very narrow conditions. "Qwest concedes that it evaluates a CLEC's request differently than Qwest evaluates an end-user customer's request for construction of comparable facilities." *Joint CLECs' Brief at 2.*

73 The Joint CLECs also point to Qwest's reliance on paragraph 451 of the FCC's *Local Competition Order* which "expressly limit[s] the provision of unbundled interoffice facilities to *existing* incumbent LEC facilities." *Joint CLECs' Brief at 3.* The Joint CLECs note that Qwest's remarks are taken out of context and that the Eighth Circuit opinion only applies when CLECs request *superior* service. *Id.* The Joint CLECs point out that the FCC Order addressed small and rural LECs and is restricted to interoffice facilities, and that the FCC has implicitly required incumbent LECs such as Qwest to construct new facilities unless specifically relieved of that obligation under the Act or FCC rules. *Id.*

74 The Joint CLECs also cite Washington law, which they contend is more demanding. Qwest is prohibited from "subject[ing] any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." *RCW 80.36.170.* Qwest also "shall, upon reasonable notice, furnish to all persons and corporations who may apply therefore and be reasonably entitled thereto suitable and

proper facilities and connections for telephonic communication and furnish telephone service as demanded." *RCW 80.36.090. Joint CLECs' Brief at 3 and 4.*

75 The Joint CLECs recommend the Commission refuse to approve Qwest's SGAT until the SGAT is revised "to require Qwest to construct facilities for CLECs in the same circumstances and under the same terms and conditions that Qwest constructs the same or comparable facilities for other customers." *Joint CLECs' Brief at 4.*

Qwest's Position

76 Qwest argues that its SGAT language in sections 9.1.2.1 and 9.1.2.2 actually exceeds Qwest's legal obligation to provide UNEs to CLECs. Qwest insists that it "does not have an obligation to build networks for CLECs." *Qwest Brief at 11.* The Qwest SGAT language indicates that Qwest has a legal obligation to build facilities when facilities are not available to meet either Provider of Last Resort (POLR) or Eligible Telecommunications Carrier (ETC) obligations to provide basic local exchange service.[40]

77 Qwest asserts that it is not "obligated to do everything for CLECs as it does for retail." As an example, Qwest says it is not required to provide unbundled packet switching in all circumstances, and that "[t]he bottom line is that there is no statute, rule or case that imposes on Qwest the obligation to construct all UNEs." *Qwest Brief at 13.*

78 Qwest claims that its SGAT limitations on the obligation to provide facilities is supported by the Eighth Circuit Court Opinion that "subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's *existing* network – not to a yet unbuilt superior one." *Iowa Utils. Bd. V. FCC, 120 F.3d753, 813 (8th Cir. 1997). Rev'd in part and remanded on other grounds, AT&T v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).*

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[40] SGAT section 9.1.2.1 states: If facilities are not available, Qwest will build facilities dedicated to an end-user customer if Qwest is legally obligated to build such facilities to meet its Provider of Last Resort (POLR) obligation to provide basic local exchange service or its Eligible Telecommunications Carrier (ETC) obligation to provide primary basic local exchange service. CLEC will be responsible for any construction charges for which an end-user customer would be responsible. In other situations, Qwest does not agree it is obligated to build UNEs, but it will consider requests to build UNEs pursuant to section 9.19 of this Agreement.

Discussion and Decision

79 Qwest's discussion of "existing" network refers to paragraph 324 of the *UNE Remand Order*.[41] While Qwest points to the FCC's reference to limiting unbundling to the incumbent LEC's "existing" network, the FCC says it "did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use."[42] The FCC goes on to state that the "incumbent LEC's unbundling obligation extends throughout its ubiquitous transport network." Later, the FCC explains the incumbent is not required to provision for "point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use." In other words, the incumbent LEC's "existing" network includes all points that it currently serves via interoffice facilities, and it is not required to extend its network to new points, based on competitors' requests. However, the incumbent LEC is still required to provide access to UNEs within its existing network even if it must construct additional capacity within its network to make the UNEs available to competitors. Qwest implies that the term "existing network" only applies to the actual facilities that are in place, when in fact existing network applies to the "area" (end offices, serving wire centers, tandem switches, interexchange carrier points of presence, etc.) that Qwest's interoffice facilities serve. This same concept applies on the loop side of Qwest's network where Qwest is obligated to construct additional loops to reach customers' premises whenever local facilities have reached exhaust.

80 Qwest must modify section 9.1.2 of the SGAT and the appropriate subsections of 9.1.2 to state that Qwest will provide access to UNEs to any location currently served by Qwest's network. Qwest must construct new facilities to any location currently served by Qwest when similar facilities to those locations have exhausted. In situations where locations are outside of currently served areas, Qwest may construct facilities under the same terms and conditions it would construct similar facilities for its own customers in those locations.

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[41] Notwithstanding the fact that we require incumbents to unbundle high-capacity transmission facilities, we reject Sprint's proposal to require incumbent LECs to provide unbundled access to SONET rings. In the *Local Competition First Report and Order*, the Commission limited an incumbent LEC's transport unbundling obligation to existing facilities, and did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use. Although we conclude that an incumbent LEC's unbundling obligation extends throughout its ubiquitous transport network, including ring transport architectures, we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use. *UNE Remand Order*, para. 324.

[42] *Local Competition Order*, para. 451.

Requirement To Provide Additional Capacity For Unbundled Dedicated Transport Through The Addition Of Electronics Or Activation Of "Dark Fiber" (CL 2-18)

81 Issue CL 2-18 addresses Qwest's obligation to provide additional capacity on facilities that are at or near exhaust. This issue can be viewed as a subset of issues EEL-5, UNE C-11, and CL 2-15, discussed earlier. In those issues we discussed Qwest's obligation to build unbundled dedicated transport for CLECs within its current existing service area. Issue CL2-18 assumes that facilities are already in place and that additional capacity can be provided by activating unused fiber,[43] or by adding electronics to make additional capacity available.

AT&T's Position

82 AT&T asserts that the FCC determined that dark fiber is dedicated transport at paragraph 325 of the *UNE Remand* Order. Quoting from paragraphs 327 and 328 of the *UNE Remand Order*, AT&T notes that the FCC views dark fiber no differently than unused copper that is "dormant until carriers put it into service," and that the fiber "is physically connected to the incumbent's network and is easily called into service." *AT&T Brief at 10.*

83 AT&T believes Qwest should be required to "light" unused dark fiber and to replace electronics to expand capacity to make dedicated transport available. Additionally, AT&T says that Qwest should be required to add the necessary electronics to provide dedicated transport for CLECs. AT&T also indicates that Qwest should be required to provision unused dark fiber as provided in paragraphs 325, 327, and 328 of the *UNE Remand Order*. AT&T argues that Qwest would add the necessary electronics or light up unused dark fiber, if it needed more capacity for its own use. Failure to add electronics for CLECs would be a clear violation of Section 251(c)(3) of the Act and FCC rules. *AT&T Brief at 11.*

Qwest's Position

84 Qwest acknowledges that it is required to provide access to unbundled dark fiber. However, it claims that it is not required to provide the electronics needed to put the dark fiber in service. *Qwest Brief at 13.*

85 Qwest asserts that it has no obligation to upgrade multiplexers, or other electronics, to allow additional capacity so that CLECs have access to transmission facilities. Qwest looks for support to paragraph 324 of the *UNE Remand Order* which states, "we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements that the incumbent LEC has not

[43] Optical fiber that is in place but has no electronic equipment on either end to send or receive impulses is called "dark fiber."

deployed for its own use." Qwest believes that upgrading of electronics is comparable to new transport facilities. *Qwest Brief at 13.*

86 Qwest objects to being required to incur what it refers to as expensive "material and placing costs" to furnish what Qwest believes will provide small incremental capacity needs of the CLECs. *Qwest Brief at 15.* Qwest also points to the possibility of network downtime and additional costs for potential migration of circuits between electronic units. *Id. at 16.*

Discussion and Decision

57 At paragraphs 325-328 of the *UNE Remand Order*, the FCC explains the need to provide electronics in order to "light" the dark fiber.[44] In these paragraphs FCC discusses the use of electronics to expand capacity on fibers that have been previously "lit." In particular, paragraph 327 provides insight into FCC's determination that dark fiber represents facilities dedicated for use, which like other elements have surplus capacity that can be upgrade to provide additional capacity.[45] A discussion of the use of specific optical capacities by the CLECs is given in paragraphs 323-324 of the *UNE Remand Order*.[46] The additional capital outlays Qwest would make for

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[44] "To provide additional capacity, new electronics are attached to previously "lit" fiber or to previously "dark" fiber. Because dark fiber is already installed and easily called into service, we find that it is similar to the unused capacity of other network elements, such as switches or "dead count" or "vacant" copper wire that is dormant until carriers put it in service." *UNE Remand Order, at para. 325.*

[45] "Although particular dark fiber facilities may not be "lit" they constitute network facilities dedicated for use in the provision of telecommunications service, as contemplated by the Act. Indeed, most other network elements have surplus capacity or can be upgraded to provide additional capacity and therefore are not always "currently used" as the term is interpreted by incumbent LECs. For example, switches, loops, and other network elements each may have spare, unused capacity, yet each meets the definition of a network element." *Id. at para. 327.*

[46] **High-Capacity Transmission.** We reaffirm that the definition of dedicated transport set forth in the *Local Competition First Report and Order* includes all technically feasible capacity-related services such as DS1-DS3 and OC3-OC96 dedicated transport services. We clarify that this definition includes all technically feasible capacity-related services, including those provided by electronics that are necessary components of the functionality of capacity-related services and are used to originate and terminate telecommunications services. . . . Accordingly, we modify section 319(d)(ii) of our rules to clarify that incumbent LEC must unbundle DS1 through OC192 dedicated transport offerings and such higher capacities as evolve over time. Our intention is to ensure that the definition of interoffice transmission will apply to new, as well as current technologies, and to ensure that competitors will continue to be able to access these facilities as unbundled network elements as long as that access is required pursuant to section 251(d)(2). *UNE Remand Order, para. 323. See para. 324* at footnote 41.

CLECs are no different from outlays it is currently required to make when its own end use customers or interexchange carriers request additional capacity.

88 The Commission directs Qwest to provide access to unbundled dedicated transport capacity between Qwest's wire centers, between Qwest's wire centers and other carriers' (including interexchange carriers) wire centers, and between Qwest's wire centers and the wire center of the requesting CLEC. In instances where CLECs want specific optical capacities (as specified by paragraph 323 of the *UNE Remand Order*) the CLECs may purchase capacity from Qwest at unbundled dedicated transport rates. In cases where capacity is limited or at exhaust, Qwest is required to either light additional fiber or change electronics to provide additional capacity in the same manner it would provide additional capacity for its own use.

Characterization Of Network Elements Priced At Retail Rates (UNE-C-21)

AT&T's Position

89 AT&T argues that Qwest should waive the local use restrictions on connecting UNEs to finished services where Qwest refuses to build UNEs. As an example, AT&T says a CLEC may order a UNE DS1 loop. Qwest takes the position that it is not required to build UNEs. Thus the CLEC may instead order a DS1 loop under the retail tariff. AT&T contends that because of its local use restrictions, Qwest refuses to permit the CLEC to connect the DS1 retail service to the CLEC's own multiplexer so the CLEC can multiplex the DS1 service onto its UNE transport. Consequently the CLEC incurs additional costs in having to purchase multiplexing and transport from Qwest on top of the increased costs the CLEC pays for the DS1 retail loop (distinguished from the DS1 UNE loop). *AT&T Brief at 42 and 43.*

Qwest's Position

90 Qwest argues that this issue is another rehash of the commingling issue using a slightly different configuration. Qwest's position is that this issue belongs under EEL-3 and UNE-C-4. *Qwest Brief at 19.*

Discussion and Decision

91 AT&T treats this issue as a "local use restriction" on "connecting UNEs to retail services." Qwest sees it as a CLEC paying "retail rates and charges for an element, but having that facility considered a UNE." AT&T points to restrictions that appear under SGAT section 9.19. However, section 9.19 deals with special construction costs that have been addressed in CL 2-15, UNE-C-11, and EEL-5. Qwest implies that finished services rates are lower than UNE rates, which is not necessarily the case. It is clear that if Qwest is not making UNEs available, the CLECs will be forced to purchase retail services (which are usually more expensive) in place of

UNEs. Placing restrictions on how these retail services (which CLECs are forced to purchase if they are to provide any service at all) will be used is inconsistent with the arrangements Qwest makes within its own network, and it disadvantages the CLECs and their customers. Consequently, it is discriminatory and improper.

92 The Commission believes that this issue is more closely related to issues EEL-5, UNE-C-11, and CL 2-15 than it is to issues EEL-3 and UNE C-4, as Qwest believes. Qwest cannot deny CLECs access to UNEs and then refuse to combine UNEs with the retail service the CLEC obtains in lieu of a UNE. If UNEs were available, as AT&T demonstrates in its example of DS1 loops, there would be no need to order DS1 loops as a retail service, and hence AT&T would not have a need to combine a UNE with a retail service. Therefore, Qwest is directed to remove in SGAT sections 9.1.5 and 9.23.1.2.2 any restrictions on combining UNEs with retail services when UNEs are not available

93 Qwest must modify the construction requirements in section 9.19 of the SGAT such that special construction charges for UNEs only apply when CLECs request UNEs outside of Qwest's current service area. Qwest's treatment of CLEC orders for UNEs must be consistent with the treatment of CLEC orders for retail services in a given area. CLECs should not have to substitute retail services for UNEs in order to avoid construction charges, or to obtain connectivity to end users in general.

Prohibiting the use of EELs to Bypass Special Access Charges - WA-EEL-1 and WA-EEL-4

94 Qwest defines an Enhanced Extended Loop (EEL) as a combination of a loop and dedicated interoffice transport, sometimes including multiplexing or connecting equipment.[47] At SGAT section 9.23.3.7.1, CLECs are prohibited from using combinations of UNEs that include unbundled loop and unbundled interoffice transport alternatives unless granted a waiver from the FCC applicable to the particular EEL, or unless the CLEC establishes it is using the combination of network elements to provide a significant amount of local exchange traffic to a particular end use customer.

Joint CLECs' Position

95 Joint CLECs argue that the FCC's *Supplemental Clarification Order*[48] concerning limitations on combinations of UNEs and loop transport alternatives is specifically limited to conversions from special access circuits to EELs. *CLEC Brief at 8.* Joint

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[47] Described by the FCC as an Enhanced Extended Link. *UNE Remand Order* para. 477.

[48] *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183, Supplemental Order Clarification (June 2, 2000) ("*Supplemental Clarification Order*").

CLECs argue that Qwest's reading of the *Supplemental Clarification Order* ignores this, and that Qwest is attempting to unfairly burden CLECs with difficult and onerous certification requirements that should only apply to conversions from special access circuits to EELs. They contend that Qwest cannot broaden this requirement to new EELs. *Id. at 8, 10.*

96 Joint CLECs argue that the Commission has already required Qwest to combine network elements on behalf of a requesting CLEC and that the Commission did not condition Qwest's obligation on a "significant local usage" certification by the CLEC. *Id. at 9.*

Qwest's Position

97 Qwest argues that there is nothing in the FCC orders to support the Joint CLECs' notion that the limitations the FCC has set on use of unbundled network combinations and loop transport alternatives are limited to conversions from special access. Qwest argues that for the Commission to do other than to maintain the status quo as Qwest sees it set by the FCC would introduce unnecessary uncertainty because the FCC has only adopted an interim policy on the issue. *Qwest Brief at 24-26.*

Discussion and Decision

98 Qwest's SGAT provisions at 9.23.3.7.1 and 9.23.3.7.2.12.2 are rejected. While we disagree with Joint CLEC arguments (Joint CLECs' Brief at 8) that the FCC *Supplemental Clarification Order* contains "plain language" to limit applications of significant local usage tests to conversions of existing special access circuits to EELs, *Id.*, the Commission in August, 2000, rejected Qwest's argument. *In re the arbitration of Sprint Communications Company, L. P. and U S WEST Communications, Inc., Fifth Supplemental Order, August 28, 2000.*

99 At page 3, the Commission said,

> Qwest urges us to depart from our consistent policies of . . . requiring ILECs to perform the functions necessary to combine requested UNEs in any technically feasible manner either with other UNEs from their networks, or with network elements possessed by requesting carriers . . . .

100 The Commission rejected Qwest's contentions there, accepting Sprint interconnection agreement language that would require Qwest to combine UNEs in any manner, provided that the UNE combination is technically feasible and that it would not impair the ability of other carriers to obtain access to UNEs or to interconnect with Qwest. Sprint's language was taken nearly verbatim from FCC rule 315(e).

101 The Commission required the interconnection agreement to contain language consistent with Rule 315, and prohibited Qwest from imposing different standards when combining network elements for other carriers than it employed for itself.

102 We see no need at present to vary from the status quo that this Commission has established in Washington State. We acknowledge that the FCC is inquiring into the situation. If the FCC changes the requirements or the application of its rule, the Commission can accept a modification to the SGAT.

103 Qwest's current SGAT proposal is inconsistent with the Commission's prior rulings in Washington State. Qwest must submit modified proposals, consistent with this Order.

Connecting EELs to Qwest's tariffed services – WA - EEL-2

104 At SGAT section 9.23.3.7.2.7, Qwest proposes to prohibit connecting EELs to Qwest's tariffed services.

WorldCom's Position

105 WorldCom argues that Qwest should not be permitted to refuse to commingle UNE combinations with tariffed services. *WorldCom Brief at 6,7.* WorldCom cites paragraph 28 of the *Supplemental Clarification Order* as stating that the FCC's commingling determination does not imply a prejudgment as to whether unbundled network combinations may be combined with tariffed services. *Id.* Qwest acknowledged that the only reason for not allowing CLECs the opportunity to commingle services is an administration issue which Qwest argues will make sorting out traffic for billing purposes difficult. WorldCom cites AT&T as demonstrating such sorting is no different than sorting traffic for other types of circuits which Qwest is routinely required to do.

Qwest's Position

106 Qwest asserts that it is the FCC's clear position that commingling with tariffed services is not allowed. Qwest also cites paragraph 28 of the *Supplemental Clarification Order* in support of its argument. *Qwest Brief at 26.*

Discussion and Decision

107 Qwest's SGAT provisions at 9.23.3.7.2.7 are accepted. Loop transport combinations may not be connected to Qwest tariffed services. The FCC states not once, but three times that "[This] option does not allow loop-transport combinations to be connected

to the incumbent LEC's tariffed services."[49] The *Supplemental Clarification Order* clearly results in maintaining the *status quo* until it has further information on the issue.[50] The Commission may reconsider this issue in light of a prospective FCC decision lifting the prohibition, but should not do so now.

Waiver of TLAs – WA-EEL-15

108 Qwest's SGAT at 9.23.3.1.2 states that if a CLEC is obtaining services from Qwest under an arrangement or agreement that includes the application of termination liability assessment (TLA) or minimum period charges, and if the CLEC wishes to convert such services to UNEs or a UNE Combination, the applicability of such charges is governed by the terms of the original agreement, tariff or arrangement.

Joint CLEC's Position

109 Joint CLECs argue that the requirement to pay the TLA raises CLEC costs in an anticompetitive manner. Joint CLECs propose treating the circuits subject to termination liability as UNEs provided temporarily at a higher price so that the entire facility could be converted.

110 The Joint CLECs contend that TLAs should be waived for conversions of special access and private line circuits to EELS, along with a rebuttable presumption regarding the use of the circuits and the purpose of the TLA. *Joint CLEC Brief at 13-14.*

AT&T's Position

111 AT&T objects to being required to pay the TLAs when converting special access or private line circuits to EELs. AT&T supports the CLECs' arguments that because of Qwest's refusal to make facilities available as unbundled network elements, the CLECs were forced to make uneconomic choices and sign long term agreements subject to TLAs, to obtain the needed facilities. The TLAs should be waived if the CLECs choose to be served via UNEs. *AT&T Brief at 41.*

Qwest's Position

112 Qwest disagrees but offers to waive certain TLAs. Qwest contends that when a termination liability exists it is due to a term or volume discount, or both, having been applied to the full rate for the service. Qwest applies the discount to the full rate for the service in return for a time commitment from the CLEC. Qwest argues that to the extent a CLEC is now attempting to "disconnect" this rate, having had benefit of the

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[49] *Supplemental Clarification Order at Paragraph 22.*
[50] Id at 28.

discounted rate for a period of time that is less than agreed upon with Qwest, then clearly a termination liability should and does apply so that Qwest receives the benefit of its bargain with the CLEC. *Qwest brief at 27-28.*

113 Qwest also argues that the FCC has held that TLAs are not an appropriate issue for Section 271 cases. *Id.*

114 Qwest proposes to not apply TLAs if all of the following conditions are met:

(1) CLEC's private line circuit(s) was ordered or augmented between October 9, 1999 (the effective date of the 9th Circuit decision)[51] and May 16, 2001 (the date of this proposal);
(2) Qwest did not have to build facilities to install the private line circuits at issue to meet CLEC's request;[52]
(3) CLEC identifies and communicates in writing to Qwest on or before August 1, 2001, each circuit it believes qualifies under this proposal; and
(4) Each private line circuit so identified qualifies under one of the three local use options contained in Section 9.23.3.7.2 of the SGAT and CLEC identifies which option each circuit qualifies under.[53]

Id. at 29.

115 If all of the conditions listed above are met, Qwest states that it will implement this proposal on an individual case basis with each CLEC. *Id.*

Discussion and Decision

116 Termination liabilities under long term contracts for special access services should not be abrogated just because the customer subsequently chooses to convert those

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[51] Qwest's proposal was footnoted as follows:
This date will be February 17, 2000, (the effective date of the UNE Remand Order) in non-9th Circuit states.

[52] Qwest's proposal was footnoted as follows:
Qwest considers the following to be incremental facility work that would not be considered a "build" situation: conditioning, placing a drop, adding a network interface device, adding a card to existing equipment at the central office or remote locations, adding central office tie pairs, and adding field cross jumpers. SGAT 9.1.2.3. All other work, including, but not limited to installing fiber, conduit, or adding or upgrading electronics, is considered a "build" situation. See also Issue CL2-10 and UNEC-11 which address the obligation to build issue.

[53] Qwest's proposal was footnoted as follows:
For clarification, Internet traffic/ISP traffic cannot be counted as local traffic for purposes of meeting the local use restriction. See Issue EEL-16 for the discussion and authorities stating that Internet traffic is interstate, not local, traffic.

circuits to EELs. The Commission has no way of determining from this record the reasons why CLECs have entered into specific agreements containing TLAs. Therefore Qwest SGAT at 9.23.3.12 stands until the FCC provides further guidance. The Commission does not object to the proposal by Qwest to waive certain TLAs as set forth above, and approves its inclusion in the SGAT.

Is ISP traffic "local" if it is carried on an EEL? - WA-EEL-16

117 During the workshops AT&T asked Qwest how it would propose to treat ISP traffic for purposes of applying the "significant local use" restriction. *Tr. 3634.* The parties discussed whether the FCC's recent decision on the treatment of ISP traffic for reciprocal compensation would affect the treatment of such traffic for EELs and agreed the issue was at impasse. *Tr. 3635, 3637.*

Joint CLECs' Position

118 Joint CLECs contend that the FCC's *ISP Remand Order*[54] has no impact on the "significant local usage" certification requirements for converting special access service to EELs. In that Order, the FCC once again concludes that ISP-bound traffic is jurisdictionally interstate, but the FCC does not revoke the access charge waiver granted ISPs and other enhanced services providers. *Joint CLEC Brief at 11.* Joint CLECs argue that service to ISPs for calls delivered within a local calling area is local exchange service, not special access. *Id.* Therefore, to the extent that the "significant local usage" certification requirements are specific to "traffic," ISP-bound traffic should continue to be considered "local." *Id.* A contrary position would permit Qwest to require that CLECs provide more costly special access service to ISPs, while Qwest provides its ISP customers with local exchange service. Such a result would be inconsistent not only with FCC orders but with principles of nondiscrimination and competitive parity. *Id.*

Qwest's Position

119 Qwest contends that in the *ISP Remand Order*, the FCC found that state commissions no longer have authority to address the issue because the FCC has exercised its jurisdiction over Internet-bound traffic and declared that this traffic is jurisdictionally interstate. The *ISP Remand Order* clearly and unmistakably states that Internet-bound traffic is interstate and the Order pre-empts a state decision to the contrary. *Qwest Brief at 33.* Qwest concedes that the FCC did not preempt state commission decisions governing compensation for Internet-bound traffic for the period of time

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[54] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, and Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, FCC 01-131, (released April 27, 2001) *(ISP Remand Order).*

CONTINUATION

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prior to the effective date of the Order. However, Qwest contends that the compensation schemes adopted for this interstate traffic are not at issue in this Section 271 proceeding. Qwest also argues that the "significant local use" provisions in the *Supplemental Clarification Order* only apply to voice traffic and that even if the Commission had discretion to define ISP traffic as local in nature, it could not be considered local traffic for purposes of meeting EEL requirements under the FCC's rules. *Qwest Brief at 34.*

Discussion and Decision

120 This Commission has consistently ruled that ISP traffic is local and there is no reason to differentiate such traffic on the basis of how the loop carrying that traffic is regulated.

Qwest Contacts with CLEC End Users during Misdirected Calls – WA-UNEP-5(a)

121 SGAT section 9.23.3.17, discussing points of contact for CLEC end users of UNE-Ps, addresses the conduct of Qwest or CLECs when they receive misdirected calls from end users. The SGAT states, "nothing in this agreement shall be deemed to prohibit Qwest or CLEC from discussing its products and services with CLEC's or Qwest's end user customers who call the other Party."

AT&T's Comments

122 AT&T objects to this language as anticompetitive, and requests the Commission add the words "seeking such information" to the SGAT provision, so that marketing during misdirected calls could only take place at the request of the end user. *AT&T Brief at 18.* AT&T cites the U. S. Supreme Court as affording commercial free speech "a limited measure of protection." AT&T argues that its proposed language is a narrowly tailored restriction which does not interfere with Qwest's right to freedom of speech, while at the same time preventing anticompetitive behavior that threatens competition. *AT&T Brief, at 15-16.*

Qwest's Position

123 Qwest contends that AT&T's proposed restriction would be an inappropriate restriction on commercial free speech. *Qwest Brief at 19.*

Discussion and Decision

124 The Commission observes that this issue has arisen in connection with resale services and has been addressed in Workshop II orders; however, the Commission believes that this issue should be addressed on the merits. Qwest has agreed to advise the caller that Qwest is not the service provider, and will not disparage the competitor or

its product. Qwest states that it will communicate only truthful, accurate, and nonmisleading information regarding its products. Nevertheless, given the substantial interest in promoting full and fair competition, and the fact that Qwest will be dealing with a captive audience, the Commission will impose a further limitation, namely that, Qwest be required either to: (1) provide the caller with a number they may dial to obtain sales information, or (2) ask the caller whether they would like to hear sales information. Including these limitations in the SGAT will promote competition, and not restrict the CLECs' ability to obtain or retain new customers, without unreasonably restricting Qwest's right to market its services. The SGAT language should be revised accordingly.

Checklist Item 5, Unbundled Transport

Distinction between Unbundled Dedicated Interoffice Transport (UDIT) and Extended Unbundled Dedicated Interoffice Transport (EUDIT) - (WA - TR-2)

125 Section 9.6 of the SGAT describes two rate elements for dedicated transport. The UDIT provides competitive LECs with a network element of a single transmission path between Qwest end office, serving wire centers or tandem switches in the same LATA and state. The EUDIT provides the competitive LEC with a bandwidth-specific transmission path between the Qwest serving wire center and the competitive LEC's wire center or an interexchange company's point of presence located within the same Qwest serving wire center.

AT&T's Position

126 AT&T requests that the Commission order Qwest to eliminate the EUDIT/UDIT distinction and provide dedicated transport between all required locations on a flat rate, distance-sensitive basis.[55] *AT&T Brief at 39.*

127 In its *UNE Remand Order*, the FCC reaffirmed its definition of dedicated transport as an unbundled network element contained in the Local Competition Order. *AT&T Brief at 35.* The Bell Operating Companies must provide unbundled network elements under section 251(c)(3), independent of its obligation under Section 271 to unbundle local transport. *Id. at 3.*

128 Defining the obligation to provide nondiscriminatory access, the FCC has said,

> "The duty to provide unbundled network elements on 'terms, and conditions that are just, reasonable, and nondiscriminatory' means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all

[55] The UDIT prices are flat monthly recurring charges which, for some facilities, differ based on their length. See Ex. 274, Exhibit A, pp. 8-9.

> requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself."

(Local Competition Order para. 315). AT&T Brief at 4.

129 AT&T believes SGAT section 9.6.1.1 creates an unwarranted and artificial distinction between dedicated transport provided between two Qwest wire centers and dedicated transport provided between a Qwest wire center and a CLEC wire center or interexchange carrier's point of presence. The FCC makes no such distinction, and there is no legal authority for making such a distinction. *Exhibit 616-T at 27.* By defining transport in this manner, Qwest does not truly allow CLECs to obtain dedicated transport in the manner that the FCC says they are entitled to receive it. *Tr. 3000.*

130 AT&T argues that the distinction created between the forms of transport creates an unreasonable burden on CLECs. In particular, the pricing of EUDIT and UDIT is more expensive than if priced as UDIT alone. *Tr. 2986-2987.*

131 According to AT&T, there are additional problems with EUDIT pricing. As a general rule, costs for network elements must be recovered in a manner reflecting the way costs are incurred. Qwest's rate structure for EUDIT does not follow these FCC guidelines because the rate for the EUDIT is non-distance sensitive. CLECs electing to build closer to the Qwest wire centers lose the cost benefits of doing so under EUDIT pricing. The pricing structure also imposes disincentives for CLECs to build facilities to a meet point. The CLEC will have to pay the entire EUDIT as if the CLEC had built none of its own facilities. *AT&T Brief at 36-37.*

132 AT&T asserts that it is also discriminatory that CLECs can use UDIT to connect to another independent telecommunications carrier and the CLEC can obtain UDIT for transport between Qwest wire centers. However, if the CLEC wishes to obtain dedicated transport to connect to a Qwest wire center it must use EUDIT. *AT&T Brief at 37.*

133 AT&T concludes that it would be appropriate to revisit the pricing issue in the next series of cost dockets. *Tr. 2994.*

WorldCom's Position

134 WorldCom argues that the Qwest SGAT should be changed to eliminate the artificial distinction suggested between EUDIT and UDIT. *Exhibit 641-T at 10.*

135 Through its SGAT, Qwest improperly disaggregates unbundled dedicated transport into various subparts. WorldCom concurs in AT&T comments on this issue. As an

unbundled network element, CLECs are permitted to use UDIT with none of the restrictions imposed by Qwest by its disaggregating of UDIT in separate subparts, UDIT and EUDIT. The sole effect of this is to raise the costs of doing business for CLECs. *WorldCom Brief at 2.*

136 WorldCom contends that the rate structure does not justify departing from the FCC definition of the required element. Qwest's own examples of the Access and Private Line Tariffs include both distance sensitive and non-distance sensitive rate elements. There is no need to create a separate service classification to describe the different rate elements. *Exhibit 641-T at 9.*

137 WorldCom requests that the Commission address the relevant pricing issues in UT-003013, Part B.

Covad's Position

138 Covad argues that Qwest must prove that it complies with state and federal laws regard to transport before the Commission may grant Qwest's Section 271 application. Section 251(c)(3) of the Act requires incumbent LECs to provide access to unbundled network elements "at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." *Covad Brief at 2.*

Qwest's Position

139 Through its SGAT, Qwest provides CLECs with access to unbundled dedicated transport. *Exhibit 550-T at 47.* The pricing issues should be deferred to the cost docket. *Qwest Brief at 37.*

140 Qwest provides existing unbundled dedicated transport between all locations identified in the FCC rules and orders. Identifying EUDIT separately recognizes that this segment of dedicated *transport* has historically been recovered in cost models and resultant rate schedules as a non-distance-sensitive rate element. All other interoffice transport has been rated on a fixed and per mile basis. For example, Switched Access Services have a non-distance sensitive rate component called "entrance facilities" or "channel termination." *Exhibit 572-T at 4.*

141 Qwest Exhibit 559 demonstrates the difference between UDIT and EUDIT. The exhibit shows the UDIT connection between Qwest central offices and the EUDIT connection between a Qwest central office and a CLEC switch.

142 Qwest contends that UDITs and EUDITs are not two different unbundled network elements; they are a single unbundled *network* element with two rates. The EUDIT is the entrance facility component. *Tr. 2983-2984*

143 Qwest argues that the pricing structure is also consistent with the treatment of retail end-users, for which there is channel termination at the serving wire center at a fixed price and then the transport becomes fixed and per mile. *Tr. 3000.*

144 This pricing structure is standard industry practice. The FCC recognized this practice by suggesting the use of existing rates for interstate dedicated switched transport as a default proxy for unbundled dedicated transport. As an example, the FCC cited BellSouth's entrance facility charge, for transport from an IXC's point of presence to a BellSouth serving wire center, and its dedicated transport charge for 10 miles of interoffice transmission between a serving wire center and an end office. *Qwest Brief at 36-37.* The Texas 271 Agreement, or Statement of Generally Accepted Terms, provides another example of *this* standard industry price structure. *Exhibit 572-T at 5.*

145 Qwest believes cost and rate structure issues associated with EUDIT should be deferred to the cost docket. *Id. at 37.*

Discussion and Decision

146 The Commission agrees with the Intervenors' interpretation of the FCC's *Local Competition Order* and *UNE Remand Order*, which clearly categorized local transport as an unbundled network element subject to section 251(c)(3) of the Act requiring "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."

147 The *Local Competition Order* states at paragraph 315, "The duty to provide unbundled network elements on 'terms, and conditions that are just, reasonable, and *nondiscriminatory*' means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself."

148 Exhibit 559 shows that the only apparent difference between the UDIT and the EUDIT justifying different charges is the owner of the wire center at the far end of the transport. While Qwest has likened the EUDIT to an entrance facility, the record does not show that the EUDIT is sufficiently distinct from the UDIT.

149 In addition, Qwest's argument that the EUDIT pricing scheme is similar to a number of examples of standard industry practice is not persuasive given that many of the

interconnection agreements negotiated by Qwest in Washington make no distinction between UDIT and EUDIT.[56]

150 As such, in its SGAT, Qwest should eliminate the distinction between unbundled dedicated interoffice transport (UDIT) and extended unbundled dedicated interoffice transport (EUDIT).

151 Finally, all parties agree that the pricing of unbundled dedicated transport should be addressed in the generic pricing docket. These rates are currently under consideration in UT-003013; briefs on the issue were filed on May 29, 2001.

Responsibility for provision of electronics at the CLEC end of unbundled dedicated transport – WA-TR-14

152 Qwest is providing unbundled transport with two different rate elements, that is discussed at issue WA-TR-2 above. Qwest is also refusing to provision electronics on the CLEC's end of the arrangement, and will not add more electronics within its own network if facilities are at exhaust. The CLECs object to the two-element rate structure and the lack of provisioning for electronics.

AT&T's Position

153 AT&T objects to Qwest's refusal to provide electronics with the EUDIT/EUDIT arrangement. The CLEC end of the EUDIT does not have electronics. *Tr. at 3527-3528.* AT&T compares this situation to receiving "half the dark fiber," and notes the FCC specified that dedicated transport includes electronics that will "permit the transmission of voice or data." *AT&T Brief at 38.*

154 AT&T asserts it is unlawful for Qwest to require CLECs to pay for the CLEC's costs of electronics on the CLEC's end of the EUDIT. AT&T recommends that Qwest be

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[56] The *Agreement For Local Wireline Network Interconnection and Service Resale Between AT&T Communications of the Pacific Northwest, Inc. and U.S. West Communications, Inc.*, filed July 25, 1997, provides in Attachment 3, section 7.1.1, that, "Dedicated Transport is an interoffice transmission path between AT&T designated locations to which AT&T is granted exclusive use." The *Interconnection Agreement Between U.S. West Communications, Inc. and Covad Communications Company for Washington*, dated February 27, 1998, provides in section 8.2.2 that, "U.S. West will provide unbundled access to dedicated transmission facilities between its central offices or between such offices and those of competing CLECs." Other interconnection agreements similarly make no distinction between unbundled dedicated interoffice transport and extended unbundled dedicated interoffice transport. See *Agreement For Local Wireline Network Interconnection and Service Resale Between MCImetro Access Transmission Services, Inc, and U.S. West Communications, Inc.* filed August 20, 1997; *MFS Intelenet, Inc. and U.S. West Communications, Inc. Arbitrated Interconnection Agreement for the State of Washington*, filed December 3, 1996; and *Sprint Communications Company, L.P. and U.S. West Communications, Inc. Negotiated/Arbitrated Terms of Agreement for Interconnection, Resale, and Unbundled Elements*, filed July 8, 1997.

ordered to provide electronics on dedicated transport at the CLEC's wire center. *AT&T Brief at 39.*

Qwest's Position

155 Qwest indicates that the electronics issue associated with the EUDIT is the same issue that is addressed under Qwest's obligation to build. Qwest refers to the arguments and authorities cited in the discussions under CL2-15, CL2-18, and UNE C-11. *Qwest Brief at 37.* Qwest asserts that if it already has electronics available, Qwest will provide electronics for the UDIT arrangement. Qwest will not provide electronics, add electronics, or upgrade electronics at the CLEC's end of the EUDIT. Qwest does not agree to add electronics or upgrade electronics for either the UDIT or EUDIT where electronics are not available. Qwest believes it is only obligated to unbundle access to its *existing* network. Qwest characterizes the addition of electronics at the CLEC end of the EUDIT as falling outside the scope of the work it has agreed to perform in SGAT section 9.1.2.3. *Id. at 13-14.*

Discussion and Decision

156 As it has with other issues, Qwest continues to insist that it is not obligated to build additional facilities to provide unbundled transport beyond what it has defined as its existing network. Clearly the FCC has stated in the *UNE Remand Order* at paragraph 323 that Qwest is required to unbundle dedicated transport at rates DS1 through OC 192. At paragraph 324 the FCC concludes that "an LEC's unbundling obligation extends throughout its ubiquitous transport network." The incumbent LEC is not required to build facilities beyond its own point-to-point demand network. However, if a CLEC is located inside of Qwest's current point-to-point service area, Qwest is required to build facilities and provide electronics at the CLEC's wire center, if requested.

157 The Commission directs Qwest to provide electronics for the unbundled dedicated interoffice transport arrangements at the CLEC wire center if requested by the CLEC. The provisioning of unbundled transport elements requires a complete end-to-end connection. Electronics are already required to terminate the transport facility at the Qwest wire center. There is no reason for Qwest to provision only one-half of this element.

Checklist Item 6, Unbundled Local Switching

Availability of AIN Service Software - WA-SW-2

158 Qwest's SGAT Section 9.11 addresses Qwest's obligation to provide access to unbundled local switching. SGAT sections 9.13 and 9.14 contain provisions regarding signaling and Advanced Intelligent Network (AIN) services.

Qwest asserts that it complies with the obligation to provide access to unbundled local switching through its interconnection agreements and its SGAT.

AT&T's Position

AT&T objects to Qwest's position that it does not need to offer unbundled access to AIN service software, or features. *AT&T Brief at 23.* AT&T asserts that Qwest reads the FCC's *UNE Remand Order* too broadly and that the FCC disregarded its own criteria in determining that unbundled access to AIN service software was proprietary, and that it was not "necessary" under the "necessary" standard set forth for proprietary elements. *Id.*

AT&T claims that the FCC erred in finding that AIN service software met the criteria for a proprietary element, and that it did not conduct the analysis required to determine whether a proprietary element is required to be offered. That analysis requires a determination of whether: a) AIN service software differentiates an ILEC's services from its competitors, or is competitively significant; b) lack of access to the element would jeopardize the goal of the 1996 Act to bring rapid competition to the greatest number of customers; and, c) as a practical, economic and operational matter, CLECs are precluded from providing the services they seek to offer. *Id. at 26.*

AT&T asserts that Qwest has not demonstrated that its AIN services differentiate it from its competitors; that Qwest's refusal to provide AIN features through UNE-P will result in AIN features being lost for customers who switch service to a CLEC; and that the time and cost involved for CLECs to create their own AIN software, or to purchase it from an outside vendor, results in CLECs being precluded from providing the services they seek to offer. *Id. at 28.*

AT&T states that AIN services are not available from third party vendors, and that desired software is not available on Qwest switches. It asserts that it would take years for AT&T to develop its own software with the use of the unbundled elements Qwest provides, and that its AIN software would need to be functionally equivalent to Qwest's without infringing on Qwest's patents. *Id. at fn 119, 120.* AT&T therefore concludes that Qwest should be required to make its AIN service software available to CLECs that are using UNEs to provide telecommunications services. *Id. at 29.*

Qwest's Position

Qwest cites the FCC's *UNE Remand Order*, at paragraph 419,[57] as stating that AIN service software should not be unbundled. Qwest asserts that it makes available its

[57] We agree with Ameritech that unbundling AIN service software such as "Privacy Manager" is not "necessary" within the meaning of the standard in section 251(d)(2)(A). In particular, a requesting carrier does not need to use an incumbent LEC's AIN service software to design, test, and implement a

AIN platform, its Service Creation Environment, Service Management System, and Signaling Transfer Points (SCE, SMS, and STP, respectively), which are the components the CLEC needs to develop its own AIN service software. It states that it therefore complies with the FCC's requirements referred to above.

165 Qwest states that it also has agreed to leave software for existing vertical switch features on its switches for use by CLECs, even after it is itself providing the service from its AIN platform. It has agreed to load onto its switches vertical features that are currently unloaded. *Id. at 40.*

166 Qwest concludes that, because of the FCC's finding in the *UNE Remand Order*, its AIN service software is not required to be unbundled, even if it is not deemed proprietary; however, Qwest asserts that all of its AIN software is proprietary, through copyrights, patents, or trademarks. It also asserts that it owns all of its AIN products, and that its products are proprietary regardless of what entity owns the patents on the products. *Id. at 41.*

Discussion and Decision

167 While the FCC has appeared to decide the treatment of AIN service software, the Commission retains the responsibility to consider the issue on its merits. The FCC stated in the *UNE Remand Order*, paragraph 155, that the states are not precluded from requiring additional unbundling under certain conditions.[58] The FCC modified 47 CFR 51.317 to "bring it into compliance with our new standards and the Supreme Courts' decision. Modification of this rule will enable state commissions to add additional unbundling obligations consistent with sections 251(d)(3)(B) and (C) of the Act."

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similar service of its own...Because we are unbundling the incumbent LECs' AIN databases, SCE, SMS, and STPs, requesting carriers that provision their own switches or purchase unbundled switching from the incumbent will be able to use these databases to create their own AIN software solutions to provide services similar to Ameritech's "Privacy Manager." They therefore would not be precluded from providing service without access to it. Thus, we agree with Ameritech and BellSouth that AIN service software should not be unbundled. *UNE Remand Order, para. 419.*

[58] We agree with commenters that section 251(d)(3) provides state commissions with the ability to establish additional unbundling obligations as long as the obligations comply with subsections 251(d)(3)(B) and (C). Section 251(d)(3) states:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and

does not substantially prevent implementation of the requirements of this section and the purposes of this part. *UNE Remand Order, para. 153*

¶ 468 Qwest is correct that paragraph 419 of the *UNE Remand Order* does not require ILECs to unbundle their AIN services. The FCC came to its conclusion by applying its standards to AIN services. First, it determined that AIN services are proprietary, and therefore must be considered under the "necessary" standard. Next, it determined that they did not meet the standard of being "necessary," as defined in the *UNE Remand Order*. Third, the FCC declined to require the ILECs to unbundle AIN services under the criteria it established for requiring proprietary services to be unbundled.

¶ 469 In order to decide this issue in Washington, the Commission must first decide whether the Qwest AIN service software is proprietary. While AT&T states that Qwest's "Caller ID with Privacy+" service appears to be similar to Ameritech's "Privacy Manager" service, we cannot draw a conclusion that all Qwest AIN software is therefore not proprietary. AIN service software covers more products than "Caller ID with Privacy+." *Ex. 565-C.* There has been no testimony offered to dispute Qwest's contention that its other AIN products and features are proprietary in nature under the FCC's definition.

¶ 470 Second, the Commission must determine whether the service is "necessary." In the *UNE Remand Order*, paragraphs 44 through 46, the FCC discusses its definition of "necessary," as follows: (footnotes omitted)

> 44. We conclude that a proprietary network element is "necessary" within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer. We agree with NTIA that the proper focus of the "necessary" standard is whether access to the incumbent LEC's proprietary element is absolutely required for the competitor's provision of its intended service. We find, therefore, that an incumbent LEC must provide access to a proprietary element, if withholding access to the element would prevent a competitor from providing the service it seeks to offer. In other words, we conclude that an incumbent LEC's proprietary network element would only be available to a competitor if the competitor is unable to offer service, without access to the element, because no practical, economic, and operational alternative is available, either by self-provisioning or from other sources.
>
> 45. The standard we assign to the term "necessary," as used in section 251(d)(2)(A), is consistent with the Supreme Court's decision because it considers alternatives available outside the incumbent's network and gives substance to the meaning of "necessary." Moreover, insofar as the

standard focuses on the competitor's ability to furnish a desired service, and not merely on whether profits are increased by using the incumbent's network, the standard is also consistent with the Court's instruction that we must "apply some limiting standard, rationally related to the goals of the Act."

46. This "necessary" standard differs from the "impair" standard we adopt below because a "necessary" element would, if withheld, *prevent* a carrier from offering service, while an element subject to the "impair" standard would, if withheld, merely limit a carrier's ability to provide the services it seeks to offer. We therefore disagree with the standards proposed by ALTS and other competitive LECs that access to a proprietary element is "necessary" if the entrant would experience a material loss in functionality without access to the element. A standard based on a test of "material loss" in functionality requires only that the competitive LEC's ability to compete be materially affected in some way, as opposed to precluded, and ignores the higher degree of protection normally afforded intellectual property rights. The incumbent LECs argue that the "necessary" standard is a higher standard that is intended to preserve their incentive to invest in proprietary protocols, and that access to a proprietary element is "necessary" only if lack of access to that element would deny an efficient competitor a meaningful opportunity to compete. We agree with the incumbent LECs' concerns regarding the preservation of their investment incentives. We believe that our standard, by requiring that a requesting carrier be precluded as a practical, economic, and operational matter from providing service without access to the proprietary information, sufficiently protects the incumbents' proprietary property from nonessential access by competitors.

171 In the case of AIN service software, AT&T has not made a showing that it would be precluded from offering the requested services. It has asserted, through statements made at the workshops, only that it will be costly and time consuming. *AT&T Brief at 28.*

172 Third, we must evaluate Qwest's AIN service software under the criteria set forth by the FCC for unbundling features even if they are proprietary. The FCC's rules at 51.317(a)(2) are as follows:

> If access is not "necessary," FCC may require unbundling if it determines that:
>
> (A) The incumbent ILEC has implemented only a minor modification to qualify for proprietary treatment;

(B) Information or functionality that is proprietary does not differentiate the ILEC's services from the requesting carrier's services; or
(C) Lack of access to such element would jeopardize the goals of the 1996 Act.

173 AT&T contends that the FCC overlooked at least some of these criteria in determining that AIN service software was not "necessary." Specifically, AT&T questioned whether the proprietary aspects of Qwest's AIN services differentiate it from the requesting carrier's services, and asserts that lack of access to AIN features would jeopardize the goal of the 1996 Act.

174 As stated above, the Commission believes there has not been a showing that Qwest's proprietary information or functionality does not differentiate its services from those of a requesting carrier, or that Qwest's proprietary designation is the result of only minor modifications to the AIN software. While AT&T points out similarities between Qwest's and Ameritech's "Privacy" services, it does not address Qwest's other services, which Qwest states are proprietary using the FCC's standards.

175 With respect to subsection (C) above, the question is whether Qwest's refusal to unbundle its AIN services results in a lack of access to AIN services. AT&T points out that Qwest does not provide the current AIN features through its switches; the AIN service software is not available from a third-party vendor; and that AT&T will be subject to patent infringement concerns if it develops software that is too similar to Qwest's patents. *AT&T Brief at 27.* Nevertheless, these difficulties do not preclude AT&T from developing its own AIN software using the unbundled components that Qwest provides. Thus, we do not believe Qwest's AIN software meets the criteria necessary to require Qwest to offer it to CLECs as an unbundled element.

176 The Commission concludes that evidence has not been presented here that would demonstrate a need for Qwest to offer its proprietary AIN service software as an unbundled element. The elements Qwest offers in the SGAT are consistent with the level of unbundled elements offered in its interconnection agreements. *See, Ex. 232, Attachment 3, page 46.* Absent evidence that Qwest's AIN service software is not proprietary, or that it is necessary in order for CLECs to provide requested services, the Commission declines to require a change to the SGAT for this issue.

Availability of EELs for the unbundled switching exemption, WA-SW-7

177 Issue SW-7 addresses whether Qwest may restrict CLECs from access to unbundled switching in Density Zone 1 wire centers in the top 50 Metropolitan Service Areas (MSAs) when Enhanced Extended Links (EELs) are not available.

AT&T's Position

178 AT&T contends that Qwest is obligated to provide unbundled local switching in wire centers in Density Zone 1[59] if EELs are not available. AT&T argues that Qwest must provide unbundled switching in Density Zone 1 wire centers if Qwest cannot provision an extended electronic loop (EEL). *AT&T Brief at 29.* AT&T cites the *FCC UNE Remand Order* at paragraph 288 saying that unbundled local switching does not impair a CLEC's access to unbundled switching if EELs are available.[60] *Id. at 30.*

179 AT&T contends that a CLEC would not be impaired if it had its own switch in an MSA and could purchase EELs from the incumbent LEC. However, if an EEL is not available in a wire center, the CLEC must collocate in that wire center or use unbundled switching. If unbundled switching is not available the CLEC would be forced to provide multiple switches within an MSA and that would "impair" its operation. *AT&T Brief at 30.*

180 AT&T recommends language for Qwest's SGAT as follows:

> 9.11.2.5.3 This exclusion will not apply in wire centers where Qwest has held orders for transmission facilities needed for EELs or where CLECs are unable to obtain sufficient collocation space to terminate EELs.

181 Otherwise, AT&T says that Qwest would be out of compliance with Checklist Item 6. *AT&T Brief at 31.* AT&T also notes that Qwest is not relieved of its obligation to unbundle switching in wire centers in Density Zone 1 for customers having less than 4 lines. *Id.*

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[59] The only counties in Washington that are in the top 50 MSAs are King, Snohomish, and Clark. The only Qwest wire centers in Density Zone 1 are Seattle Main and Seattle Elliott. Both wire centers are in downtown Seattle in King County.

[60] Our conclusion that competitors are not impaired in certain circumstances without access to unbundled switching in Density Zone 1 in the top 50 MSAs also is predicated upon the availability of the enhanced extended link (EEL). As noted in section VI(B) above, the EEL allows requesting carriers to serve a customer by extending a customer's loop from the end office serving that customer to a different end office in which the competitor is already collocated. The EEL therefore allows requesting carriers to aggregate loops at fewer collocation locations and increase their efficiencies by transporting aggregated loops over efficient-high capacity facilities to their central switching location. Thus, the cost of collocation can be diminished through the use of the EEL. We agree with ALTS that, if requesting carriers can obtain nondiscriminatory, cost-based access to the enhanced extended link, their collocation costs would decrease, and they would need to collocate in as few as one incumbent LEC central office in an MSA to provide service. *UNE Remand Order*, para. 288.

Qwest's Position:

182 Qwest claims that the FCC's exemption for unbundled switching is not dependent on the capacity availability for other services. Qwest argues that the FCC determined that the CLECs had alternatives to unbundled switching other than the incumbent LEC in Density Zone 1 wire centers. *Qwest Brief at 43.* Qwest states that the FCC analysis was not limited to wire centers not having exhaust issues. Qwest states that AT&T's and WorldCom's concerns about whether CLECs have access to a particular EEL or collocation is misplaced. *Id.* Qwest argues that the FCC's analysis is based upon the alternatives available to CLECs in the aggregate, and not as to whether a particular CLEC has access to a desired transport element. *Id.*.

Discussion and Decision

183 The FCC has found that switch capacity, distance-sensitive transport costs, and collocation costs significantly impair a requesting carrier.[61] We agree, and find that AT&T is correct that Qwest should not enjoy the exemption from the requirement relating to unbundled switching in Density Zone 1 unless the CLEC can obtain EEL from Qwest as a local transport alternative on a basis at parity with Qwest's self-provisioned local transport alternatives. We find Qwest's argument that the FCC's analysis is based on alternatives in the aggregate insufficiently persuasive to outweigh statutory consideration of the "impair" standard. AT&T's proposed paragraph SGAT 9.11.2.5.3 should be adopted.[62]

To determine whether a requesting carrier serves end-users with four or more voice grade equivalent lines in Density Zone 1, are the lines counted using customer locations rather than the sum of customer locations in the wire center? - WA SW-10a

184 SGAT section 9.11.2.5 states that ... "unbundled local switching does not constitute a UNE...when CLEC end-user customer to be served with unbundled local switching has four access lines or more in Density Zone 1 in specified MSAs."

AT&T's Position

185 AT&T advocates that the "four or more" lines be counted for each location in a wire center, rather than for the wire center as a whole. *AT&T Brief at 32.* AT&T asserts that the SGAT is ambiguous regarding how lines should actually be counted, whether on per-wire center or per-location basis, and that the FCC provides no clarity. *Id.*

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[61] *UNE Remand Order* at para. 261.

[62] *See AT&T brief* at 31.

186 AT&T asserts that it does not always possess the information necessary to determine the number of lines an end user may have at multiple locations, and that Qwest does not have a process available to allow a CLEC to determine line counts for a wire center. *Id.* The more practical way to implement the "3 lines or less" exception to Qwest's obligation to provide the unbundled local switching network element is on a location basis. *Id.*

Qwest's Position

187 Qwest states that the FCC has been clear that the number of lines is satisfied if the end user has "four or more lines within density zone 1." Qwest argues that AT&T's request to erode the FCC's exception and make the end user have four or more lines at each geographic location within Density Zone 1 is contrary to the mandate of the FCC and should be rejected. *Qwest Brief at 44.*

Discussion and Decision

188 The FCC rule, at CFR 51.319(c)(2), is not clear on this point. However, in the order implementing the rule, the FCC used an unbundling analysis that takes into account the possibility that carriers will offer residential service, as well as considering the cost, quality, ubiquity and timeliness factors in the FCC "impair" standard. The FCC concludes that lack of access to unbundled switching, as a general matter, impairs the ability of a requesting carrier to provide service to consumers.[63]

189 Also compelling is the discussion in the *UNE Remand Order* on the "four or more lines" issue at paragraphs 290-298. The FCC noted that competition has continued to develop, primarily for business customers or users with substantial telecommunications needs. *Id. at 291.* It acknowledges that exemptions from unbundling requirements are appropriate in areas with competition. However, it recognized that competitors have deployed switches to serve medium and large business customers, rather than the "mass market," which is largely the residential market. *Id. at para. 292.* The FCC found that

> ...any business that has three or fewer lines is likely to share more characteristics of the mass market customer than a medium and large business. In particular, small businesses are likely to use the same number of lines as many residential subscribers and purchase similar volumes and types of telecommunications services.

Id. at 293.

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[63] *UNE Remand Order*, para. 255.

190 The Commission believes a subscriber with less than four lines at a location, even if it has more than one location in a wire center, will exhibit characteristics more in common with small businesses or residential customers and will likely not be in the market segment in which competition is prevalent. To address the possibility of impairing the market's ability to provide competitive choices to consumers, we therefore conclude that the proper way to count the number of lines a requesting carrier's end-user has is by counting them per location, not per wire center.

Should unbundled local switching in Density Zone 1 for subscribers subject to the "four line or more" exemption be priced on a market or TELRIC basis? - WA-SW-10b and UNE P-12

Qwest's Position

191 Qwest relies on the FCC's *UNE Remand Order* to conclude that unbundled switching is available at UNE rates for CLEC end user customers "with three lines or less."[64] For customers with four or more lines in Density Zone 1, local switching is not required to be unbundled and is not a UNE.[65] Qwest also objects to the suggestion that if a CLEC end user with three lines adds a fourth line, the first three lines would remain at TELRIC prices. *Qwest Brief at 22-23.*

192 No other parties addressed this issue in briefs.

Discussion and Decision

193 Pricing of unbundled local switching when requesting carrier end-users have more than four lines remains subject to Commission regulatory oversight, and may be priced on a non-TELRIC basis. We agree with the FCC that in Density Zone 1, the increased demand and enhanced revenue opportunities associated with high-density areas make it possible for requesting carriers serving a dense area to make more efficient use of self-provisioned switching facilities, and requesting carriers can thus counter incumbent LEC scale economies. Therefore there is a rationale for limiting the unbundling requirement for local switching, and that same rationale supports allowing Qwest to charge prices based on something other than TELRIC for all lines at a location, if the end user meets the exemption criteria as determined by this Commission. We therefore accept Qwest's proposal.

Switch interfaces at the GR-303 and TR-008 level – Issue WA-SW-16

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[64] *UNE Remand Order*, para. 293.
[65] *UNE Remand Order*, para. 299.

194 Issue SW-16 appears to be near resolution between the parties. CLECs want to be able to interconnect with Qwest's loop electronics at either the GR-303 or TR-008 interface.

AT&T's Position

195 AT&T points to the FCC statement on technical feasibility as it appears in its *Local Competition Order* at paragraph 198. *AT&T Brief at 33.* Section 251(c)(3) of the 1996 Act requires ILECs to provide access to UNEs at any "technically feasible point." AT&T goes on to point out that the "FCC has conclude[d] that the obligations imposed by sections 251(c)(2) and 251(c)(3) of the 1996 Act include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." The FCC concluded Congress' intent was to

> "obligate the incumbent to accommodate the new entrant's network architecture... Consistent with that intent, the incumbent must accept the novel use of, and modification to, its network facilities to accommodate the interconnector or to provide access to unbundled elements."

AT&T Brief at 34. AT&T states that although the FCC concludes that consideration needs to be given to "legitimate threats to network reliability and security," the burden of proof, here, rests with the ILEC. *Id.*

196 AT&T also acknowledges that Qwest submitted language in a workshop in another jurisdiction, filed by Qwest in this proceeding as Exhibit 702, that is acceptable to AT&T. *AT&T Brief at 35.*

Covad's Position

197 Covad concurs with AT&T that Qwest be required to unbundle the high speed line ports from its digital loop carrier (DLC) systems for access by CLECs. Covad recommends that the SGAT be revised to allow this procedure. *Covad Brief at p. 11.*

Qwest's Position

198 Qwest indicates that although the parties were at impasse on this issue at the conclusion of the April 24-25 follow-up workshop, Qwest and AT&T have now agreed to SGAT language and have agreed to close this issue. *Qwests Brief at 44.*

Discussion and Decision

199 The Commission has reviewed Exhibit 702 and Qwest's proposed language for SGAT sections 9.11.1.1.2, and 9.11.1.1.2.1 through 9.11.1.1.2.10. The proposed language changes are not completely word-for-word descriptions from Exhibit 702.

However, it appears that the intent of Exhibit 702 has not been changed materially. The Commission has not received any response to the latest SGAT version from the interested parties.

200 The Commission will close this issue once both AT&T and Qwest verify that language based on the agreement between AT&T and Qwest in Exhibit 702 is correctly reflected in the SGAT.

FINDINGS OF FACT

201 Having discussed above in detail the oral and documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse between the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

202 (1) Qwest Corporation, formerly known as and sometimes referred to in this Order as U S WEST Communications, Inc., is a Bell operating company (BOC) within the definition of 47 U.S.C. Section 153(4), providing local exchange telecommunications service to the public for compensation within the State of Washington.

203 (2) The Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, to verify the compliance of Qwest with the requirements of Section 271(c) of the Telecommunications Act of 1996, and to review Qwest's Statement of Generally Available Terms, or SGAT, under Section 252(f)(2) of the Act.

204 (3) Section 271 of the Act contains the general terms and conditions for BOC entry into the interLATA market.

205 (4) Pursuant to 47 U.S.C. Section 271(d)(2)(B), before making any determination under this section, the FCC is required to consult with the state commission of any state that is the subject of a BOC's application under Section 271 in order to verify the compliance of the BOC with the requirements of Section 271(c).

206 (5) Pursuant to 47 U.S.C. section 252(f)(2), any BOC statement of terms and conditions filed with the state commission under Section 252(f)(1) must comply with Section 251 and 252(d) and the regulations thereunder in order to gain state commission approval.

207 (6) In October 1997 and in March 2000, the Commission issued Interpretive and Policy Statements addressing the process and evidentiary requirements for the Commission's verification of Qwest's compliance with Section 271(c).

208 (7) On March 22, 2000 and on April 28, 2000, Qwest submitted its SGAT for review and approval by this Commission.

209 (8) On June 6, 2000, the Commission consolidated its review of Qwest's SGAT in Docket No. UT-003040 with its evaluation of Qwest's compliance with the requirements of Section 271(c) in Docket No. UT-003022.

210 (9) During the third workshop in this proceeding held on March 12-15, 2001, and April 24-26, 2001, Qwest and a number of CLECs submitted testimony and exhibits to assist the Commission in evaluating Qwest's compliance with the requirements of Section 271(c) of the Act, as well as the review of Qwest's SGAT pursuant to Section 252(f).

Unbundled Network Elements Findings of Fact

211 (10) Qwest and AT&T each submitted a proposed SGAT section 12 regarding testing procedures during the April workshops. AT&T's proposed SGAT language contains, and Qwest's proposed section 12 language does not contain, an additional type of testing called Comprehensive Production Testing.

212 (11) Testing will be a topic for discussion in the context of Qwest's Co-Provider Industry Change Management Process, which will be discussed at the Commission's Workshop IV.

213 (12) SGAT section 9.1.2 states that Qwest will comply with all state wholesale service quality requirements when furnishing unbundled network elements (UNEs).

214 (13) SGAT section 9.23.1.2.2 provides that UNE combinations will not be directly connected to a Qwest finished service.

215 (14) SGAT section 4.23(a) defines finished services as including voice messaging, Qwest-provided DSL, Access Services, private lines, retail services and resold services.

216 (15) SGAT section 9.6.2.1 provides that when cross-connects are not ordered as part of a UNE combination, the CLEC is responsible for cross-connections, including any regeneration charges.

217 (16) SGAT section 9.6.2.3 specifies that when regeneration is required between an unbundled direct interoffice transmission point and a CLEC's collocation, the CLEC must order regeneration as specified in SGAT section 9.1.4.

218 (17) SGAT section 9.1.10 defines the channel regeneration charge required when the distance from a Qwest facility to the CLEC's facility is of sufficient length to require regeneration.

219 (18) SGAT section 9.1.2 provides that Qwest shall provide non-discriminatory access to UNEs on rates, terms and conditions that are non-discriminatory, just, and reasonable.

220 (19) SGAT section 9.1.2.1 restricts Qwest's obligation to build to facilities that Qwest would be legally obligated to build to meet provider of last resort obligations or Eligible Telecommunications Carrier obligations to provide primary basic local exchange service.

221 (20) SGAT section 9.1.2.4.2 provides that if no facilities exist and the facilities requested by the CLEC do not meet the criteria contained in SGAT section 9.1.2.1, Qwest will reject the CLEC's service request and require the CLEC to submit a request for construction of unbundled network elements, and pay for all construction, as specified in SGAT section 9.19.

222 (21) SGAT section 9.1.2.3 provides that Qwest will perform incremental facility work in order to make UNEs available.

223 (22) SGAT section 9.23.3.7.1 prohibits CLECs from using combinations of UNEs that include an Enhanced Extended Loop (EEL), unless granted a waiver by the FCC for the particular EEL or if the CLEC proves it is using the UNE combination to provide a significant amount of local exchange traffic to a particular end use customer.

224 (23) SGAT section 9.23.3.7.2.7 prohibits connection of EELs to tariffed services.

225 (24) SGAT section 9.23.3.12 states that when a CLEC converts services to UNEs or UNE combinations, that any termination liabilities applicable to such services will apply upon conversion.

226 (25) SGAT section 9.23.3.17 allows Qwest or CLECs to market their services to each other's end users when they receive misdirected calls from such end users.

Unbundled Transport Findings of Fact

227 (26) SGAT section 9.6 provides for dedicated transport to be offered in two components, Unbundled Dedicated Interoffice Transport (UDIT) and Extended UDIT (EUDIT).

228 (27) SGAT section 9.6.1.1 provides that UDIT prices are distance-sensitive flat rates, and EUDIT prices are non-distance sensitive flat rates.

229 (28) In oral testimony, Qwest stated that it does not provide electronics at the CLEC end of the EUDIT facility.

Unbundled Local Switching Findings of Fact

230 (29) FCC rules require Qwest to make available unbundled local switching to CLECs.

231 (30) SGAT sections 9.11.1, 9.13, and 9.14 provide that Qwest will make available to CLECs AIN databases and platforms, Signaling Transfer Points, Service Management Systems, and AIN Customized Services.

232 (31) FCC rules do not require an ILEC's AIN service software to be offered as an unbundled element to CLECs if certain conditions are met.

233 (32) FCC rules provide that ILECs need not offer unbundled switching in Density Zone 1 wire centers in the top 50 Metropolitan Service Areas (MSAs) when EELs are available.

234 (33) Qwest's Seattle Main and Seattle Elliott wire centers are the only Density Zone 1 wire centers qualifying for the FCC exemption.

235 (34) SGAT section 9.11.2.5 provides that unbundled local switching will not be offered at UNE rates when a CLEC's end-user customer has four or more access lines in Density Zone 1 in specified MSAs.

236 (35) SGAT section 9.11.1.1.2 has been revised by Qwest to reflect an agreement between Qwest and AT&T on conditions pertaining to the offering of GR-303 features and functionalities as unbundled switching.

CONCLUSIONS OF LAW

237 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following

summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

338 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.

Unbundled Network Elements Conclusions of Law

339 (2) Adequate testing is essential to providing CLECs a meaningful opportunity to compete, as required by the Telecom Act.

340 (3) A decision on testing should incorporate a review of the testing issues being addressed in Workshop IV.

341 (4) Qwest's failure to adhere to retail quality standards in the provision of UNEs violates its obligation to provide nondiscriminatory access to UNEs.

342 (5) Qwest's prohibition in the SGAT against combining UNEs with "finished services" violates the Commission's orders requiring the provision of UNEs in any technically feasible manner and in combination with others' network elements.

343 (6) Qwest's proposal that CLECs pay directly for regeneration required to provide UNEs unfairly burdens CLECs with costs they cannot avoid or control.

344 (7) Under the Telecom Act, Qwest must provide access to UNEs to any location currently served by Qwest's network. Qwest must construct new facilities to any location currently served by Qwest when similar facilities to those locations have exhausted. Qwest's failure to do so is a violation of its legal obligations under the Act.

345 (8) Qwest's SGAT provisions result in the failure to either "light" dark fiber or to modify electronics on fiber facilities to provide additional capacity for UNEs in the same manner it would provide additional capacity for its own use, and therefore are in violation of Qwest's obligation to provide UNEs in a nondiscriminatory manner as required by the Commission and the FCC.

346 (9) Qwest's SGAT construction requirements and its practices in constructing facilities for UNEs result in discriminatory treatment of CLECs compared to Qwest's practices in constructing like facilities for retail services.

247 (10) The FCC's *Supplemental Clarification Order* does not prohibit the "significant local usage" test being applied to new EELs as well as to EELs converted from special access facilities.

248 (11) Qwest's prohibition on the connection of EELs to tariffed services properly reflects the requirements of the FCC's *Supplemental Clarification Order* .

249 (12) Qwest's application of termination liability assessments (TLAs) when converting CLEC special access or private line circuits to EELs does not unfairly restrict the CLECs' opportunities to compete. Qwest's proposed waiver of TLAs as outlined in its brief will not violate Commission policy or regulations.

250 (13) To be consistent with Commission orders and policy, for purposes of applying the "significant local use" restriction on EELs, telecommunications traffic delivered to ISPs should be considered local traffic.

251 (14) Qwest's proposed procedures regarding the marketing of its services to CLEC customers during misdirected calls fail to promote full and fair competition.

252 (15) The modifications proposed by the Commission Staff to Qwest's procedures for marketing its services during misdirected calls promote competition without unreasonably restricting Qwest's right to market its services.

Unbundled Local Transport Conclusions of Law

253 (16) Qwest's distinction between UDIT and EUDIT in the SGAT results in discriminatory treatment of CLECs seeking to obtain unbundled transport, and violates the requirements of the *Local Competition Order* that Qwest provide unbundled transport to CLECs under equal terms and conditions to those under which the incumbent provides such elements to itself.

254 (17) Qwest's refusal to provision electronics at the CLEC end of unbundled dedicated transport if requested by the CLEC violates its obligation to provide unbundling throughout its ubiquitous transport network as required by the FCC.

Unbundled Local Switching Conclusions of Law

255 (18) Qwest's refusal to make its AIN service software available to CLECs is not a violation of its obligations under the FCC rules to provide unbundled local switching.

(19) Qwest's proposal to prohibit CLECs from obtaining unbundled local switching at UNE prices when EELs are not available, violates the FCC's rules requiring a local transport alternative to be available in order to qualify for an exemption to provide unbundled switching in Density Zone 1 areas.

(20) Qwest's proposal to include all customer lines in a wire center when determining whether the "four or more lines" exemption applies, fails to recognize the FCC's intent that "mass market" customers not be subject to the unbundling exemption.

(21) Qwest's proposal to price unbundled local switching in Density Zone 1 wire centers at market rates does not violate its unbundled switching obligations as set forth in the Act and in the *UNE Remand Order*.

(22) Qwest's proposed amendment to SGAT language regarding switch interfaces at the GR-303 and TR-008 level is consistent with its obligations to provide unbundled local switching.

ORDER

IT IS ORDERED That, to secure a recommendation that Qwest complies with Checklist 2 elements of Section 271 review, it must alter its SGAT as necessary, and alter its behavior, consistent with the following order as to impasse items.

Unbundled Network Elements

(23) A decision on the allowed or required scope of premarket testing is deferred pending consideration of testing issues in Workshop IV.

(24) Qwest must meet retail quality standards in its provision of UNEs to competing carriers.

(25) Qwest must delete its SGAT prohibition against combining UNEs with "finished services."

(26) Qwest must not require CLECs to pay directly for regeneration required to provide UNEs. Qwest is entitled to recover regeneration costs indirectly across the pricing of all facilities, including its own.

(27) Qwest must provide access to UNEs to any location currently served by Qwest's network. Qwest must construct new facilities to any location currently served by Qwest when similar existing facilities to those locations have exhausted.

266 (28) Qwest must provide either "light" or dark fiber, or must provide or modify electronics on fiber facilities, to provide additional capacity for UNEs in the same manner it would provide additional capacity for its own use.

267 (29) Qwest must modify its SGAT construction requirements so that special construction charges for UNEs apply only when CLECs request UNEs outside of Qwest's current service area. CLEC orders for UNEs should be subject to the same provisioning criteria as CLEC orders for retail services in a given area.

268 (30) Qwest is entitled to apply the "significant local usage" test to new EELs as well as to EELs converted from special access facilities.

269 (31) Qwest may prohibit the connection of EELs to tariffed services only to the extent set forth in the FCC's Supplemental *Clarification Order*.

270 (32) Qwest is not required to waive termination liability assessments (TLAs) when converting special access or private line circuits to EELs. However, Qwest must offer to CLECs its proposed waiver of TLAs as outlined in its brief.

271 (33) For purposes of applying the "significant local use" restriction on EELs, telecommunications traffic delivered to ISPs shall be considered local traffic.

272 (34) Qwest must modify its SGAT to add limitations on its ability to market its services to CLEC customers during misdirected calls.

Unbundled Transport

273 (35) Qwest must eliminate any distinctions between UDIT and EUDIT.

274 (36) Qwest must provision electronics at the CLEC end of unbundled dedicated transport if requested by the CLEC.

Unbundled Local Switching

275 (37) Qwest need not change its SGAT to make its AIN service software available to CLECs.

276 (38) Qwest must provide CLECs unbundled local switching at UNE prices when EELs are not available.

277 (39) When determining whether the "four or more lines" exemption from providing unbundled local switching as a UNE applies, Qwest must count the lines by customer location, rather than by wire center.

(40) Qwest is not required to price unbundled local switching in Density Zone 1 wire centers at TELRIC rates.

(41) Subject to dispute from other parties and the resolution of any such disputes in post-order process, Qwest's proposed amendment to SGAT language regarding switch interfaces at the GR-303 and TR-008 level is accepted.

Other Elements, as the Parties Have Agreed

(42) Qwest's SGAT provisions on other items within Checklist Items 2, 5, and 6, as the provisions have been agreed by the parties, are satisfactory for adoption and are approved. Those provisions – so long as the Company demonstrates that it acts in accordance with the provisions -- are sufficient for a favorable recommendation in the FCC review of an application for Section 271 approval.

DATED at Olympia, Washington and effective this 24th day of July, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

for ANN E. RENDAHL,
Administrative Law Judge

NOTICE TO PARTIES:

This is an Initial Order. The action proposed in this Initial Order is not effective until entry of a final order by the Utilities and Transportation Commission. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below.

WAC 480-09-780(2) provides that any party to this proceeding has twenty (20) days after the service date of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-09-780(3). WAC 480-09-780(4) states that an *Answer* to any Petition for review may be filed by any party within ten (10) days after service of the Petition.

WAC 480-09-820(2) provides that before entry of a Final Order any party may file a *Petition To Reopen* a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition To Reopen will be accepted for filing absent express notice by the Commission calling for such Answer.

One copy of any Petition or Answer filed must be served on each party of record, with proof of service as required by WAC 480-09-120(2).

An original and three copies of any Petition or Answer must be filed by mail delivery to:

Office of the Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, WA 98504-7250

or, by hand delivery to:

Office of the Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive, S.W.
Olympia, WA 98504

EXHIBIT F

Exhibit F

SERVICE DATE

DEC 2 0 2001

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s[1] Compliance With Section 271 of the Telecommunications Act of 1996	DOCKET NO. UT-003022
In the Matter of U S WEST COMMUNICATIONS, INC.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	DOCKET NO. UT-003040
	TWENTY-FOURTH SUPPLEMENTAL ORDER
	COMMISSION ORDER[2] ADDRESSING WORKSHOP THREE ISSUES: CHECKLIST ITEMS NOS 2, 5, AND 6.

I. SYNOPSIS

In this Order, the Commission reviews the Thirteenth Supplemental Order (Initial Order), an initial order relating to Checklist Items No. 2 (Unbundled Network Elements), 5 (Unbundled Transport), and 6 (Unbundled Switching). The Commission reverses the Initial Order with respect to the jurisdictional treatment of ISP-bound traffic. It affirms all other issues raised by parties in response to the Initial Order.

II. BACKGROUND AND PROCEDURAL HISTORY

This is a consolidated proceeding to consider the compliance of Qwest Corporation (Qwest), formerly known as U S WEST Communications, Inc. (U S WEST), with the

[1] Since the inception of this proceeding, U S WEST has merged and become known as Qwest Corporation. For consistency and ease of reference we will use the new name Qwest in this order.

[2] This proceeding is designed, among other things, to produce a recommendation to the Federal Communications Commission (FCC) regarding Qwest's compliance with certain requirements of law. This order addresses some of those requirements. The process adopted for this proceeding contemplates that interim orders including this one will form the basis for a single final order, incorporating previous orders, updated as appropriate. The Commission will entertain motions for reconsideration of this order so that issues may be timely resolved.

requirements of section 271 of the Telecommunications Act of 1996 (the Act),[3] and to review and consider approval of Qwest's Statement of Generally Available Terms (SGAT) under section 252(f)(2) of the Act.

3 In this proceeding, the Commission must determine whether Qwest has sufficiently opened its local network to competition to permit the Commission to recommend to the Federal Communications Commission (FCC) that Qwest be allowed to enter the interLATA toll market. At its June 16, 2000, open meeting, the Commission allowed Qwest's SGAT to go into effect, subject to later review. The Commission has reviewed the SGAT provisions during the Section 271 workshops to determine whether the provisions comply with section 252(d) and section 251 of the Act, as well as requirements of Washington state law.

4 The Commission has also outlined a process and standards for evaluating Qwest's compliance with section 271. Qwest's compliance with the fourteen "Checklist Items" listed in section 271 has been addressed through a series of workshops. The first workshop addressed Checklist Items No. 3 (Poles, Ducts, and Rights of Way), 7 (911, E911, Directory Assistance, Operator Services), 8 (White Pages Directory Listings), 9 (Numbering Administration), 10 (Databases and Associated Signaling), 12 (Dialing Parity), and 13 (Reciprocal Compensation). The administrative law judge entered a Draft Initial Order on August 8, 2000, and a Revised Initial Order on August 31, 2000. A final Commission order resolving the disputed issues in Workshop 1 was entered on June 11, 2001.

5 The second workshop addressed Checklist Items No. 1 (Interconnection and Collocation), 11 (Number Portability), and 14 (Resale) and provisions of the SGAT addressing these issues. The administrative law judged entered initial orders on February 23, 2001, and March 30, 2001. A final Commission order resolving the disputed issues in Workshop 2 was entered on August 17, 2001.

6 The Commission convened the third workshop on March 12-15, 2001, to consider the issues related to Checklist Items No. 2, 5, and 6, and provisions of Qwest's proposed SGAT addressing these issues. The Commission convened a follow-up workshop on April 24 and 25, 2001, to address unresolved issues from the March workshop sessions. Administrative Law Judge C. Robert Wallis presided over the workshops.

7 During the workshop sessions, the parties resolved many issues and agreed upon corresponding SGAT language. However, certain issues remained in dispute. The parties filed briefs with the Commission on May 16, 2001, concerning disputed issues involving Checklist Items No. 2, 5, and 6. The administrative law judge entered an Initial Order finding non-compliance with respect to Checklist Items 2, 5, and 6 on

[3] Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

July 24, 2001. The parties argued disputed issues to the Commission on September 21, 2001. This Order resolves the issues raised by the parties in briefs, comments, and oral argument to the Commission regarding matters in the Thirteenth Supplemental Order, the Initial Order entered following the third Workshop.

III. PARTIES AND REPRESENTATIVES

The following parties and their representatives participated in the third workshop: Qwest, by Lisa Anderl, attorney, Seattle, WA, and John Munn and Andrew Crain, attorneys, Denver, CO; AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle (collectively AT&T), by Richard Wolters and Dominic Sekich, attorneys, Denver, CO; WorldCom, Inc. (WorldCom) by Ann E. Hopfenbeck, attorney, Denver, CO; Sprint Corporation, by Barbara Young, Hood River, OR; XO Washington, Inc. (XO), and Electric Lightwave Inc., and Advanced TelCom Group, Inc. (ATG), by Gregory J. Kopta, attorney, Seattle, WA; McLeod USA Telecommunications Services, Inc. by Marianne Holifield, attorney, Seattle, WA; Covad Communications, Inc. (Covad), by Brooks E. Harlow, attorney, Seattle, WA; and Public Counsel by Robert Cromwell, Assistant Attorney General, Seattle, WA.

IV. DISCUSSION

The administrative law judge in July 2001, entered an Initial Order addressing disputed issues from the third workshop. The Commission restates and adopts the findings and conclusions of the Initial Order, with the modifications discussed below.

Checklist Item No. 2: Unbundled Network Elements

Obligation to Build: Issues WA-CL2-15, UNE-C-11, EEL-5, CL2-18, TR-14, and UNE-C-21

The Initial Order concluded that Qwest must modify section 9.1.2 of its SGAT and the appropriate subsections, to state that Qwest will provide access to UNEs in any location currently served by Qwest. This request would require Qwest to construct new facilities to locations where existing facilities have reached capacity.

Qwest cites pending decisions in other jurisdictions that, it claims, are in conflict with the Initial Order's proposal. Qwest argues that Mr. Antonuk, in the Multistate proceeding Unbundled Network Element Report of August 20, 2001, states that "Qwest should not generally be required to construct new facilities to provide CLECs with UNEs."[4] Mr. Antonuk refers to sections 9.1.2.1 and 9.1.2.2 as provisions that allow CLECs to obtain "new facilities that Qwest would provide under its carrier-of-

[4] Unbundled Network Element Report (Multistate Report), August 20, 2001, p. 25.

last-resort obligations."[5] Similarly, the Colorado Hearing Commissioner required "that Qwest revise SGAT section 9.19 to include the sentence: 'Qwest will assess whether to build for CLEC in the same manner that it assesses whether to build for itself,'" stating that "This language will sufficiently address situations where Qwest rejects a request to build and then constructs the same facilities for its own customers."[6]

12 Qwest also characterizes the initial order as requiring it to build facilities for CLECs at no charge.

13 In this proceeding, the Commission is largely tasked with interpreting Federal law. We believe the best interpretation of the Telecommunications Act supports the recommendation in the Initial Order. We also endorse this position on independent state grounds. Because this combined proceeding encompasses more than Qwest's eligibility for section 271 approval, we think it appropriate to decide this issue here.

14 In briefs and oral argument, Qwest cited various FCC orders (*UNE Remand Order, Collocation Remand Order)* and court decisions from the Eighth Circuit as supporting its position. The Commission has reviewed these decisions and orders and finds them unpersuasive in supporting Qwest's argument.

15 The first Eighth Circuit opinion cited by Qwest struck down the "Superior Quality" provisions enacted by the FCC at 51.305(a)(4) and 51.311(c)[7]. These rules required LECs to provide superior quality access to interconnection and unbundled network elements upon the CLECs' request. The discussion by the FCC in paragraphs 224 and 225 of the *Local Competition Order* are illuminating in that the FCC drew a

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[5] Id. at 24.

[6] Decision No. R01-846, Investigation into U S West Communications, Inc.'s Compliance with §271 (c) of the Telecommunications Act of 1996, Volume 4A Impasse Issues order at p. 10 (August 16, 2001).

[7] 47 CFR 51.305(a)(4): [An incumbent LEC shall provide ... interconnection with the incumbent LEC's network...] That, if so requested by a telecommunications carrier and to the extent technically feasible, is superior in quality to that provided by the incumbent LEC to itself or to any subsidiary, affiliate, or any other party to which the incumbent LEC provides interconnection. Nothing in this section prohibits an incumbent LEC from porviding interconenction that is lesser in quality at the sole request of the requesting telecommunications carrier.

47 CFR 51.311(c): To the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an icumbent LEC provides to a requesting telecommunications carrier shall, upon erquest, be superior in quality to that which the incumbent LEC provides to itself. If an incumbent LEC fails to meet this requirement, the incumbent LEC must povide to the state commission that it is not technically feasible to provide the requested unbundled network element or access to such unbundled network element at the requested level of quality that is superior to that which the incumbent LEC provides to itself. Nothing in this section prohibits an incumbent LEC from porviding interconnection that is lesser in quality at the sole request of the requesting telecommunications carrier.

distinction between the "equal in quality" standard contained in section 251(c)(2)(c) and the "superior in quality" standard expressed in the aforementioned FCC rules:

> *224.* We conclude that the equal in quality standard of section 251(c)(2)(C) requires an incumbent LEC to provide interconnection between its network and that of a requesting carrier at a level of quality that is at least indistinguishable from that which the incumbent provides itself, a subsidiary, an affiliate, or any other party. *We agree with MFS that this duty requires incumbent LECs to design interconnection facilities to meet the same technical criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used with their own networks."*..(emphasis added)
>
> 225. ...Requiring incumbent LECs to provide upon request higher quality interconnection than they provide themselves, subsidiaries, or affiliates will permit new entrants to compete with incumbent LECs by offering novel services that require superior interconnection quality."

A This explanation by the FCC makes clear that it contemplated incumbent LECs being required to plan, design and build their networks, including interconnection facilities, to accommodate the needs of CLECs as well as the needs of their retail customers, and that the term "superior in quality" should not be construed to apply to additions to existing network facilities that provide a level of quality indistinguishable from that the incumbent LEC provides itself.

A With respect to unbundled network elements, Qwest cites the Eighth Circuit opinion's statement that ..."subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network – not to a yet unbuilt superior one.[8]" The FCC's discussion in paragraphs 313 and 314 of the *Local Competition Order*[9] is

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[8] Iowa Utils. Bd. v. FCC, 120 F.3d 753, 812 (8th Cir. 1997), aff'd in part, rev'd on other grounds, sub nom, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

[9] *Local Competition Order, ¶¶ 313 and 314:*

> 313. We believe that Congress set forth a "nondiscriminatory access" requirement in section 251(c)(3), rather then an absolute equal-in-quality requirement, such as that set forth in section 251(c)(2)(C), because, in rare circumstances, it may be technically infeasible for incumbent LECs to provide requesting carriers with unbundled elements, and access to such elements, that are equal-inquality to what the incumbent LECs provide themselves. According to some commenters, this problem arises in connection with one variant of one of the unbundled network elements we identify in this order. These commenters argue that a carrier purchasing access to a 1AESS local switch may not be able to receive, for example, the full measure of customized routing features that such a switch may afford the incumbent. In the rare circumstances where it is technically infeasible for an incumbent LEC to provision access or elements that are equal-in-quality, we believe disparate access would not be inconsistent with the nondiscrimination requirement. Accordingly, we require incumbent LECs to provide access and unbundled elements that are at least equal-in-quality to what the incumbent LECs

again instructive, as it is clear that the FCC is discussing situations in which the existing quality level of the incumbent LEC network may not support the provisioning of unbundled network elements that are either equal or superior in quality to the elements the ILEC provides to itself. Taken in that context, the Eighth Circuit's use of the term "existing network" as contrasted with an "unbuilt superior" network cannot be construed to mean what Qwest contends. Footnote 33 of the Eighth Circuit Opinion also supports this interpretation:

> Although we strike down the [FCC]'s rules requiring incumbent LECs to *alter substantially their networks in order to provide superior quality interconnection and unbundled access*, we endorse the Commission's statement that 'the obligations imposed by sections 251(c)(2) and 251(c)(3) include *modification to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements. 120 F.3d 753, n.33* (emphasis added)

18 In the instant case, the CLECs are not requesting superior quality access to unbundled network elements – they are requesting access at the same level of quality that Qwest currently provides to its own customers. The access the CLECs request, and that we

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provide themselves, and allow for an exception to this requirement only where it is technically infeasible to meet. We expect incumbent LECs to fulfill this requirement in nearly all instances where they provision unbundled elements because we believe the technical infeasibility problem will arise rarely. We further conclude, however, that the incumbent LEC must prove to a state commission that it is technically infeasible to provide access to unbundled elements, or the unbundled elements themselves, at the same level of quality that the incumbent LEC provides to itself.

314. Our conclusion that an incumbent LEC must provide unbundled elements, as well as access to them, that is "at least" equal in quality to that which the incumbent provides itself, does not excuse incumbent LECs from providing, when requested and where technically feasible, access or unbundled elements of higher quality. As we discuss below, we do not believe that this obligation is unduly burdensome to incumbent LECs because the 1996 Act requires a requesting carrier to pay the costs of unbundling, and thus incumbent LECs will be fully compensated for any efforts they make to increase the quality of access or elements within their own network. Moreover, to the extent this obligation allows new entrants, including small entities, to offer services that are different from those offered by the incumbent, we believe it is consistent with Congress's goal to promote local exchange competition. We note that, to the extent an incumbent LEC provides an element with a superior level of quality to a particular carrier, the incumbent LEC must provide all other requesting carriers with the same opportunity to obtain that element with the equivalent higher level of quality. We further note that where a requesting carrier specifically requests access or unbundled elements that are lower in quality to what the incumbent LECs provide themselves, incumbent LECs may offer such inferior quality if it is technically feasible. Finally, we conclude that the incumbent LEC must prove to a state commission that it is technically infeasible to provide access to unbundled elements, or the unbundled elements themselves, at a level of quality that is superior to or lower than what the incumbent LEC provides to itself.

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require Qwest to provide, would require modification to Qwest facilities, rather than substantial alterations to provide superior quality facilities to CLECs. Accordingly, this requirement does not violate either Federal law or the decisions cited by Qwest.

In requiring Qwest to provide facilities to CLECs in areas already served by facilities that are used to full capacity, we do not ask Qwest to do anything different for CLECs from what it would do for a retail customer requesting like facilities. We do not require Qwest to provide such facilities "for free." Our requirement neither limits nor prevents Qwest from recovering its investment in the same way it would recover the investment it makes for a retail customer requesting a similar facility. We expect that this approach will avoid placing undue hardship on CLECs when their requirements for UNEs in a location are small, and where Qwest would normally be obligated to build more capacity due to growth. When CLECs have larger demands for UNEs than would be expected from a retail customer, the CLECs should have the option of either seeking favorable construction terms from the incumbent or building their own facilities.

Local Use Restrictions on EELs: Issues WA-EEL-1 and 4

The Initial Order rejected sections of Qwest's SGAT that imposed conditions on the use of Enhanced Extended Loops (EELs) by CLECs. The Initial Order referred to a previous Commission arbitration order, *Sprint/US West Arbitration, UT-003006, 5th Suppl. Order*, which rejected Qwest restrictions on combinations of UNEs for CLECs.

Qwest argues that the FCC, in its *Supplemental Order Clarification* of June 2, 2000, has determined that local use restrictions should apply to new EELs as well as to conversions from special access, citing the potential harm to the funding of universal service if access charges are lost through using EELs at unbundled element rates as a substitute for special access. Qwest also cites the Multistate report as supporting its position that the local use requirement should be applied to all EELs.

Joint CLECs comment that the Initial Order is inconsistent in requiring Qwest to eliminate the restrictions on EELs in SGAT sections 9.23.3.7.1 and 9.23.3.7.2.12.2, but allowing to stand the restriction on connecting EELs to tariffed services in SGAT section 9.23.2.7.2.7. Joint CLECs maintain that the FCC's temporary restriction is narrow and applies only to conversions of special access to EELs, and only to connections between EELs and tariffed special access services.

One of the primary objectives of the Telecom Act is to remove restrictions on access to facilities that hamper the development of competition in telecommunications markets. This is the basis of the Commission's decision in Docket UT-003006, the Sprint/US West arbitration case. The FCC has extended a temporary restriction on conversions to EELs from special access circuits, but has declined to decide the issue

permanently until it considers more information about the interplay of access charges, universal service, and interconnection. Until the FCC decides the issue, the Commission finds persuasive the reasoning and the policy stated in the Commission's Sprint/U S West decision in Docket UT-003006.

24 As stated in the Initial Order, if the FCC releases a policy decision on the EEL issue, Qwest may propose a modification to the SGAT reflecting that decision. Until then, the Commission concludes that the asserted interplay of access charges, universal service, and interconnection does not warrant any restriction on the use of EELs. Universal service and competition are both important policy objectives, and while restricting use of EELs would clearly hinder competition, it is far from clear that such a restriction is necessary to preserve or advance universal service. The existing access charge mechanism that Qwest and other local exchange companies use to receive universal service support was developed with the potential for competition in mind. Therefore, we decline to change the decision reached in the Initial Order on this issue.

Counting ISP Traffic as Local Traffic in Calculating Local Usage Restriction for EELs: WA-EEL-16

25 The Initial Order found that ISP-bound traffic in Washington should be considered local traffic, consistent with previous rulings. The decision had no effect on the SGAT, since the Commission also ordered that the local-use restrictions that were the subject of this argument be removed from Qwest's SGAT.

26 Qwest argued that the FCC's *ISP Remand Order* clearly established the FCC's jurisdiction over ISP-bound traffic, and that the Commission must reverse the Initial Order's designation of the traffic as local, because the FCC has ruled that it is interstate. Qwest cites the Multi-state Initial Recommendation in support of its position. No other party commented on this issue.

27 The Commission believes, as Qwest proposes, that states have been preempted by the FCC's *ISP Remand Order* on this question, and that ISP-bound traffic must be treated as interstate for the purpose of determining local use of the facilities in question. However, because we have ordered Qwest to remove usage-based criteria from consideration of facilities being priced as EELs, our changed position acknowledging Federal preemption has no practical effect. If, in the future, the FCC makes a final determination that a local-use restrictions must be applied to intrastate purchases of EELs, such restrictions should count ISP-bound traffic as interstate rather than local.

28 In reaching this conclusion, the Commission also acknowledges the concerns expressed in the Multi-state Initial Recommendation. Mr. Antonuk, the facilitator for the Multi-state proceeding and author of the recommendation, points out that the effect of designating ISP-bound traffic as interstate, and requiring CLECs to purchase

special access facilities when providing such service, will result in an inequity between the CLECs and the ILECs, who can continue to provide ISP customers with local exchange service.[10] The Commission echoes these concerns, and expects that the FCC will address them.

Qwest Compliance with Wholesale and Retail Quality Standards: WA-CL2-5b

In Section 9.1.2 of its SGAT, Qwest committed that it would comply with all state wholesale quality standards in providing unbundled elements. The Initial Order required Qwest's SGAT to state that Qwest will comply with all state wholesale and retail service quality standards.

Qwest asks that the Commission clarify the order, to specify that Qwest must provide retail parity for UNEs with retail analogues. Qwest points out that some UNEs do not have retail analogues and that the ROC OSS testing forum[11] resulted in performance benchmarks being established for those elements, which should satisfy CLECs. Qwest states that applying retail quality standards to wholesale services will provide CLECs a superior level of service, which is prohibited. Qwest also quotes from the Colorado Hearing Commissioner Decision (analogous to a Final Order) which states that CLECs wanting the retail service quality rules to apply can buy retail products for resale; that applying retail quality service rules would contradict the Colorado Performance Assurance Plan; and that UNEs are wholesale products sold at wholesale prices under wholesale rules and should only be subject to wholesale quality rules. No other comments were filed regarding this issue.

The Commission intended the addition of compliance with retail standards to be required where a retail analogue exists, and revises the required change to the SGAT to read as follows:

> "In addition, Qwest shall comply with all state wholesale service quality standards *and their appropriate retail analogue or performance benchmarks*."

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[10] While it was not the WUTC's decision that created this potential inequity, it may well fall on the WUTC and other state commissions to resolve it. The disparity that results from charging CLECs special access rates for service to ISP customers while excluding those charges from Qwest's own rates raises concerns about anti-competitive effects of Qwest's rates, both to ISPs that it serves directly and to its own retail customers who call ISPs. It also raises questions about the prices that Qwest itself charges for Internet service, were Qwest not exiting that market.

[11] ROC stands for the Regional Oversight Committee, comprising representatives of the regulatory commissions in states in which Qwest provides local exchange service. The OSS (operational support system) tests are tests sponsored by the ROC on behalf of the states to verify operation of Qwest's OSS systems and the ability of interconnecting carriers to receive the service they need from Qwest.

Connecting UNEs to Finished Services: WA-CL2-6, WA-UNEC-4

32 The Initial Order required Qwest to narrow the prohibition against connecting UNEs to "Finished Services" to a prohibition of connecting loop or loop-transport combinations with tariffed special access services.

33 Qwest maintains that the Initial Order is too broad and contrary to existing law. It states that the FCC does not require the connection of UNEs to finished services, and that connections of UNEs should be limited to services necessary to provide local exchange service. Qwest refers to a Colorado Hearing Commissioner is finding that existing rules prohibit the connection of UNEs to the items identified by Qwest as finished services in the SGAT. Qwest states that it will not oppose the connection of UNEs to local exchange services, but believes allowing connection to non-local services is not consistent with the goals of the Act. Qwest's SGAT has been revised to state that "Loops or loop-transport combinations will not be directly connected to a Qwest special access service."

34 Qwest's SGAT revisions are sufficient to broaden the services that can be connected with UNE combinations. Revising the SGAT to allow a broad range of services to be connected with UNE combinations furthers the goals of the Act and is consistent with other Commission decisions. Qwest's SGAT also contains "change of law" provisions so that further prohibitions imposed by the FCC can be accommodated in it. The Commission concludes that no change to the SGAT, as revised by Qwest above, is required at this time.

Regeneration Costs

35 The Initial Order proposed, based on the FCC's *Second Report and Order*, that Qwest provide regeneration required in cross-connects between itself and CLECs, and that the cost of any regeneration not requested by CLECs should be spread equitably to all users of Qwest facilities including Qwest.

36 Qwest states that it appreciates the Commission's statement that it is entitled to recover regeneration costs and that it will address its concerns about the ruling in response to the Commission's identical ruling in the 15th Supplemental Order, which was the final order on Workshop 2 issues.

37 No change is necessary to the Initial Order.

Distinction between UDIT and EUDIT: WA-TR-2

38 The Initial Order recommended that the SGAT be modified to eliminate the distinction between UDIT and EUDIT. It stated that the only apparent difference justifying different charges for the two elements was the owner at the far end of the

transport. The Initial Order did not specifically state that Qwest must conform the pricing or rate structure for UDIT and EUDIT.

In its Comments, Qwest suggested that this issue had been briefed in the generic cost docket (UT-003013), that both policy and cost issues had been presented in that proceeding, and that Qwest believes the Commission should decide the policy issue in that docket. Qwest characterized its comments as a "placeholder," notifying other parties that it would address the issue in the generic cost docket.

The Commission's review of the records in UT-003022 and UT-003013 indicates that the record on the policy issues is much more comprehensive in this Docket UT-003022. The Initial Order's recommended treatment on UDIT/EUDIT presupposed that the pricing of the elements would reflect no distinction between them, and that Qwest would make the pricing consistent with our decision here. The Commission agrees with the Initial Order recommendation on this issue. The policy decisions made herein will be followed in the determination of pricing for these elements in Docket UT-003013.

Based on the entire record and the file in these proceedings, the Commission makes the following finds of fact and conclusions of law.

V. FINDINGS OF FACT

(1) Qwest Corporation, formerly U S WEST Communications, Inc., is a Bell operating company (BOC) within the definition of 47 U.S.C. § 153(4), providing local exchange telecommunications service to the public for compensation within the state of Washington.

(2) The Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, to verify the compliance of Qwest with the requirements of section 271(c) of the Telecommunications Act of 1996, and to review Qwest's Statement of Generally Available Terms, or SGAT, under section 252(f)(2) of the Telecommunications Act.

(3) Section 271 of the Act contains the general terms and conditions for BOC entry into the interLATA market.

(4) Pursuant to 47 U.S.C. § 271(d)(2)(B), before making any determination under this section, the FCC is required to consult with the regulatory commission of any state that is the subject of a BOC's application under section 271 in order to verify the compliance of the BOC with the requirements of section 271(c).

46 (5) Pursuant to 47 U.S.C. § 252(f)(2), BOCs must submit any statement of terms and conditions that the company offers within the state to the state commission for review and approval.

47 (6) On June 6, 2000, the Commission consolidated its review of Qwest's SGAT in Docket No. UT-003040 with its evaluation of Qwest's compliance with the requirements of section 271(c) in Docket No. UT-003022.

48 (7) During a workshop held on March 12-15 and April 24-25, 2001, Qwest and a number of CLECs submitted testimony and exhibits to allow the Commission to evaluate Qwest's compliance with the requirements of section 271(c), concerning Checklist Items No. 2 (Ubundled Network Elements), 5 (Unbundled Transport), and 6 (Unbundled Switching), as well as to review Qwest's SGAT.

49 (8) Section 9.1.2 of the SGAT sets limits on Qwest's obligations to build facilities requested by CLECs.

50 (9) The FCC's *ISP Remand Order* established the FCC's jurisdiction over ISP-bound traffic.

51 (10) Some UNEs do not have retail analogues; for these elements, the ROC OSS testing forum established performance benchmarks.

52 (11) Qwest's SGAT section 9.23.1.2.2 has been revised to state that "Loops or loop-transport combinations will not be directly connected to a Qwest special access service."

53 (12) Qwest has stated it will address its concerns about the Commission's initial decision on recovery of regeneration costs in response to the Commission's identical ruling in the 15th Supplemental Order on Workshop 2 issues.

54 (13) The Initial Order recommended that the SGAT be modified to eliminate the distinction between UDIT and EUDIT. The record on this issue in this docket is more extensive than the record in Docket UT-003013.

VI. CONCLUSIONS OF LAW

55 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.

56 (2) The limitations on Qwest's obligation to build embodied in the SGAT are inconsistent with Commission policy or with the goals of the Telecommunications Act of 1996.

57 (3) The treatment of ISP-bound traffic as local violates the FCC's ruling in its *ISP Remand Order*. The FCC, through its ISP Remand Order, has preempted the Commission's jurisdiction to determine the jurisdictional treatment of ISP-bound traffic.

58 (4) Qwest's SGAT language regarding adherence to retail service quality standards should be changed to acknowledge UNEs having no retail analogue.

59 (5) The policy decisions regarding UDIT/EUDIT distinctions that are made in this Docket should be used as guidance in setting rates for those elements in Docket UT-003013.

VII ORDER

THE COMMISSION ORDERS That:

60 (1) Qwest must revise its SGAT construction requirements to reflect the decision and requirements articulated in paragraph 267 of the 13th Supplemental Order in this proceeding.

61 (2) ISP-bound traffic should be treated as interstate traffic for purposes of Qwest's SGAT.

62 (3) Qwest must revise SGAT section 9.1.2 to reflect the modified language stated in this Order at paragraph regarding retail service analogues.

63 (4) Qwest's modification of SGAT section 9.23.1.2.2 regarding connection of loop or loop-transport combinations with special access services is accepted.

64 (5) The Commission will consider comments regarding regeneration costs in its reconsideration of the 15th Supplemental Order on Workshop 2 Issues in this Docket.

65 (6) The Commission retains jurisdiction to implement the terms of this Order.

DATED at Olympia, Washington and effective this 20th day of December, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final Order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this Order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).

CONTINUATION

[5]

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INVESTIGATION INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	Docket No. TC 01-165

RESPONSE BRIEF OF AT&T REGARDING CHECKLIST ITEM 4 – UNBUNDLED LOOPS AND CHECKLIST ITEM 11 – LOCAL NUMBER PORTABILITY

AT&T Communications of the Midwest, Inc. ("AT&T") submits the following Response Brief of AT&T Regarding Checklist Item 4 – Unbundled Loops, including MDs and Line Splitting and Checklist Item 11 – Local Number Portability with the South Dakota Public Utilities Commission ("Commission").

A. UNBUNDLED LOOPS.

1. Loop Issues.

a. Obligation to Build.

Under Section 271(c)(2)(B)(iv) of the Act, item 4, Qwest is required to provide nondiscriminatory access to unbundled loops. In addition, the Act states that Qwest and other incumbent local exchange companies ("LECs") must provide access to unbundled elements ("UNEs") "on rates, terms and conditions that are just, reasonable, and nondiscriminatory."[1] Qwest refuses to augment the capacity in its network to meet CLEC demand, yet it does so for its own retail customers. Qwest's refusal is contrary to the Act and is discriminatory. Qwest's refusal constitutes a denial to provide CLECs with access to UNEs, including loops.

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[1] 47 U.S.C. § 251(c)(3).

The FCC has stated that:

> [t]he duty to provide unbundled network elements on "terms, and conditions that are just, reasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.[2]

The FCC's rules also require that the ILEC provision network elements to CLECs on terms and conditions no less favorable than the terms and conditions under which the ILEC provides such elements to itself.[3]

In its *Local Competition Order*, the only limitation the FCC places on the ILEC's obligation relates to unbundled interoffice facilities. In that Order, the FCC stated:

> Rural Telephone Coalition contends that incumbent LECs should not be required to construct new facilities to accommodate new entrants. We have considered the economic impact of our rules in this section on small incumbent LECs. In this section, for example, we expressly limit the provision of unbundled interoffice facilities to existing incumbent LEC facilities. We also note that Section 251(f) of the 1996 Act provide relief for certain small LECs from our regulations under § 251.[4]

While the FCC recognized the economic impact on small ILECs of having to build transport and explicitly held that all ILECs need not build transport, it made clear that for all other network elements, § 251(f) provides the relief for *rural* ILECs from any economic impact imposed on the *rural* ILECs as a result of having to build network elements for CLECs.[5] The clear inference to be drawn from this portion of the Order is that, with the exception of interoffice transport, the ILECs do have an obligation to construct UNEs to meet CLEC demand.

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[2] *Local Competition Order*, ¶ 315. In an accompanying footnote, the FCC stated that "[t]he term 'provisioning' includes installation." *Id.*, n. 684.

[3] 47 C.F.R. § 313(b).

[4] *Id.* ¶ 451. *See also, UNE Remand Order*, ¶ 324.

[5] Section 251(f) applies only to rural ILECs; therefore, ILECs such as Qwest cannot seek exemption from it obligation to build under § 251(f).

As further evidence of the FCC's intent, when citing to this section of its order in the *UNE Remand Order*, the FCC states:

> In the *Local Competition First Report and Order*, the Commission limited an incumbent LEC's transport unbundling obligation to existing facilities, and did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use. Although we conclude that an incumbent LEC's unbundling obligation extends throughout its ubiquitous transport network, including ring transport architectures, we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use.[6]

Specifically, in this paragraph, the FCC concludes that "the ILEC's unbundling obligation extends throughout its ubiquitous transport network." The inescapable conclusion is that the only limitation on the ILEC's obligation to build is for interoffice facilities to existing facilities. For all other UNEs, Qwest has an obligation to build to meet CLEC demand throughout its service territory.

Qwest currently constructs facilities for its retail customers requesting service under the terms and conditions established in its federal and state tariffs. However, for CLECs, Qwest's SGAT permits Qwest to refuse to provide service to a requesting CLEC if no facilities are available, except under very narrow conditions.[7] Qwest is not providing parity access to unbundled loops.

Specifically, Qwest has stated that it will only build DS0 loops for CLECs if Qwest has an obligation to build under its provider-of-last-resort obligations.[8] This offer is limited to the "first voice grade line per address." For all other loops, Qwest will not

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[6] *UNE Remand Order*, ¶ 324.

[7] *See, e.g.*, SGAT §§ 9.1.2 & 9.23.1.4-6. *See also*, Affidavit of Kenneth L. Wilson Regarding Checklist Item 4 – Unbundled Loops and Checklist Item 11 – Local Number Portability ("Wilson Affidavit"), Exhibit KLW-1, policy statement that was sent to CLECs prior to the SGAT revisions described herein outlining Qwest's change in policy.

[8] *See* SGAT, § 9.1.2; Wilson Affidavit, Exhibit KLW-1.

augment its network with additional capacity to meet CLEC demand.[9] Qwest's SGAT does not go far enough and does not comply with the Act and the FCC's rules. Qwest construes its carrier-of-last-resort obligations to extend only to basic residential and business service. Qwest, however, provides far more services than these services to South Dakota retail customers, including DS-1, DS-3, and other high capacity circuits. The language in Qwest's SGAT would permit Qwest to deny a CLEC's request to provision these circuits as UNEs due to lack of facilities, while Qwest's tariffs, price lists, or contracts obligates Qwest to construct those same facilities for its retail customers. In fact, the CLEC itself could require Qwest to construct those facilities if the CLEC ordered the services under Qwest's retail tariffs or price lists, rather than as UNEs. Such blatant discrimination violates federal law.

Qwest completely ignores this clear and unequivocal parity issue and attempts to cite FCC rulings that have no bearing whatsoever on this issue. In fact, the citations to the FCC Order that Qwest relies upon relate explicitly to transport facilities. For transport facilities, as AT&T has clearly acknowledged and excluded, the FCC stated that Qwest has no obligation to augment. The FCC has not created an exception for any other UNE, and clearly the FCC had a golden opportunity to do so. Setting aside these irrelevant FCC orders, once Qwest obligates itself to build facilities for its retail customers or if Qwest willingly builds to meet retail demand, the law dictates that CLECs are entitled to the same nondiscriminatory treatment.

[9] *Id.*

This was the conclusion reached by the Arizona, Colorado and Washington Commissions.[10]

The Washington Initial Order requires Qwest to "construct new facilities to any location currently served by Qwest when similar facilities to those locations have exhausted."[11] In its final order in the UNE workshop, the Washington Commission stated:

> Qwest's discussion of "existing" network refers to paragraph 324 of the *UNE Remand Order*. While Qwest points to the FCC's reference to limiting unbundling to the incumbent LEC's "existing" network, the FCC says it "did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use." The FCC goes on to state that the "incumbent LEC's unbundling obligation extends throughout its ubiquitous transport network." Later, the FCC explains the incumbent is not required to provision for "point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use." In other words, the incumbent LEC's "existing" network includes all points that it currently serves via interoffice facilities, and it is not required to extend its network to new points, based on competitors' requests. However, the incumbent LEC is still required to provide access to UNEs within its existing network even if it must construct additional capacity within its network to make the UNEs available to competitors. Qwest implies that the term "existing network" only applies to the actual facilities that are in place, when in fact existing network applies to the "area" (end offices, serving wire centers, tandem switches, interexchange carrier points of presence, etc.) that Qwest's interoffice facilities serve. This same concept applies on the loop side of Qwest's network where Qwest is obligated to construct additional loops to reach customers' premises whenever local facilities have reached exhaust.
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> Qwest must modify section 9.1.2 of the SGAT and the appropriate subsections of 9.1.2 to state that Qwest will provide access to UNEs to any location currently served by Qwest's network. Qwest must construct new

[10] Arizona Docket No. T-00000A-97-0238, Decision No. 64630, dated March 15, 2002, pp. 11-13 and Recommended Opinion and Order on Checklist Item 4, dated May 6, 2002, pp.16-17 (Exhibit 1 and 2); *In re Investigation Into U S WEST's Compliance With Section 271*, Washington Docket No. UT-003022, 28th Supplemental Order, dated March 12, 2002, ¶¶ 20-22 (Exhibit 3); Colorado Docket No. 97I-198T, Decision No R01-651-I, dated June 22, 2001, pp. 11-14 (Exhibit 4).

[11] *Id.* ¶ 50.

facilities to any location currently served by Qwest when similar facilities to those locations have exhausted. In situations where locations are outside of currently served areas, Qwest may construct facilities under the same terms and conditions it would construct similar facilities for its own customers in those locations.[12]

The Washington Commission reached the same conclusion in its ruling in the Loop workshop (Workshop 4), stating:

> We agree that the Commission should be encouraging facilities-based competition. However, we decline to approve an open-ended SGAT provision that allows Qwest to decide when and where it will build facilities for CLECs. Instead, consistent with the discussion and decision in paragraphs 79-80 of the Thirteenth Supplemental Order, we direct Qwest to provide high capacity loops to CLECs when existing high capacity loops in an area have been exhausted. This decision does not direct Qwest to build high capacity loops that are superior in quality, nor does it direct Qwest to build high capacity loops in areas where high capacity loops are not currently in use by Qwest or Qwest's customers. We repeat our requirements for section 9.1.2 of the SGAT as stated in paragraph 80 of the Thirteenth Supplemental Order:
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> > Qwest must modify section 9.1.2 of the SGAT and the appropriate subsections of 9.1.2 to state that Qwest will provide access to UNEs to any location currently served by Qwest's network. Qwest must construct new facilities to any location currently served by Qwest when similar facilities to those locations have exhausted.
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> In making this finding, the Commission does not require Qwest to perform this work "for free." Rather, Qwest must apply the same terms for provisioning facilities for CLECs as it would for its retail customers in the analogous situation. For example, if the desired facility is small in scope and Qwest would not charge a retail customer an up-front charge or require a long-term contract in order to build the facilities to serve them, it may not impose such charges on a CLEC. On the other hand, if the facility requested is large in scope and would be subject to contract terms or termination liability provisions if it were being built to serve a large retail customer, then Qwest may impose such terms on the CLEC.[13]

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[12] *In re Investigation Into U S WEST's Compliance With Section 271*, WUTC Docket Nos. UT-003022 & UT-003040, Thirteenth Supp. Order, p. 18 (July 24, 2001) (Citations omitted) (Exhibit 5).

[13] *In re Investigation Into U S WEST's Compliance With Section 271*, WUTC Docket Nos. UT-003022 & UT-003040, Twentieth Supp. Order, pp. 11-12 (November 14, 2001) (Exhibit 6)

In fact, the Washington Commission directed Qwest to adopt the revisions to the SGAT language proposed by AT&T. The revisions proposed by AT&T in Washington are attached hereto as Exhibit 7.

In addition, the Hearings Officer in Colorado has required Qwest to include a provision in its SGAT that states that Qwest must determine whether to build for CLECs in the same manner as it makes that determination for itself. [14]

Just as these other Commissions that have fully and carefully considered the issue have concluded, this Commission should likewise refuse to approve Qwest's SGAT, or permit Qwest to rely on the SGAT for purposes of Section 271, until Qwest revises the SGAT to require Qwest to construct UNEs for CLECs throughout its service territory.

An additional reason that Qwest must be required to build facilities for CLECs is that CLECs are already paying for the build of new facilities in the prices they pay for UNEs. Fill factors are used in the calculation of UNE prices. As Mr. Wilson testified, A fill factor is used to ensure that sufficient capacity is always available.[15] Once a certain percentage fill is achieved, a new facility is built.[16] That means that if a fill factor of 50% is used in the calculation of UNE prices, then the CLEC is being charged for a whole facility when only 50% of the facility's total capacity is being used.[17] The effect of using fill factors, especially low fills, is that the CLEC is being charged to build new facilities in order to ensure that the fill level remains constant and Qwest does not run out of

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[14] *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271(c) of the Telecommunications Act of 1996*, CPUC Docket No. 971-198T, Decision No. R01-846, p. 7 (August 16, 2001) (Exhibit 8).

[15] Wilson Affidavit, p. 11.

[16] *Id.*

[17] *Id.*

capacity.[18] The fact that fill is included in UNE pricing means that CLECs are being charged for building new capacity, yet because of Qwest's new policy, only Qwest would be the beneficiary of that new capacity. That is inappropriate and a clear basis for rejecting Qwest's SGAT language in § 9.1.2.

In its Brief, Qwest asserts that AT&T "misunderstands" the basis of the cost studies. AT&T is every bit as familiar with the cost studies as Qwest. In fact, in South Dakota, the Commission adopted the Qwest cost models. The Qwest cost models determine investment levels based upon "ultimate demand," which reflects current demand, plus substantial growth.[19] Qwest cost models provide more than sufficient spare capacity to meet CLEC demands in Qwest's service territory. In fact, the fill factors used in the Qwest cost models include a lower fill factor than the fill AT&T recommended, meaning that the capacity level that triggers the construction of a new facility occurs at a much lower percentage of usage of the facility. Thus, the fact that Qwest's low fill factors were adopted in South Dakota provides even greater support for AT&T's claim that the UNE prices in South Dakota compensate Qwest for augmenting its network to meet CLEC demand.

Qwest also tries to assert that AT&T has mischaracterized Qwest's new held order policy. The facts concerning Qwest's policy cannot be disputed. They are clearly set forth in Section 9.1.2 of Qwest's SGAT and in the Build Policy that was attached as Exhibit KLW-1 to Mr. Wilson's Loop Affidavit. Qwest does not appear to dispute that Qwest treats its retail orders differently. Indeed, as Mr. Wilson explained Qwest has not

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[18] *Id.*

[19] *See* Record in South Dakota Docket No. TC96-184.

invoked a similar policy for its retail customers.[20] Qwest is discriminating against its wholesale customers by refusing to keep track of CLEC held orders and failing to take those held orders into account in developing its construction plans.

Because Qwest does not reject retail orders, Qwest's retail orders will always be ahead of CLEC order in the queue for new facilities. Moreover, Qwest's policy will result in Qwest retail orders being included in the consideration of new construction plans, while CLEC orders will not, thus, effectively limiting CLEC's access to new facilities, because their demand would have been excluded from consideration.

In addition, by considering retail orders in construction plans, Qwest will be able to give its customer preferential treatment in the design, development and access to future facilities builds initiated by Qwest, but CLEC orders will not enjoy that same benefit.

Accordingly, Qwest is obligated to build UNEs, except dedicated transport, on a nondiscriminatory basis at cost-based rates under § 252(d). Qwest's failure to do augment it network to meet CLEC demand and Qwest's held order policy are discriminatory, in violation of Sections 251 and 271 of the Act.

b. Qwest Must Provide CLECs with Loop Qualification Information, Including Access to LFACs.

Qwest is required to provide access to all loop qualification information that any Qwest employee has access to, including LFACs database, and any other database or back office information that contains information regarding Qwest's loop plant. Qwest refuses to provide such access. AT&T seeks access to this loop information in order to obtain accurate loop qualification information and to learn whether spare facilities,

[20] *Id.*, Washington Transcript, pp. 4227, 4241 (Wilson Affidavit, Exhibit KLW-2).

including "fragments" of loops, can be made available by Qwest, not just for purposes of xDSL loops.[21]

The obligation to provide access to this loop and loop plant information for loop qualification purposes is clear and undisputable. Specifically, in the *UNE Remand Order*, the FCC stated:

> an incumbent LEC must provide the requesting carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent, so that the requesting carrier can make an independent judgment about whether the loop is capable of supporting the advanced services equipment the requesting carrier intends to install. Based on these existing obligations, we conclude that, at a minimum, incumbent LECs must provide requesting carriers the same underlying information that the incumbent LEC has in any of its own databases or other internal records.[22]
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> *the incumbent LEC must provide access to the underlying loop qualification information contained in its engineering records, plant records, and other back office systems so that requesting carriers can make their own judgments about whether those loops are suitable for the services the requesting carriers seek to offer.* Otherwise, incumbent LECs would be able to discriminate against other xDSL technologies in favor of their own xDSL technology.[23]
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> *If an incumbent LEC has not compiled such information for itself, we do not require the incumbent to conduct a plant inventory and construct a database on behalf of requesting carriers. We find, however, that an incumbent LEC that has manual access to this sort of information for itself, or any affiliate, must also provide access to it to a requesting competitor on a non-discriminatory basis. In addition, we expect that incumbent LECs will be updating their electronic database for their own xDSL deployment and, to the extent their employees have access to the information in an electronic format, that same format should be made available to new entrants via an electronic interface.*[24]

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[21] Covad and WorldCom have joined AT&T on this issue in other states.
[22] *UNE Remand Order*, ¶ 427.
[23] *Id.*, ¶ 438.
[24] *Id.*, ¶ 439.

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> Consistent with the framework we adopted in the *Local Competition First Report and Order*, we conclude that access to loop qualification information must be provided to competitors within the same time intervals it is provided to the incumbent LEC's retail operations. *To the extent such information is not normally provided to the incumbent LEC's retail personnel, but can be obtained by contacting incumbent back office personnel, it must be provided to requesting carriers within the same time frame that any incumbent personnel are able to obtain such information.*[25]

In its *SBC Kansas/Oklahoma 271 Order*, the FCC required RBOCs to provide carriers with the same underlying information that they have in any of their own databases or internal records for pre-ordering, loop qualification purposes and how such access must be afforded:

> In this proceeding, we require a BOC to demonstrate for the first time that it provides access to loop qualification information in a manner consistent with the requirements of the *UNE Remand Order*. In particular, we require SWBT to provide access to loop qualification information as part of the pre-ordering functionality of OSS. In the *UNE Remand Order*, we required incumbent carriers to provide competitors with access to all of the same detailed information about the loop that is available to themselves, and in the same time frame, so that a requesting carrier could make an independent judgment at the pre-ordering stage about whether a requested end user loop is capable of supporting the advanced services equipment the requesting carrier intends to install. At a minimum, SWBT must provide carriers with the same underlying information that it has in any of its own databases or internal records. We explained that the relevant inquiry is not whether SWBT's retail arm has access to such underlying information but whether such information exists anywhere in SWBT's back office and can be accessed by any of SWBT's personnel. Moreover, SWBT may not "filter or digest" the underlying information and may not provide only information that is useful in the provision of a particular type of xDSL that SWBT offers. SWBT must provide loop qualification information based, for example, on an individual address or zip code of the end users in a particular wire center, NXX code or on any other basis that SWBT provides such information to itself. Moreover, SWBT must also provide access for competing carriers to the loop

[25] *Id.*, ¶ 431

qualifying information that SWBT can itself access manually or electronically.[28]

The legal obligation is clear, Qwest must provide access to any loop or loop plant information that "any Qwest employee has access to," not what is accessible by Qwest's retail operations.

Qwest has refused to provide access to LFACs or to any other primary source of loop information available to its employees. During the course of the loop workshops, obtaining information regarding where loop or loop plant information resides in Qwest's database(s) or back office systems that are accessible by any Qwest employee has been like pulling teeth. Initially believing that loop information resided in LFACs, AT&T sought access to LFACs. In the Section 271, AT&T asked Qwest where its loop information resides and what its employees have access to. Qwest dodged these queries and spun a record so confusing that it is impossible to tell where loop qualification information resides in Qwest's systems and back office files. At varying times, Qwest claimed this information resides in LFACs, or LEIS and LEAD, which are subsets of LFACs.[29] In recent discovery responses in the Minnesota Section 271 proceeding, Qwest has finally revealed that primary inventory information is kept in the CIMAGE and OSP-

[28] *In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, Memorandum Opinion and Order*, CC Docket No. 00-217, FCC 01-29, ¶ 121 (released January 22, 2001) ("*SBC Kansas/Oklahoma 271 Order*") (citations omitted). *See also UNE Remand Order*, ¶ 430; *In the Matter of 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*, Memorandum Opinion and Order, CC Docket No. 01-8, FCC 01-130, ¶ 54 (released April 16, 2001) ("*Massachusetts Verizon 271 Order*").

[29] Colorado Transcript (05/25/01), pp. 74-75 (Wilson Affidavit, Exhibit KLW-3); WA Transcript, pp. 4319-20 (Wilson Affidavit, Exhibit KLW-2).

PM systems.[28] Irrespective of where it resides, if there is loop or loop plant information that is accessible to any Qwest employee in Qwest's databases and back office records, the FCC Orders state that CLECs are entitled to access that same information.

In the other Section 271 workshops, Qwest has refused to provide the access mandated by the FCC, using a myriad of arguments. None of the arguments raised by Qwest alter the fundamental FCC-established obligation to provide access to any loop information that is accessible by Qwest employees. This obligation cannot be seriously disputed by Qwest.

First, Qwest tried to dilute the parity standard established by the FCC by suggesting that it only need provide CLECs that is reviewed by its retail operations. The FCC could not have been clearer that this is not the parity standard. CLECs must be given access to any loop information that is accessible by any Qwest employee. The FCC even concluded that **"to the extent such information is not normally provided to the incumbent LEC's retail personnel, but can be obtained by contacting incumbent back office personnel, it must be provided to requesting carriers within the same time frame that any incumbent personnel are able to obtain such information."**[29]

Second, Qwest claims that its "host of tools" provides all the loop information the CLECs need. As an initial matter, whether that is true or not is irrelevant. The FCC has made clear that CLECs are entitled to access the same loop information that any Qwest employee has access to and such information may not be filtered by Qwest. The information in the raw loop data tools has been filtered by Qwest. Qwest has selected what information in LFACs will be loaded into its tools.

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[28] See Exhibit 9, Minnesota Discovery, Qwest Response to ATT 011.

[29] *Id.*, ¶ 431

In any case, Qwest has admitted that not all loop qualification information is in the raw loop data tools. For example, information on loop conditioning and spare facilities is not in the raw loop data tools.[30] Information regarding all spare facilities, including fragments, is necessary for CLECs to have a meaningful opportunity to compete. Qwest maintains records of spare facilities, including loop fragments, somewhere in its back office systems. Qwest's witness in Colorado stated that this information is available to Qwest engineers.[31] Qwest is required to provide CLECs with access to this information.

Qwest claims that spare facility information regarding loops that are attached to the switch or partially attached to the switch is now available in the RLDT.[32] Even if this is true, there remains a very large and important gap – loops, and loop elements such as distribution and feeder, that are not attached to the switch. This is the spare facility information that AT&T was concerned about from the outset. This information does not reside in the RLDT. Even if it did, however, this would not change Qwest's obligation under the FCC orders.

Contrary to Qwest's Brief, Qwest's witness Ms. Liston described during the Washington Section 271 workshop the prequalification performed by Qwest for its Megabit service. Ms. Liston testified that Qwest was encountering loop accuracy issues with LFACs – the very information that was used to populate the RLDT.[33] Qwest embarked on a bulk deload process for certain predefined wire centers in each state. As

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[30] CO Transcript (04/19/01), pp. 25-53 (Wilson Affidavit, Exhibit KLW-4), CO Transcript (05/25/01), pp. 73-77 (Wilson Affidavit, Exhibit KLW-3).

[31] CO Transcript (05/25/01), p. 74 (Wilson Affidavit, Exhibit KLW-3).

[32] See Exhibit 16, Excerpt from Motion for Reconsideration filed by Qwest before the New Mexico Public Regulation Commission, dated December 14, 2001, p. 15.

[33] WA Transcript, pp. 4341-42 (Wilson Affidavit, Exhibit KLW-2).

part of this process, Qwest conducted MLTs on the copper loops in those wire centers and then conditioned any loop in these wire centers that had load coils or bridge taps. Further evidence of this prequalification/bulk deload activity performed by Qwest was provided to KPMG in connection with Discrete Test 12.7 in the ROC OSS Test.

Discrete Test 12.7 relates to a review of Qwest's loop qualification process for Qwest's retail DSL operations as compared to the CLEC loop qualification process. As part of the confidential information produced by Qwest purportedly to demonstrate its satisfaction of the concerns to be addressed in this discrete test, Qwest provided KPMG the SUMO Batch Results Report dated August 28, 2001.[34] The SUMO Batch Results Report shows a batch loop qualification that was done on 13,836 loops. The purpose of the batch loop qualification was to pre-qualify (determine whether the loop was capable of supporting) Qwest's various DSL and ISDN services. Any documentation that Qwest presented to KPMG in the course of the OSS testing, generally and, more specifically, that Qwest has provided to KPMG as evidence of its compliance with Discrete Test 12.7 and Checklist Item 4 is highly probative to this proceeding. Given that this matter and these documents have been put squarely at issue in Discrete Test 12.7 by Qwest, Qwest cannot refuse to disclose them here. Clearly, Qwest thought this information was relevant to KPMG's assessment of Qwest's performance in connection with Discrete Test 12.7. In addition, any other SUMO Batch Results Reports and any other documentation that relates to any loop qualification that has been performed in connection with Qwest's DSL or ISDN services would be highly probative as well. For these reasons alone, AT&T's information request seeks relevant information.

[34] *See* Exhibit 11, Confidential Excerpt of SUMO Batch Results Report recently produced in discovery by Qwest in Minnesota.

In short, Qwest predetermined where it intended to provide DSL service and obtained accurate information for those loops. As Ms. Liston testified, Qwest will not provision service to any customer seeking service on a loop that does not qualify for its Megabit service. Qwest will not condition loops that weren't already conditioned and Qwest will not search for spare facilities.[35]

The bottom line is that Qwest's retail representatives are assured of getting accurate loop information on the loops that Qwest wants to serve. While the MLT information for these loops was loaded into LFACs and the RLDT, there remain a significant number of loops where such updated loop information has not been obtained. Of course, if the CLEC were satisfied with limiting its marketing to the same customers that Qwest wants to serve, then they would benefit from the same accurate information. However, the CLEC should not be limited in their marketing to areas that neatly match Qwest business plans. They must have the ability to pre-qualify their loops, even loops outside of Qwest's predetermined marketing area, in the same manner as Qwest. To put the CLEC on a level playing field, they must have access to all of Qwest's loop qualification information.

A comparison of the Qwest offering to the loop qualification information that Verizon and Southwestern Bell are providing to CLECs, clearly highlights the disparity of Qwest's offering.

For example, as discussed in the *SBC Kansas/Oklahoma 271 Order*, Southwestern Bell provides competitors access to:

> actual loop make-up information, theoretical, or design, loop make-up information, or can request that SWBT perform a manual search of its

[35] CO Transcript (04/18/01), pp. 228-229 (Wilson Affidavit, Exhibit KLW-4)

> paper records to determine actual loop information. SWBT provides competitors access to actual loop make-up information contained in SWBT's back-end system Loop Facilities Assignment and Control System (LFACS) through the pre-ordering interfaces Verigate, Datagate and EDI/CORBA. Because LFACS was designed as a provisioning system, LFACS will provide the requesting carrier with actual information on the loop that SWBT or ASI, would use if it were going to provision the service requested. If, however, actual loop make-up information is not available in LFACS, SWBT will automatically provide theoretical, or design, loop makeup information. Specifically, SWBT will cause a query to be made into its LoopQual database for loop information based on a standard loop design for the longest loop in that end user's distribution area. The requesting carrier can then use this theoretical loop information to determine if it would be willing to provide xDSL service to that end-user. Additionally, a carrier may also request loop design information without having to first request an actual loop make-up query. Finally, carriers may also request that SWBT perform a manual search of SWBT's engineering records. Such a request may be submitted via Verigate or DataGate directly to SWBT's engineering operations personnel. Once SWBT engineers complete the manual search, they will update the information in LFACS and the competing carrier can either receive the results via email or review the results in LFACS.[36]

According to the Order, in addition to the ability to access LFACs directly via three OSS interfaces, a CLEC may also request that SWBT perform a manual search of its engineering records. Qwest does not offer access to LFACs or the ability to have a manual search of engineering records – both of which, as discussed above, are activities that Qwest performs when provisioning service for its customers and activities that Qwest undertook in the Colorado FOC trial.

Similarly, in the *Verizon Massachusetts 271 Order*, the FCC recounted the loop qualification information that Verizon gives CLECs access to, stating:

> Verizon provides four ways for competing carriers to obtain loop make-up information: (1) mechanized loop qualification based on information in its LiveWire database; (2) access to loop make-up information in its Loop Facility Assignment and Control System (LFACS) database; (3) manual loop qualification; and (4) engineering record requests. As we discuss in

[36] *SBC Kansas/Oklahoma 271 Order*, ¶121.

more detail below, competitors can request loop make-up information from the LFACS and LiveWire databases, or can request that Verizon perform a manual search of its paper records to determine whether a loop is capable of supporting advanced technologies.[37]

In addition to providing direct access to the Live Wire and LFACs databases, the Order describes the manual access offered by Verizon, indicating that Verizon provides a manual loop qualification process as a pre-order function in which Verizon examines information from the LiveWire and LFACS databases, and performs a mechanized line test (MLT) on the loop to verify the actual loop length.[38] If this information is inconclusive, engineers in Verizon's Facilities Management Center examine paper records to determine the loop length, whether or not the loop is qualified and, if it is not, the reasons why.[39] Finally, Verizon, through an engineering record request, provides additional types of loop make-up information not returned through the mechanized and manual loop qualification processes. Verizon indicates that competitors may request this engineering query on a pre-order basis. To conduct this engineering query, Verizon's Facilities Management Center conducts a search of loop inventory and paper records. The additional information provided through an engineering query includes the exact locations of load coils, the exact locations and lengths of bridge taps, as well as actual cable gauges and the length of each gauge and provides loop make-up information for loops not in the LFACS database.[40]

Clearly, the Raw Loop Data tool fails in comparison to the comprehensive access to loop qualification information that is provided by Verizon and Southwestern Bell.

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[37] *Verizon Massachusetts 271 Order*, ¶ 55.
[38] *Id.*, ¶ 58.
[39] *Id.*, ¶ 58.
[40] *Id.*, ¶ 59.

Both Verizon's and Southwestern Bell's offers to CLECs are more comparable to the process that these RBOCs employ in provisioning service to their customers. The record demonstrates that Qwest has the ability to access to LFACs, other databases, and manual review processes to provision service to its customers, yet Qwest has refused to provide any loop qualification information beyond the RLDT available to CLECs. Qwest's offer is plainly discriminatory and contrary to the FCC's orders. By denying competing carriers' access to loop qualification information as required by the *UNE Remand Order*, Qwest fails to meet its obligation to provide a competitor a meaningful opportunity to compete.

Qwest ignores the real point of the comparison offered by AT&T and instead attempts to shift the focus to whether Verizon and Southwestern Bell offer "direct access" to LFACs. As discussed above, this issue is of little moment. While AT&T disagrees that Qwest is offering access to LFACs that in any way compares to what Verizon and Southwestern Bell offers,[41] the main point is that Verizon and Southwestern Bell offer a procedure that allows the CLEC to request a search of their back office systems and records that more closely aligns with the FCC's requirements. Qwest does not.

Both the Arizona and the Washington Commission's have determined that Qwest must provide CLECs access to this back office loop information. The Washington Commission concluded:

> Upon review, we find that the provisions of the *28th* and *31st Supplemental Orders* on this issue may have created confusion concerning Qwest's obligations to provide access to back office information. The Commission

[41] Contrary to Qwest's assertion in its Brief, CLECs access Verizon's and Southwestern Bell's LFACs, in their entirety, via a graphical interface. Qwest, on the other hand, determines what information in LFACs in will make available to CLECs and that information is loaded into its tools.

begins its discussion in the *28th Supplemental Order* by noting that paragraph 430 of the *UNE Remand Order* "requires that Qwest provide access to loop qualification information that *exists anywhere within the incumbent's back office*." *28th Supplemental Order at ¶34 (emphasis added).* The *28th Supplemental Order* then refers to provisions in Attachment 25 to the Texas Plan, which establishes terms and conditions for access to xDSL-Capable Loop offerings. That portion of the plan provides that SWBT will provide CLECs with access at parity with its own retail xDSL service, and allows CLECs to request back office information concerning loop make-up information for xDSL-capable loops. *T2A, Attachment 25, at 6-7.*

The reference to the Texas plan was intended to show that other states have allowed access to back office information. The Commission did not intend to limit CLEC access to loop information at parity only with Qwest's retail personnel. As AT&T stated during the hearing, the *UNE Remand Order* requires that CLECs have access to loop qualification information that may "be accessed by *any of the incumbent LEC's personnel*." *UNE Remand Order, ¶430 (emphasis added).* However, we note that the *UNE Remand Order* also provides that the information must be provided to CLECs within the same time intervals as the information is provided to the incumbent's retail operations. *Id. at ¶431.*

The *31st Supplemental Order* did not correctly state the parity standard, or Qwest's obligations to provide access to back office loop information. Qwest must provide CLECs access to all back office information pertaining to loop qualification accessible to any Qwest personnel, within the same time intervals Qwest provides the information to its own retail personnel.[42]

Similarly, the Administrative Law Judge in Arizona concluded:

The FCC has been clear that ILECs must provide CLECs with access to all of the detailed information about the loop that is available to the ILEC itself. The FCC has not required direct access to the LFACS database where the ILEC provides the same information by other means. Here, Staff is unsure whether the KPMG Report is as thorough as Qwest claims it to be. Furthermore, at least as of the date of the Final Report, interested parties have not filed comments on the KPMG Report. However, Staff believes that with its offer to implement a manual process for researching loop qualification data, and with modifying its SGAT to include all options, Qwest will meet its obligation regarding access. We agree that if

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[42] *In re Investigation Into U S WEST's Compliance With Section 271*, WUTC Docket Nos. UT-003022 & 003040, 34th Supplemental Order, ¶¶ 55-58, dated May 29, 2002 ("Washington 34th Supplemental Order")(Exhibit 12).

all is as Qwest purports, Qwest has met its obligations to provide access to loop qualification data. However, because the system is yet untested in Arizona, we believe that periodic audits of the back office systems and databases containing loop qualification data are an important component in assuring that Qwest makes the required loop qualification information available on an on-going basis. Thus, we adopt Staff's proposed language with minor modification (underlined):

> Qwest shall provide to CLEC, on a non-discriminatory basis, access to the information contained in Qwest's records, back office systems and databases where loop <u>qualification</u> information, including information relating to spare facilities resides, that is accessible to any Qwest employee or any affiliate of Qwest. An audit shall be conducted on a periodic basis, but no more often than every eighteen months, of Qwest's company records, back office systems and databases to determine that Qwest is providing the same access to loop <u>qualification</u> information to CLECs to which any Qwest employee has access. Such audit will be in addition to the audit rights contemplated by Section 18 of this Agreement, but the processes for such audit shall be consistent with the processes set forth in Section 18.

Under the audit procedures set in SGAT Section 18, each party bears its own expenses for the audit. Although potentially, Qwest may be subject to additional audit requests, CLECs are not likely to incur the expense of an audit unless they have concerns about the accuracy of the records. In addition, Qwest should revise its SGAT to include a description of all the options available to CLECS for obtaining loop qualification information. As always, our procedures permit CLECs to comment on the proposed language, and ultimate approval of Qwest's compliance is contingent upon its filing acceptable SGAT language.[43]

In both Arizona and Washington, Qwest has been ordered to revise its SGAT. In both states Qwest has agreed to language proposed by AT&T. That language is as follows:

> If the Loop make-up information for a particular facility is not contained in the Loop qualification tools, ~~or~~ if the Loop qualification tools return unclear or incomplete information, or if the CLEC identifies any inaccuracy in the information returned from the Loop Qualification tools, and provides Qwest with the basis for CLEC's belief that the information is inaccurate, then CLEC may request and Qwest will perform a manual search of the company's records, back office systems and databases where

[43] Arizona Recommended Opinion and Order, ¶ 55 (May 6, 2002) (Exhibit 2).

loop information resides. Qwest will provide the CLEC via email the loop information identified during the manual search within forty-eight (48) hours of Qwest's receipt of the CLEC's request for manual search. The email will contain the following loop makeup information: composition of the loop material; location and type of pair gain devices, the existence of any terminals, such as remote terminals or digital loop terminals, bridge tap, and load coils; loop length, and wire gauge. In the case of loops served by digital loop carrier, the email will provide the availability of spare feeder and distribution facilities that could be used to provision service to the customer, including any spare facilities not connected to the switch and the loop makeup for such spare facilities. After completion of the investigation, Qwest will load the information into the LFACS database, which will populate this loop information into the fields in the Loop qualification tools.

In addition, both states have ordered audits of Qwest processes to ensure that CLEC have parity access to the back office loop information. For example, the Washington Commission required Qwest to include audit language, stating:

> We are mindful of the FCC's concern that CLECs obtain loop information in the same time and manner as the BOC's retail operations. The only way we can ensure that the RLDT contains the same information available to Qwest's retail operations is to allow competitors to make manual loop make-up requests and to audit Qwest's information, if it appears to be necessary to do so. Nothing in the FCC's decisions prohibits such a safeguard. The provisions of SGAT section 18.2.8 provide that a CLEC requesting the audit would bear the cost of the audit, including any cost by Qwest to provide a "special data extraction." We deny Qwest's request for reconsideration of paragraph 35 of the *28th Supplemental Order*.[44]

In their 34th Supplemental Order, the Washington Commission approved the following SGAT audit language:

> To ensure parity with Qwest retail operations, CLEC may request an audit of information available to Qwest pertaining to the Loop qualification tools pursuant to Section 18 of this Agreement.[45]

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[44] *In re Investigation Into U S WEST's Compliance With Section 271*, WUTC Docket Nos. UT-003022 & 003040, 31st Supplemental Order, ¶ 28 (April 12, 2002) (Exhibit 13).

[45] Washington 34th Supplemental Order, ¶¶ 47-57 (Exhibit 12).

In conclusion, Qwest's SGAT must be revised to provide the access to loop information mandated by the FCC. Until Qwest does so it cannot satisfy Checklist Item 4.

c. Qwest Must Allow CLECs to Perform or Request a Pre-Order MLT.

Qwest must provide CLECs the ability to conduct or request Pre-Order MLTs. This is a parity issue. Qwest has performed pre-order MLTs on its loops in connection with its plans to offer MegaBit service. Qwest does not deny that, but claims that the fact that it has purportedly loaded this information into its Loop Qualification Database affords CLEC parity. It does not. Qwest's retail arm has already pre-qualified the loops on which it wants to provide its DSL service. As Ms. Liston testified in Washington, Qwest was encountering loop accuracy issues with LFACs – the very information that was used to populate the RLDT.[46] Qwest embarked on a bulk deload process for certain predefined wire centers in each state. As part of this process, Qwest conducted MLTs (the MLT sweep referenced by Qwest) on the copper loops in those wire centers and then conditioned any loop in these wire centers that had load coils or bridge taps. In short, Qwest predetermined where it intended to provide DSL service and obtained accurate information for those loops.

The bottom line is that Qwest's retail representatives are assured of getting accurate loop information on the loops that Qwest wants to serve. While the MLT information for these loops was loaded into LFACs and the RLDT, there remain a significant number of loops where such updated loop information has not been obtained.

[46] WA Transcript, pp. 4341-42 (Wilson Affidavit, Exhibit KLW-2).

Of course, if the CLECs were satisfied with limiting their marketing to the same customers that Qwest wants to serve, then they would benefit from the same accurate information. However, the CLEC should not be limited in their marketing to areas that neatly match Qwest business plans. They must have the ability to pre-qualify their loops, even loops outside of Qwest's predetermined marketing area, in the same manner as Qwest. To put the CLEC on a level playing field, they must have the same ability to get MLT information on Loops that Qwest did not pre-qualify as Qwest did on the loops it pre-qualified.

Moreover, Qwest has the ability to run MLT for its services on a pre-order basis if it desires. Qwest has conceded that it has the ability to perform MLT on its switched based services.[47] It can do so any time it wants. For example, Qwest has the ability to expand the area that it seeks to provide DSL service and to select additional wire centers to test and which loops or service terminals to test. CLECs must have the same access to be afforded parity.

In short, Qwest has the ability to perform an MLT on a copper loop connected to its switch at any time, and can perform this test to obtain loop qualification information any time it chooses. It did such testing prior to provisioning Megabit. Qwest performed thousands of MLTs on its copper loops to pre-qualify its own loops for its Megabit service. AT&T requests access to the same information to which Qwest personnel have access, which includes the ability to perform an MLT prior to the provisioning of an

[47] CO Transcript (04/18/01), p. 248 (Wilson Affidavit, Exhibit KLW-4).

unbundled loop. This access is consistent with and required by the *UNE Remand Order* and is required in order for Qwest to meet the nondiscriminatory standard of the Act.[48]

d. Qwest should revise certain of its Loop intervals.

The standard intervals set forth in Exhibit C for 1(g) DS-1 Loops and 1(h) Repair Intervals for Basic 2-Wire Analog Loops should be revised because they are too long to provide the CLEC a meaningful opportunity to compete, are discriminatory, anticompetitive.

The standard interval is the interval in which Qwest is committing to provide a particular UNE to the CLEC. It is the interval that the CLEC will rely upon in providing information to its retail customer when the CLEC will be able to provision service to that customer.[49] It is the interval which the CLEC uses for calculating its due date for submission of its order to Qwest and in designing and provisioning other components and facilities that make up the service that the CLEC is provisioning to its retail customer. Qwest's proposed intervals are set forth in the Service Interval Guide ("SIG") - Exhibit C to the SGAT.

AT&T recommends the following revisions to Exhibit C:

(d) Established Service Intervals for existing DS-1 Capable Loops, DS1 Capable Feeder Loop, 2-Wire Analog Distribution Loop:

a)	1 – 8 lines	~~9~~ 5 business days
b)	9 – 16 lines	~~9~~ 6 business days
c)	17 – 24 lines	~~9~~ 7 business days
d)	25 or More	ICB

(h) Established Repair Intervals for Basic 2-wire Analog Loops, Line Sharing and Line Splitting:

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[48] *UNE Remand Order*, ¶ 427.

[49] *Id.*

~~24~~ 18 Hours OSS
48 Hours AS

The rationale for these revisions is as follows.

With respect to Interval 1(d), DS-1 loops, in prior versions of Exhibit C, Qwest proposed the very intervals AT&T is requesting. Qwest now claims that it lengthened these intervals because those are the intervals that exist on the retail side (apparently from Qwest's interstate special access tariff) and, therefore, the intervals in Exhibit C are parity.[39] Qwest notified CLECs of these changes to the standard intervals for DS-1s in the ROC process, but did not seek the approval or agreement of the ROC participants for these changes. Nor were these changes discussed by the ROC or TAG participants.

AT&T objects to Qwest's revised intervals. AT&T is the largest purchaser of DS-1s from Qwest on the "retail" side. Qwest arbitrarily and unilaterally changed the intervals offered to retail customers in the last year. For years prior to that, Qwest provided DS-1s pursuant to the intervals AT&T is proposing here, although it did not do so in a timely fashion. As has been the case with local service, Qwest has failed to build facilities to meet customer needs in a timely manner and AT&T filed service quality complaints to attempt to resolve this issue. Qwest's response was not to improve its service, but rather to change its provisioning commitment to its retail customers by lengthening the intervals. It now uses those retail intervals that it arbitrarily altered to argue parity. In AT&T's view, the solution to poor service is not to change the intervals. Moreover, poor service on the retail side should not be used to drive parity decisions of

[39] WA Transcript, p. 4471 (Wilson Affidavit, Exhibit KLW-2).

the wholesale side. Qwest should be required to establish an appropriate interval and meet that interval.

Qwest has been ordered to revise its DS-1 intervals in Arizona, New Mexico and Washington. In Arizona, the staff final report recommends that Qwest be directed to adopt the following intervals for DS-1:

1-8 lines	5 business days
9-16 lines	7 business days
17-25 lines	9 business days
25 and above lines	ICB[51]

In Washington, the Commission directed Qwest to revise the SGAT to include the following intervals:

1-8 lines	5 days (high density)
	8 days (low density)
9-16 lines	6 days (high density)
	9 days (low density)
17-24 lines	7 days (high density)
	10 days (low density)
25 or more	ICB[52]

In New Mexico, the Commission directed Qwest to adopt the following DS-1 intervals:

5 business days in high density areas
8 business day in low density areas.[53]

The intervals proposed by AT&T here are consistent with the high density intervals ordered by these Commissions.

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[51] *In the Matter of Qwest Corporation's Section 271 Application*, Arizona Corporation Commission Docket No. T-00000A-97-0238, Final Report on Qwest's Compliance with Checklist Item No. 4, dated February 20, 2002, ¶ 164 (Exhibit 14).

[52] *In re Investigation Into U S WEST's Compliance With Section 271*, WUTC Docket Nos. UT-003022 & 003040, 28th Supplemental Order, ¶ 124-25 (Exhibit 3).

[53] *In the Matter of Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, Order Regarding Facilitator's Report on Checklist Item 2, Checklist Item 4, Checklist Item 5 and Checklist Item 6, New Mexico Utility Case No. 3269, dated November 20, 2001, ¶ 72 (Exhibit 15).

As for 1(h), AT&T contends that an 18-hour interval on repair is more than sufficient given Qwest performance on mean time to restore. For its retail customers Qwest's mean time to restore is in a range of 7 to 14 hours, with and without dispatch. That is the parity figure that should be used as the basis for establishing the wholesale service interval. If Qwest is not required to do better than a 24-hour interval on the wholesale side, CLECs will never be able to come close to matching Qwest's repair time for its retail customers.

Qwest has argued that the ROC performance measures establish a 24-hour repair interval and the repair interval for retail basic service is 24 hours. That is, however, not the measure of parity. Parity is measured based upon the actual service Qwest provides to its retail customers, itself or its affiliates, not the standard established by state commissions.[24] That is the only measure that will provide CLECs with a meaningful opportunity to compete, particularly where Qwest is performing better than the standard. As the record and the reported performance results indicate Qwest' repair performance for its retail customers is significantly better that the 24-hour repair interval proposed in Exhibit C.

For all the reasons set forth herein, Qwest should be required to revise its service intervals in the manner proposed by AT&T. Such revisions are necessary to afford CLECs a meaningful opportunity to compete and to afford the CLEC nondiscriminatory access to UNE loops.

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[24] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (released August 19, 1997), ¶ 139.

2. Line Splitting

a. Qwest Should be Required to Provide Access to Outboard Splitters on a Line-At-A-Time, or Shelf-At-A-Time Basis.

Line splitting is the ability for different carriers to provide voice and data services over a single loop, utilizing both the high and low frequency spectrum portions of the loop. The FCC has determined that incumbent LECs have a current obligation to provide competing carriers with the ability to engage in line splitting arrangements.[55] The FCC's rules require incumbent LECs to provide requesting carriers with access to unbundled loops in a manner that allows the requesting carrier "to provide any telecommunications service that can be offered by means of that network element."[56] As a result, incumbent LECs have an obligation to permit competing carriers to engage in line splitting over any loop or loop combination.

In addition, Qwest is required to provide to CLECs all the functionalities and capabilities of the loop, including electronics attached to the loop.[57] The splitter is an example of such electronics that is included within the loop unbundled network element.

CLECs purchasing UNE Loops or UNE combinations are entitled to "all capabilities of the loop including the low and high-frequency spectrum portions of the loop . . ."[58] In the FCC's Line Sharing Order, the FCC defined the high frequency portion

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[55] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order on Reconsideration, CC Docket No. 98-147, FCC 01-26, ¶ 18 (released January 19, 2001) ("*Line Sharing Reconsideration Order*").

[56] 47 C.F.R. § 51.307(c).

[57] *UNE Remand Order*, ¶ 175.

[58] 47 C.F.R. § 51.319(a)(1).

of the loop as a capability of the loop.[59] In order to gain access to the high frequency portion of the loop, line splitting is required. Such line splitting is accomplished by means of passive electronic equipment referred to as splitters, which splits the low and high frequency portions of the loop. The FCC has also determined that ILECs must afford CLECs access to all of the UNE's features, functions, and capabilities, including attached electronics, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element, specifically including DSL services."[60] The FCC reiterated that the loop includes "attached electronics" if such electronics are necessary to fully access the loops feature, functions and capabilities in order to provide service to end users.[61] Under these determinations of the FCC, the splitter is a feature, function or capability of the loop that must be provided to CLECs.

Qwest is not providing the access required by the FCC. Qwest cites to *SBC Texas 271 Order* to support its position that it is not required to provide access to the splitter. The *SBC Texas 271 Order* is not dispositive on this issue. In that Order, the FCC merely notes that it had not yet exercised its rulemaking authority to require ILECs to provide access to splitters, and therefore, it would not require SBC to provide access to splitters as part of that proceeding.[62] The FCC explicitly declined to comment on the requirement that an ILEC provide access to an ILEC-owned splitter on the grounds that it was considering this issue in response to AT&T's petition for reconsideration of the *UNE*

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[59] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order, CC Docket No. 98-147, FCC 99-355, ¶ 17 (released December 9, 1999) ("*Line Sharing Order*").

[60] 47 C.F.R. §51.307; *UNE Remand Order*, ¶¶166-67.

[61] *Id.* ¶ 175.

[62] *SBC Texas 271 Order*, ¶ 328.

Remand Order.[63] Nor does the FCC decision in any way limit what state commissions may order to promote the development of competition and the broader availability of advanced services.

That is precisely what the Texas Public Utilities Commission concluded in a recent arbitration decision.[64] There, concluding that the FCC's BellSouth Texas 271 Order did not prevent the Texas Commission from doing so, the PUC affirmed an arbitrators' recommended decision, which required Southwestern Bell to provide splitters on a line-at-a-time basis. Specifically, the Arbitrator stated:

> Although, as noted by SWBT, the FCC has to date, not required ILECs to provide the splitter in either a line sharing or line splitting context, the Arbitrators believe this Commission has the authority to do so on this record. The FCC has clearly stated that its requirements are the minimum necessary, and that state commissions are free to establish additional requirements, beyond those established by the FCC, where consistent. Indeed, in the *SWBT Texas 271 Order*, the FCC acknowledged that line splitting, a recent development, would be subject to potential arbitration before the Texas Commission. The Arbitrators, therefore, believe on this record that it is sound public policy to require SWBT to provide AT&T with a UNE loop that is fully capable of supporting any xDSL service.[65]

Then, citing the rulings of the FCC referenced above, the Arbitrators determined that SBC must provide access to its splitters. The decision stated (1) that "excluding the splitter from the definition of the loop would limit its functionality," (2) that "it is technically feasible for SWBT to furnish and install splitters to [enable CLECs to] gain access to the high frequency portion of the loop when purchased in combination with a

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[63] *Id.*

[64] *Order Approving Revised Arbitration Award, Petition of Southwestern Bell Telephone Company for Arbitration with AT&T Communications of Texas*, Docket No. 22315, pp. 7 - 9 (dated March 14, 2001) (Wilson Affidavit, Exhibit KLW-11).

[65] *Revised Arbitration Award, Petition of Southwestern Bell Telephone Company for Arbitration with AT&T Communications of Texas*, Docket No. 22315, p. 16 (released September 27, 2000) ("*Texas Arbitration Award*"). (Wilson Affidavit, Exhibit KLW-12).

switch port," and (3) that it is "inaccurate from a technical standpoint to analogize splitters to DSLAMs."[66]

Finally, the Texas decision noted that SWBT's effort to require LECs to collocate in order to gain access to the high-frequency portion of the loop "(1) unnecessarily increases the degree of coordination and manual work and accordingly increases both the likelihood and duration of service interruptions; (2) introduces unnecessary delays for space application, collocation construction and splitter installation; and (3) unnecessarily wastes central office and frame space."[67] Thus, the arbitrators found that SWBT's approach "significantly prohibits UNE-P providers from achieving commercial volumes."[68] On the flip side, they found that requiring the ILEC to provide the splitter not only advances competition but also "promotes more rapid deployment of advanced services to a broader cross section of consumers, as required by § 706" of the Act.[69]

Contrary to Qwest's claim in it brief, AT&T has not stated that Qwest uses a "outboard" splitter. Rather, it is AT&T's position that Qwest's splitter is accessible and that access by CLECs is technically feasible, which notably, Qwest does not dispute in its Brief. During the Colorado Loop workshop, Qwest finally revealed the type of splitters it deploys in its network and testified that, in Qwest's current configuration, a shelf of splitters are "connecterized" to their DSLAMs.[70] Splitters that are "connecterized" to the DSLAM are not integrated into the DSLAM and, therefore, it is technically feasible to

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[66] *Id.*, pp. 17 - 19

[67] *Id.*, p. 19

[68] *Id.*

[69] *Id.*

[70] CO Transcript (05/22/01), pp. 141-42 (Wilson Affidavit, Exhibit KLW-13); WA Transcript, 4560-61 (Wilson Affidavit, Exhibit KLW-2).

separate the splitter from the DSLAM.[71] For the splitters used by Qwest, it is technically feasible to break out the splitter from the DSLAM.[72] In fact, Covad testified in Colorado that the Qwest DSLAM/splitter configuration is no different that the Covad/Qwest splitter/DSLAM configuration that Qwest is requiring CLEC to use in lieu of the Qwest splitter and under this configuration the Covad splitters are "connecterized to the Qwest DSLAM."[73] Indeed, Qwest's witness conceded that it was possible to provide access to a shelf of Qwest splitters in this configuration.[74]

Access to Qwest-owned splitters will serve to advance competition for DSL service and bundles of voice and data service, and as such, are very much in the public interest. There are several significant benefits to Qwest providing access to outboard splitters. When data CLECs share an ILEC-owned splitter, switching a voice customer's data provider among such providers is much simpler and conserves valuable resources.

Access to Qwest owned splitters also yields benefits when a customer terminates individual services, allowing for the efficient usage of splitters and racks within central offices where space is already scarce, and promotes competition among data CLECs because voice providers and ISPs encounter fewer barriers to switching from one provider to another.

Requiring Qwest to provide access to its splitters also promotes the ability of CLECs to offer a bundle of voice and data service in competition with Qwest. One of the procompetitive aspects of UNE-P is that it allows a voice CLEC to enter the market and compete with Qwest without having to obtain collocation space. Access to Qwest-owned

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[71] CO Transcript (01/22/01), pp. 149 – 50 (Wilson Affidavit, Exhibit KLW-13).
[72] *Id.*
[73] *Id.*
[74] *Id.*, pp. 145 -46

splitters on a line-at-a-time basis eliminates the need for UNE-P providers to secure collocation arrangements, and thus provides similar benefits to the expansion of DSL with UNE-P. For example, by having access to splitters, UNE-P providers can effectively partner with any data CLEC that has deployed a DSLAM in the central office, and are not limited to those that have already deployed their own splitters or lack space for additional splitters. By making it less difficult for UNE providers to access the high frequency portion of the loop, this impediment to competition may be avoided.

Accordingly, Qwest should be required to modify its SGAT to state that it will provide access to its splitters on a shelf-at-a-time basis.

3. Network Interface Devices (NID)

a. Qwest should be required to remove its connections from protectors when CLECs access the protector.

CLECs may encounter situations where they will need to request that Qwest free capacity on the NID so that the CLEC can provide service to the customer. This is an important issue because § 9.5.2.1 of the SGAT limits the CLEC's access to NID to cases where space is available on the NID. There is no provision that would require Qwest to make space available on the NID. This may be particularly necessary in situations where the customer does not want an additional NID on their premise or in MTE setting where association rules limit additional boxes. Failure to free such capacity may make the NID, or connections within the NID, inaccessible to the CLEC.

Qwest has objected to this request, claiming it has no obligation to make space available on the NID and that AT&T's proposal for removing Qwest loop connection violates the National Electrical Code. Qwest is obligated to provide access to the NID,

unless it is technically infeasible for it to do so. Therefore, Qwest is obligated to remove its loop connections from the NID, absent technical infeasibility.

There is no question that it is technically feasible for Qwest to remove its connections from the NID. Qwest does not dispute this. AT&T provided a Bell System Practice that explicitly permits a procedure called "capping off," a procedure which would entail removing the Qwest circuit from the NID and tying it down.[75] Qwest claims that this practice is from 1969, implying it is outdated. Qwest has never presented any evidence that this practice was ever superceded in the Bell System or U S WEST/Qwest.

Qwest claims in its Brief that this Bell System practice addresses a scenario that is different from the removal of the loop by the ILEC for use by the CLEC. This argument is false. Of course, the precise scenario at issue here did not exist at the time since CLECs were not envisioned at the time the Bell System practice was adopted. However, the procedure depicted in the Bell System practice of removing the protector from the house is analogous to the procedure proposed by AT&T. More to the point, lightning and over-voltage issues have not change since the date of this practice. The Bell System practice depicts a procedure that is proper and acceptable practice. If this practice was acceptable then from a safety perspective, there is no reason it would not be safe now.

The only evidence Qwest has presented to support its refusal to provide access to the NID is its reference to § 315A of the National Electrical Safety Code and the § 800-30(a) of the National Electrical Code.[76] Qwest claims that these provisions somehow proscribe it from removing its loop connections in the manner proposed by AT&T. Neither of the provisions cited by Qwest to the National Electrical Safety Code and the

[75] Wilson Affidavit, Exhibit KLW-14.
[76] Wilson Affidavit, Exhibit KLW-15 and 16

National Electrical Code address the proposal made by AT&T. Section 315A of the National Electrical Safety Code addresses the need for protection where a "communications apparatus is handled by other than qualified persons." That is not the case here. We are talking about situations where company technicians that are qualified persons would be capping off loop facilities.

Similarly, § 800-30(a) of the National Electrical Code is not applicable. This section applies to circuits that run partly or entirely in aerial wire or aerial cable that not confined within a block or circuits, aerial or underground, located within the block containing the building served so as to be exposed to accidental contact with electric light or power conductors operating at over 300 volts to ground. A block is defined in § 800-2 as square or portion of a city, town, or village enclosed by streets and including the alleys so enclosed, but not any street. "Exposed" has three definitions in the Code. In Article 100 – Definitions, exposed (as applied to live parts) is defined as capable of being inadvertently touched or approached nearer than a safe distance by a person and it is applied to parts that are not suitably guarded, isolated, or insulated. Also in Article 100, exposed (as applied to wiring methods) is defined as on or attached to the surface or behind panels designed to allow access. Finally, in § 800-2 Definitions, exposed is defined as a circuit that is in such a position that, in case of failure of supports and insulation, contact with another circuit may result.

A capped circuit is not exposed under any of these definitions. Based upon the first definition, when the conductors are capped, the wire cannot be inadvertently touched. For purposes of the second definition, a capped circuit is not attached directly to the structure, it is attached to a standoff that is an insulator. Finally, based upon the

third definition, the circuit is doubly insulated and so it cannot come in contact with another circuit even if one insulating sheathe is compromised.

When a communications circuit actually interfaces with inside wire at a building, then it is "exposed" and must have a protector under the National Electrical Code.

In essence, paragraph 800-30(a) requires Qwest to have a protector on a pole in the block for each circuit. This is because not all distribution facilities are actually connected to premises. Spare facilities exist in the loop plant that are not "dropped" to buildings. The reference to electric light or power conductors at over 300 volts is referring to the fact that telephone wires typically coexist on power poles with high voltage lines. Workmen must be protected from accidental contact with communications circuits that have become connected to high voltage power lines or lighting. If Qwest does not have such protectors on all circuits in the block, they are in violation of the National Electrical Code. All cables must have such protection as there is no assurance that any particular circuit actually terminates in a protector at a building. There is no exposure to voltages over 300 volts at buildings (with the exception of industrial facilities that are covered by other sections) as the voltage that is available to such buildings is at maximum 220 V. However, the National Electrical Code does not require a protector at the house when the drop does not penetrate the building. Thus, this section of the National Electrical Code is not germane to AT&T's proposal.

Therefore, Qwest has not presented any viable technical or safety concerns. It must remove its loop connections in order to provide access to its NID in order to provide CLECs access to its NID where space is not otherwise available. AT&T proposes the following modification to the last sentence of § 9.5.2.1 to implement this obligation: "At

no time should either Party remove the other Party's loop facilities from the other Party's NID without appropriately capping off the other Party's loop facilities."

B. CHECKLIST ITEM 11 - LOCAL NUMBER PORTABILITY.

To satisfy Checklist Item 11, Qwest must demonstrate that it provides LNP with minimum service disruptions and without impairment of quality. Qwest's performance results cannot be used as a basis for concluding that Qwest is not providing nondiscriminatory access to LNP with minimum service disruptions and without impairment of quality. As has been discussed, Qwest has implemented a new mechanized process that will delay the disconnect of its loop from its switch to 11:59 p.m. of the day following the CLEC's scheduled customer conversion. This process was implemented to address serious performance issues that were being encountered by AT&T and Cox. However, Qwest's new offering has only recently been incorporated into the PIDs. To date, no results have been produced under the new PID and the results have not been audited, as Qwest concedes in its Brief.[77] Until PID results are available and have been audited, it would be premature to conclude that Qwest is providing nondiscriminatory access to local number portability with minimum service disruptions and without impairment of quality.

Nor do the performance results reported under the initial revision to OP-17 fully measure the new disconnect process implemented by Qwest. The old version of OP-17 stated that one of the prerequisites for measurement is that the CLEC must notify Qwest by 8:00 p.m. on due date in order to be counted as a CLEC-requested delay, if not, that

[77] *See* Brief, p. 32.

order is excluded from the PID measure. However, Qwest's new product offer indicates that CLECs have until noon of the day following the scheduled due date to notify Qwest to delay the disconnect. Thus, absent a notification by 8 p.m. of the due date, under the current PID, Qwest will count that order as an exclusion and Qwest would not be measuring whether the disconnect was made on the day after the due date or not. Thus, any current performance data presented for OP-17 does not provide any evidence of whether Qwest's new process is working or not.

Second, there is no SGAT language that addresses this new offering. Specifically, the last sentence in Section 10.2.2.4 states "If CLEC requests Qwest to do so by 8:00 p.m. mountain time, Qwest will assure that the Qwest Loop is not disconnected that day." Similarly, Section 10.2.5.3.1 states:

> Qwest will set the ten (10) digit unconditional trigger for numbers to be ported, unless technically infeasible, by 11:59 p.m. (local time) on the business day preceding the scheduled Port date. (A 10-digit unconditional trigger cannot be set for DID services in 1AESS, AXE10, and DMS10 switches thus managed cuts are required, at no charge.) *The ten (10) digit unconditional trigger and Switch translations associated with the End User Customer's telephone number will not be removed, nor will Qwest disconnect the Customer's Billing and account information, until 11:59 p.m. (local time) of the next business day after the Due Date.*

These provisions do not address Qwest's new product offer, which specifically states that CLECs have until noon of the day following the scheduled due date to notify Qwest to delay the disconnect.[78] Without SGAT language reflecting Qwest's commitment, there is legally binding obligation on which the CLECs can rely for this new process and that the CLECs can enforce in the future.

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[78] *See* Wilson Affidavit, Exhibit KLW-17.

Qwest touted this offering as the solution to the premature disconnects that AT&T and other CLECs were encountering. It is Qwest that proposed this solution, not AT&T. Qwest made this change because of the commercial experience evidence produced by AT&T and Cox that showed Qwest processes were causing the premature disconnection of CLEC customers. Qwest changed it processes in response to this evidence, so that it could gain approval on Checklist Item 11. It is this process change that prompted AT&T to seek a revision to the PID to synch up the PID with the product offering initially made and then clarified by Qwest. It is this process change that has prompted AT&T to seek changes to the SGAT to ensure that the SGAT language properly reflects Qwest's new commitment. Yet, now despite Qwest's claim that this is the solution that will put Qwest in compliance with Checklist Item 11, Qwest refuses to reflect this solution in its SGAT. Without SGAT language describing this solution, CLECs have no assurance that Qwest will live up to this obligation or that Qwest will not unilaterally alter this product, forcing the CLECs to invoke the CMP process to reinstate this process. It is Qwest's burden to demonstrate that it has the legal obligation in its SGAT to provide LNP in accordance with the FCC's standards. AT&T has demonstrated that Qwest's SGAT is deficient. Until Qwest revises its SGAT to properly reflect what it has agreed to, Qwest has not and cannot fulfill the requirements of Checklist Item 11.

To cure this problem, AT&T has proposed in other Section 271 proceedings the last sentence in Section 10.2.2.4 that states "If CLEC requests Qwest to do so by 8:00 p.m. mountain time, Qwest will assure that the Qwest Loop is not disconnected that day." be deleted and that Section 10.2.5.3.1 be revised as follows:

> Qwest will set the ten (10) digit unconditional trigger for numbers to be ported, unless technically infeasible, by 11:59 p.m. (local time) on the

business day preceding the scheduled Port date. (A 10-digit unconditional trigger cannot be set for DID services in 1AESS, AXE10, and DMS10 switches thus managed cuts are required, at no charge.) The ten (10) digit unconditional trigger and Switch translations associated with the End User Customer's telephone number will not be removed, nor will Qwest disconnect the Customer's Billing and account information, until 11:59 p.m. (local time) of the next business day after the Due Date. CLEC is required to make timely notifications of Due Date changes or cancellations by 8:00 p.m. mountain time on the Due Date through a supplemental LSR order. In the event CLEC does not make a timely notification, CLEC may submit a late notification to Qwest as soon as possible but in no event later than 12:00 p.m. mountain time the next business day after the Due Date to Qwest's Interconnect Service Center in the manner set forth below. For a late notification properly submitted, Qwest agrees to ensure that the End User's service is not disconnected prior to 11:59 p.m. of the next business day following the new Due Date or, in the case of a cancellation, no disruption of the End User's existing service. Late notifications must be made by calling Qwest's Interconnect Service Center followed by CLEC submitting a confirming supplemental LSR order.

Qwest has agreed to these changes in other states, with the addition of two additional words in the second to last sentence:

> For a late notification properly submitted, Qwest agrees to **try to** ensure that the End User's service is not disconnected prior to 11:59 p.m. of the next business day following the new Due Date or, in the case of a cancellation, no disruption of the End User's existing service.

Qwest claims this revision is necessary because of some fear that the late notice language will become the norm. AT&T disagrees. Qwest's new process has been in effect for some time and, as far as AT&T is aware, the concern raised by Qwest that late notice would become the norm has not materialized. Moreover, clearly Qwest's product team that is responsible for this product was not concerned about Qwest's ability to meet this obligation and did not require the wishy-washy language that Qwest is now trying to insert into its SGAT. Finally, during the workshops, Qwest claimed that it could stop the disconnect by 11:59 p.m., if it received notice from the CLEC by 8:00 p.m. on that day. CLECs

questioned that claim based upon CLEC experience. Here, Qwest has nearly 12 hours to stop the disconnect. Based upon its own testimony this should pose no problem for Qwest. Accordingly. Qwest's concern is unfounded and must be rejected in favor of language that more accurately tracks its product offering.

More importantly, AT&T objects to Qwest's proposed addition, because with the addition of the words "try to" Qwest would effectively eliminate any binding commitment to the new process. Ultimately, the existing contract language permits Qwest to respond to every failure to stop the disconnect from the switch when it received appropriate notice from the CLEC by 12:00 noon on the day after the originally scheduled disconnect by saying "we tried." That is unacceptable from a legal standpoint. The CLEC could suffer extensive customer disconnects and all Qwest would have to do is say that they tried to stop the disconnect in accordance with the contract. The CLEC would have no commitment that they could enforce.

Both the Washington and Colorado Commissions have required Qwest to revise these SGAT provisions.[79] This Commission should do the same. Until Qwest modifies its SGAT to properly reflect its new process, Qwest cannot comply with Checklist Item 11.

[79] *See* Washington 34th Supplemental Order, ¶¶105-106 (Exhibit 12).

Respectfully submitted this 28th day of June, 2002.

AT&T COMMUNICATIONS
OF THE MIDWEST, INC.

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EXHIBIT 1

BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission
DOCKETED
MAR 15 2002
DOCKETED BY

WILLIAM A.MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

IN THE MATTER OF U. S. WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. T-00000A-97-0238

DECISION NO. 64630

ORDER

Open Meeting
, 2002
Phoenix, Arizona

BY THE COMMISSION:

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

1. The Federal Telecommunications Act of 1996 ("1996 Act") added Section 271 to the Communications Act of 1934. The purpose of Section 271 is to specify the conditions that must be met in order for the Federal Communications Commission ("FCC") to allow a Bell Operating Company ("BOC"), such as Qwest Corporation ("Qwest" or the "Company"), formerly known as US WEST Communications, Inc. ("US WEST")[1] to provide in-region interLATA services. The conditions described in Section 271 are intended to determine the extent to which local phone service is open to competition.

2. Section 271 (c)(2)(B) sets forth a fourteen point competitive checklist which specifies the access and interconnection a BOC must provide to other telecommunications carriers in order to satisfy the requirements of Section 271. Section 271 (d)(2)(B) requires the FCC to consult with state commissions with respect to the BOC's compliance with the competitive checklist. Also, Subsection (d)(2)(A) requires the FCC to consult with the United States Department of Justice.

3. Section 271(c)(2)(B)(ii) of the 1996 Acts requires a section 271 applicant to show that

[1] For purposes of this Order, all references to US WEST have been changed to Qwest

MAR 27 2002

be required or where there would have been such location had Qwest not reserved space for its future use.

55. Staff recommends that the SGAT be modified to remove Qwest's ability to charge for regeneration where there exists another available collocation location where regeneration would not be required, or where there would have been such location, had Qwest not reserved space for its future use in the affected premises.

56. Staff's recommendation is consistent with our Order in Decision No. 64216 (November 20, 2001) concerning Checklist Item No. 5. Qwest has already modified its SGAT to reflect this obligation concerning regeneration charges. Consequently, this issue has been resolved.

57. Disputed Issue No. 3 is whether Qwest is obligated to construct UNEs for CLECs other than certain types of unbundled loops and line ports.

58. Qwest's SGAT provides that Qwest will provide CLECs access to UNEs provided that facilities are available. AT&T argues that Qwest is obligated to build network elements on a nondiscriminatory basis for CLECs and that Qwest must build UNEs for CLECs under the same terms and conditions that Qwest would build such facilities for itself or its retail customers at cost-based rates.

59. AT&T and MCIW object to SGAT Section 9.19 that provides Qwest will construct network capacity, facilities, or space for access to or use of UNEs only upon Qwest's determination of the acceptability of Qwest's individual financial assessment.

60. AT&T argues that the FCC explicitly limited an ILEC's obligation to provide interoffice facilities to existing facilities, but has not pronounced explicit limitations for other network elements. AT&T opposes Qwest's position that it does not have to light unused dark fiber and make it available as dedicated transport because it has no obligation to build UNEs. AT&T asserts that if dark fiber is in place, Qwest should not be able to claim that it does not have to light the fiber to meet orders for dedicated transport. Otherwise, AT&T argues Qwest is permitted to reserve the dark fiber for its own use and negate the obligation to provide dedicated transport. The CLECs want the Commission to clarify that Qwest is obligated to build UNEs, except dedicated transport, on a nondiscriminatory basis at cost-based rates.

61. Qwest argues there is no statute, rule or case that imposes upon it the obligation to construct all UNEs. Qwest argues the 1996 Act requires access only to an ILEC's existing network. According to SGAT Section 9.1.2.2, Qwest will build loops and switch ports if Qwest would be legally obligated to build such facilities to meet its Provider of Last Resort ("POLR") obligation to provide basic local exchange service or its Eligible Telecommunications Carrier ("ETC") obligation to provide primary local exchange service. Qwest argues the CLECs have options if Qwest is not obligated to build. A CLEC may submit a request to build under Section 9.19, a CLEC can build the facilities itself, or obtain them from another party.

62. Qwest also argues that although it is required to unbundle dark fiber, the FCC has not required ILECs to add or upgrade electronics for dedicated transport facilities.

The FCC's *UNE Remand Order* at para. 324 states:

> In the Local Competition First Order and Report the Commission limited an Incumbent LEC's transport unbundling obligations to existing facilities, and did not require Incumbent LEC's to construct facilities to meet a requesting carriers requirements where the Incumbent LEC has not deployed transport facilities for it own use . . . We do not require Incumbent LEC's to construct new transport facilities to meet specific competitive LEC point-to point demand requirements for facilities the Incumbent LEC has not deployed for its own use.

63. The Eight Circuit Court of Appeals in *Iowa Utilities Board v FCC* held "[w]e also agree with petitioner that subsection 251(c)(3) implicitly requires access to only an Incumbent LEC's existing network, . . not to a yet un-built superior one."

64. Staff believes there is no dispute that Qwest must construct facilities if Qwest would be legally obligated to build such facilities to meet its POLR or ETC obligations. Staff concurs that CLECs cannot demand that Qwest construct network additions or modifications on behalf of the CLECs. Staff also agrees with AT&T that Qwest must provide CLECs with UNEs on the same terms and conditions that it provides UNEs to itself or to its retail customers. Staff notes that Qwest has stated that it would evaluate a CLEC's request for "special construction" utilizing similar criteria to that Qwest uses to determine whether to construct facilities for retail customers, and that Qwest has agreed to provide CLEC notification of major loop facility builds through the ICONN database.

65. Staff believes it is important that Qwest treat CLEC orders the same as it would its own. Staff recommends that Qwest should be required to amend SGAT Section 9.19 to state: "Qwest will assess whether to build for CLEC in the same manner that it assesses whether to build for itself. Qwest shall treat CLEC orders the same as it would treat its own orders for new or additional service." Staff further recommends that the SGAT, or an appendix, contain objective assessment criteria.

66. Staff's proposed addition to SGAT Section 9.19 accurately states Qwest's legal obligation to construct facilities at CLEC request. We agree with Staff that Qwest should modify its SGAT accordingly, including the assessment criteria it will employ in considering such requests. In response to AT&T's concerns expressed in its January 9, 2002 Comments to the Interim Report, we note that the CLECs are entitled to UNEs at cost-based rates.

67. Disputed Issue No. 4 is whether Qwest may prohibit connecting UNEs with finished services for a CLEC.

68. Qwest SGAT Section 9.23.1.2.2 provides in pertinent part:

> UNE Combinations will not be directly connected to a Qwest finished service, whether found in a tariff or otherwise, without going through a Collocation, unless otherwise agreed to by the parties . . .."

69. The CLECs assert that the FCC does not allow limits on the use of UNEs and does not employ the words "finished services". They argue that connection is allowed at any technically feasible point and Qwest has not shown that accessing UNEs by connecting the UNE to a finished service is not technically feasible. They claim the restriction requires CLECs to construct their own networks because traffic cannot be aggregated on the same trunk groups. AT&T argues that FCC limitations on certain connections of UNEs to tariffed services does not extend to all UNEs.

70. Qwest argues the FCC has ruled that ILECs can prohibit commingling. In its *Supplemental Order Clarification*,[4] the FCC held:

> We further reject the suggestion that we eliminate the prohibition on "co-

[4] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification*, FCC-00-183 (June 2, 2000), para. 28.

Exhibit 2

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

IN THE MATTER OF U. S. WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996

DOCKET NO. T-00000A-97-0238

DECISION NO. _____

OPINION AND ORDER

Open Meeting
, 2002
Phoenix, Arizona

BY THE COMMISSION:

* * * * * * * * * *

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

1. The Federal Telecommunications Act of 1996 ("1996 Act") added Section 271 to the Communications Act of 1934. The purpose of Section 271 is to specify the conditions that must be met in order for the Federal Communications Commission ("FCC") to allow a Bell Operating Company ("BOC"), such as Qwest Corporation ("Qwest" or the "Company"), formerly known as US WEST Communications, Inc. ("US WEST")[1] to provide in-region interLATA services. The conditions described in Section 271 are intended to determine the extent to which local phone service is open to competition.

2. Section 271 (c)(2)(B) sets forth a fourteen point competitive checklist which specifies the access and interconnection a BOC must provide to other telecommunications carriers in order to satisfy the requirements of Section 271. Section 271 (d)(2)(B) requires the FCC to consult with State commissions with respect to the BOC's compliance with the competitive checklist. Also, Subsection

[1] For purposes of this Order, all references to US WEST have been changed to Qwest.

by Verizon and Southwestern Bell. Staff further states that Qwest's offer to perform a manual process is an important option available to CLECs in other RBOC regions, including Verizon's and Southwestern Bell's. With Qwest's implementation of the manual process and its assurances that CLECs will have access to loop qualification data in the same manner and timeframe as is available to Qwest personnel, Staff believes Qwest has met its obligations as long as Qwest formalizes the details of its manual process in the SGAT, and includes all options available to CLECs which are functionally equivalent to those offered by Verizon and Southwestern Bell, including access to actual loop make-up information, access to theoretical or design loop make-up information or the ability to request a manual search of paper records to determine actual loop information in timely manner. Staff continues to support its audit recommendations as an important check in the future that Qwest is meeting its obligations in this regard.

54. In its May 1, 2002 Comments, AT&T supports Staff's analysis and conclusions, and believes it is important that the CLECs have an opportunity to review and comment on any proposed SGAT language.

55. The FCC has been clear that ILECs must provide CLECs with access to all of the detailed information about the loop that is available to the ILEC itself. The FCC has not required direct access to the LFACS database where the ILEC provides the same information by other means. Here, Staff is unsure whether the KPMG Report is as thorough as Qwest claims it to be. Furthermore, at least as of the date of the Final Report, interested parties have not filed comments on the KPMG Report. However, Staff believes that with its offer to implement a manual process for researching loop qualification data, and with modifying its SGAT to include all options, Qwest will meet its obligation regarding access. We agree that if all is as Qwest purports, Qwest has met its obligations to provide access to loop qualification data. However, because the system is yet untested in Arizona, we believe that periodic audits of the back office systems and databases containing loop qualification data are an important component in assuring that Qwest makes the required loop qualification information available on an on-going basis. Thus, we adopt Staff's proposed language with minor modification (underlined):

> Qwest shall provide to CLEC, on a non-discriminatory basis, access to the

> information contained in Qwest's records, back office systems and databases where loop qualification information, including information relating to spare facilities resides, that is accessible to any Qwest employee or any affiliate of Qwest. An audit shall be conducted on a periodic basis, but no more often than every eighteen months, of Qwest's company records, back office systems and databases to determine that Qwest is providing the same access to loop qualification information to CLECs to which any Qwest employee has access. Such audit will be in addition to the audit rights contemplated by Section 18 of this Agreement, but the processes for such audit shall be consistent with the processes set forth in Section 18.

Under the audit procedures set in SGAT Section 18, each party bears its own expenses for the a
Although potentially, Qwest may be subject to additional audit requests, CLECs are not likely to i
the expense of an audit unless they have concerns about the accuracy of the records. In addi
Qwest should revise its SGAT to include a description of all the options available to CLECS
obtaining loop qualification information. As always, our procedures permit CLECs to commen
the proposed language, and ultimate approval of Qwest's compliance is contingent upon its fi
acceptable SGAT language.

DISPUTED ISSUE NO. 3: Concerns regarding Qwest's obligation to build.

56. AT&T argues that Qwest must build loops, and other UNEs for CLECs under the s
terms and conditions that Qwest would build network elements for itself (or its retail customer
cost-based rates.

57. CLECs object to Qwest's decision that CLEC orders that are currently in "held" s
will be rejected if there are no facilities and no current construction jobs. Thus, for new serv
orders placed by CLECs, if no facilities are available and no construction jobs are planned, the
will be rejected, rather than placed in held order status. AT&T states the policy appears design
improve Qwest's PID performance, creating the false impression that Qwest is provisioning net
elements to meet CLEC demand. CLECs argue that because Qwest has not instituted a similar p
for its retail customers, Qwest is discriminating against its wholesale customers by refusing to
track of CLEC held orders and failing to take those held orders into account in developin
construction plans. CLECs express concerns that Qwest will be able to get in line for new faci
ahead of CLECs because Qwest will always have superior and advance knowledge regarding its
build plans.

START

OF

RETAKE

> information contained in Qwest's records, back office systems and databases where loop qualification information, including information relating to spare facilities resides, that is accessible to any Qwest employee or any affiliate of Qwest. An audit shall be conducted on a periodic basis, but no more often than every eighteen months, of Qwest's company records, back office systems and databases to determine that Qwest is providing the same access to loop qualification information to CLECs to which any Qwest employee has access. Such audit will be in addition to the audit rights contemplated by Section 18 of this Agreement, but the processes for such audit shall be consistent with the processes set forth in Section 18.

Under the audit procedures set in SGAT Section 18, each party bears its own expenses for the audit. Although potentially, Qwest may be subject to additional audit requests, CLECs are not likely to incur the expense of an audit unless they have concerns about the accuracy of the records. In addition, Qwest should revise its SGAT to include a description of all the options available to CLECS for obtaining loop qualification information. As always, our procedures permit CLECs to comment on the proposed language, and ultimate approval of Qwest's compliance is contingent upon its filing acceptable SGAT language.

DISPUTED ISSUE NO. 3: Concerns regarding Qwest's obligation to build.

56. AT&T argues that Qwest must build loops, and other UNEs for CLECs under the same terms and conditions that Qwest would build network elements for itself (or its retail customers) at cost-based rates.

57. CLECs object to Qwest's decision that CLEC orders that are currently in "held" status will be rejected if there are no facilities and no current construction jobs. Thus, for new services orders placed by CLECs, if no facilities are available and no construction jobs are planned, the LSR will be rejected, rather than placed in held order status. AT&T states the policy appears designed to improve Qwest's PID performance, creating the false impression that Qwest is provisioning network elements to meet CLEC demand. CLECs argue that because Qwest has not instituted a similar policy for its retail customers, Qwest is discriminating against its wholesale customers by refusing to keep track of CLEC held orders and failing to take those held orders into account in developing its construction plans. CLECs express concerns that Qwest will be able to get in line for new facilities ahead of CLECs because Qwest will always have superior and advance knowledge regarding its own build plans.

END

OF

RETAKE

58. Covad concurred with AT&T's position and further argued that because Qwest refused to provide any information regarding additional equipment, such as remote DSLAMs or NGDLC or related functionalities, that may be deployed in connection with any and all future network builds, there is no way for Covad to determine whether it can capitalize on the advance notice provided.

59. This issue is similar to disputed issue number 3 for Checklist Item No. 2. In Decision No. 64930 (March 15, 2002), this Commission approved the following SGAT language for Section 9.19:

> Qwest will conduct an individual financial assessment of any request that requires construction of network capacity, facilities, or space for access to or use of UNEs. Qwest will assess whether to build for CLEC in the same manner that it assesses whether to build for itself. Qwest shall treat CLEC orders the same as it would treat its own orders for new or additional service. When Qwest constructs to fulfill CLEC's request for UNEs, Qwest will bid its construction on a case-by-case basis. Qwest will charge for the construction through nonrecurring charges and a term agreement for the remaining recurring charge, as described in the Construction Charges Section. When CLEC orders the same or substantially similar service available to Qwest End User Customers, nothing in this Section shall be interpreted to authorize Qwest to charge CLEC for special construction where such charges are not provided for in a Tariff or where such charges would not be applied to a Qwest End User Customer. If Qwest agrees to construct a network element that satisfies the description of a UNE contained in this agreement, that network element shall be deemed a UNE.

In addition, the Commission ordered Qwest to provide an appendix to the SGAT that contains the objective assessment criteria. In its March 29, 2002 SGAT filing, Qwest included the Section 9.19 language and acknowledged that the SGAT must still contain the assessment criteria.

60. Staff believes that the Commission's resolution of the issue in connection with Checklist Item No. 2 is appropriate and responds to the concerns of all the parties here.

61. Qwest has agreed to notify CLECs through the ICONN database of future construction jobs. SGAT Section 9.1.2.1.4 provides:

> Qwest will provide CLEC notification of major Loop facility builds through the ICONN database. This notification shall include the identification of any funded outside plant engineering jobs that exceeds $100,000 in total cost, the estimated ready for service date, the number of pairs or fibers added, and the location of the new facilities (e.g., Distribution Area for copper distribution, route number for copper feeder, and termination CLLI codes for fiber). CLEC acknowledges that Qwest does not warrant or guarantee the estimated ready for service dates. CLEC also acknowledges that funded Qwest outside plant engineering

rules may be modified or cancelled at any time.

62. It appears that CLEC concerns about Qwest not treating CLEC requests for UNEs the same as it treats its own customer demand, and about Qwest having superior knowledge concerning its construction plans, are being addressed by SGAT Sections 9.18 and 9.1.2.1.4, in conjunction with the forthcoming assessment criteria. We believe that with Qwest's SGAT language and its anticipated compliance with its remaining obligation to amend the SGAT with assessment criteria, this issue is resolved.

DISPUTED ISSUE NO. 4: Should Qwest be permitted to recover loop conditioning costs for loops under 18,000 feet.

63. AT&T argues that Qwest is recovering the cost of loop conditioning in its UNE loop charges, and that this issue was deferred to the pending Wholesale Cost Docket.

64. WorldCom asserts that under accepted engineering principles, loops under 18,000 feet should not have bridge taps or load coils and that any need for conditioning is based on an inefficiently designed loop. Covad concurs with WorldCom.

65. Qwest argues that in the *UNE Remand Order*, the FCC specifically held that ILECs are entitled to recover the costs of conditioning loops less than 18,000 feet. Further, Qwest states, the FCC has rejected the argument that ILECs should not recover conditioning costs because they should not have placed bridge taps or load coils in the network in the first place. Qwest asserts that the FCC's Section 271 Orders also recognize that ILECs are entitled to recover their costs of loop conditioning. Qwest states further that it has voluntarily undertaken a bulk de-loading project to de-load loops less than 18,000 feet in those Arizona wire centers in which DLECs are concentrating their activities. Qwest states that approximately 90 percent of the wire centers in Arizona where CLECs are seeking unbundled loops have been de-loaded as part of the project. Qwest has absorbed the costs of the de-loading project.

66. Staff believes that Qwest's position is in accord with FCC rulings. Staff agrees that Qwest should be entitled to recover the costs of conditioning loops less than 18,000 feet, other than the loops which Qwest conditioned in its bulk de-loading project in Arizona. Although Staff believes that Qwest is entitled to recover the costs of conditioning lines less than 18,000 feet, Staff encourages the Company to follow the lead of other RBOCs that do not impose charges for up to 12,000 feet.

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s [1] Compliance With Section 271 of the Telecommunications Act of 1996	)	DOCKET NO. UT-003022
In the Matter of U S WEST COMMUNICATIONS, INC.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)	DOCKET NO. UT-003040

TWENTY-EIGHTH SUPPLEMENTAL ORDER

COMMISSION ORDER[2] ADDRESSING WORKSHOP FOUR ISSUES: CHECKLIST ITEM NO. 4 (LOOPS), EMERGING SERVICES, GENERAL TERMS AND CONDITIONS, PUBLIC INTEREST, TRACK A, AND SECTION 272

[1] Since the inception of this proceeding, U S WEST has merged and become known as Qwest Corporation. For consistency and ease of reference we will use the new name Qwest in this order.

[2] This proceeding is designed, among other things, to produce a recommendation to the Federal Communications Commission (FCC) regarding Qwest's compliance with certain requirements of law. This order addresses some of those requirements. The process adopted for this proceeding contemplates that interim orders including this one will form the basis for a single final order, incorporating previous orders, updated as appropriate. The Commission will entertain motions for reconsideration of this order so that issues may be timely resolved.

CONTINUATION

[6]

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Black Hills Corporation
Energy, communications...and you

LINDEN R. EVANS, P.E.
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July 1, 2002

Ms. Debra Elofson
Executive Director
Public Utilities Commission
Capitol Building, First Floor
500 E. Capital
Pierre, South Dakota 57501-5070

Re: In the Matter of the Analysis Into Qwest Corporation's Compliance With Section 271(C) of the Telecommunications Act of 1996
Docket No. TC01-165

Dear Ms. Elofson:

Enclosed for filing are the original and ten copies of INTERVENOR BLACK HILLS FIBERCOM, L.L.C.'S RESPONSE TO QWEST CORPORATION'S POST-HEARING BRIEF, copies of which have been served upon all parties of record as indicated on the Certificate of Service.

Thank you very much and please call me with any question you may have.

Sincerely,

BLACK HILLS CORPORATION

Linden R. Evans

LRE/ls

Enclosure

Cc: Karen Cremer (w/encl)
Mary S. Hobson (w/encl)
Steven H. Weigler (w/encl)
David A. Gerdes (w/encl)
Harlan Best (w/encl)

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	)))))	Docket No. TC01-165

INTERVENOR BLACK HILLS FIBERCOM, L.L.C.'S RESPONSE TO QWEST CORPORATION'S POST-HEARING BRIEF

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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	)))))	Docket No. TC01-165

INTERVENOR BLACK HILLS FIBERCOM, L.L.C.'S RESPONSE TO QWEST CORPORATION'S POST-HEARING BRIEF

Preliminary Statement

Intervenor Black Hills FiberCom, L.L.C. ("FiberCom") respectfully submits that the South Dakota Public Utilities Commission ("Commission") should dismiss Qwest's Petition for Commission Recommendation ("Petition For Recommendation"). Dismissal of Qwest's Petition is appropriate because:

1. Qwest failed to meet its burden of proof as required by 47 USC § 271(d)(2)(B) and as further outlined in the Commission's April 4, 2002, Order, which provided that "Qwest may not rely solely on its SGAT to prove compliance with the 14-point checklist but should also use interconnection agreements and any other evidence to demonstrate to the Commission that it is in compliance with the checklist items." Qwest's SGAT (and as revised) is not consistent with testimony proffered by Qwest. Thus, Qwest has not provided sufficient proof that its interconnection agreements are indeed in compliance with 47 USC § 271(d)(2)(B) – the 14-point checklist.

2. Qwest's QPAP (as filed), SGAT (as filed), and previous activities within South Dakota, establish Qwest's unwillingness to provide a "level playing field" for all CLECs prior to tasting the forbidden fruit of providing interstate long distance services. To date, Qwest has not filed with the Commission a "firm" QPAP or SGAT that can be relied upon by the Commission (or judicial court) to facilitate robust wholesale competition, and to protect against "backsliding" so as to safeguard the Commission's charge of protecting the interests of South Dakota's citizens. Qwest has a proven record of working to tilt the balance of the playing field to its advantage and that of its favored CLECs. In fact, Qwest's recent responses to the Commission's on-the-record Questions appear narrowly crafted and, arguably, non-responsive to the Commission's inquiry. To the extent Qwest's responses are responsive, significant concerns are apparent such that Qwest's Petition for Recommendation should be denied.

3. The Commission's practice of caution and common sense within the regulatory environment and its implementation of regulation, has been very favorable to the protection of the public interest of the consumers of South Dakota. Consequently, in our small state the Commission must remain cautious and be wary of the invitation to be an early participant in the Federal Communication Commission's and Qwest's Section 271 experiment.

FiberCom's Recommendations

FiberCom respectfully offers the following recommendations for the Commission's consideration in this matter:

I. Dismiss Qwest's Petition For Recommendation because:

A. Qwest's attempt to use the Track A analysis to prove its compliance with the 14-point checklist has failed; and

B. Qwest has failed to demonstrate its ability to provide a level playing field for all CLECS, and consequently, cannot demonstrate compliance with checklist items 1 and 2.

II. Alternatively, FiberCom respectfully recommends that the Commission:

A. Conduct a separate proceeding(s) that would focus on Qwest's QPAP and SGAT, which proceeding(s) could include:

1. Sufficient testimony and proof by Qwest that it has indeed submitted a QPAP that has accurately and comprehensively adopted the recommendations set forth in the Liberty Consulting (Antonuk) Report;

2. Further opportunity for a focused proceeding wherein smaller South Dakota CLECs could afford to participate in addressing specific issues pertinent to their businesses; and

3. Commission-extended invitations to McLeod to participate, despite their secret agreements with Qwest;

B. Require that Qwest develop a QPAP that sufficiently addresses the following minimum concerns:

1. Adopt unambiguous dispute resolution language that will not be interpreted (by Qwest or other judicial body) to strip the Commission of jurisdiction over QPAP issues;

2. Specifically provide for Commission authority to administer, revise and oversee the operation of the QPAP in South Dakota (subject to judicial review);

3. Amend Section 16.1 of the QPAP (See Qwest Exhibit 79) to strike the condition that "Changes shall not be made without Qwest's agreement"; and

4. Sufficient audit protections to extend the sunset provision provided for in 47 USC § 271(f) beyond the statutory 3-year period;

5. Develop a program whereby a CLEC can take advantage of QPAP liquidated damages payments without being required to adopt the QPAP as part of its interconnection agreement with Qwest.

Argument

I. *Dismissal Of Qwest's Petition for Recommendation Is Appropriate*.

A. *Track A*:

Qwest still has not met its burden of proof under Track A, therefore the Petition for Recommendation should be denied. Early in these proceedings, FiberCom identified a problem with Qwest's proffered proof of checklist compliance in South Dakota. *See* FiberCom's Statement of Issues dated January 18, 2002. That is, although Qwest professes to be proceeding under Track A, it is attempting to prove entitlement under Track B. Instead, Qwest must prove checklist compliance through the 34 or more interconnection agreements with South Dakota CLECs which Qwest claims "offer evidence of its compliance with [the 14-point checklist]." *See* Qwest's Petition at Section II B (p. 21). This issue has been thoroughly briefed by Qwest and intervenors in this proceeding, and the Commission is referred to those briefs for a comprehensive discussion of the parties' respective positions.[1]

In an apparent concession to intervenors' argument that Qwest must point to an existing binding interconnection agreement with South Dakota CLECs to satisfy its Track A proof, Qwest hastened to present its interconnection agreement with KMC Telecom, which Qwest represents mirrors the SGAT. Qwest's last minute attempt to come up with a binding interconnection agreement that meets checklist compliance suffers from a number of deficiencies.

First, according to Mr. Tom Frieberg's testimony, the KMC interconnection agreement is not in effect yet. Tr. Vol. II, 4/23/02 (Frieberg) at p. 23. Qwest's application in this proceeding is based on the current state of competition in South Dakota. No CLEC is providing services under an SGAT agreement. Track A requires that Qwest enter into agreements with one or more "competing providers" before it can proceed pursuant to that track. *47 USC § 271(c)(1)(A)*. A CLEC is not a competing provider if it provides no or only *de minimus* services in South Dakota. Track A requires

[1]See generally: Qwest's Brief in Response to Motions Filed by FiberCom and MidContinent Communications; FiberCom's Reply Re: Track A Proceedings; and MidContinent's Reply to Qwest Corporation's Response to Motions Filed by FiberCom and MidContinent Communications Re: Qwest's § 271 Application.

that those CLECs which Qwest uses as evidence of Track A compliance must be an "actual commercial alternative" to Qwest's services.[2] "'Competing Provider's cannot mean a carrier such as [KMC] that at present has in place at most paper commitments to furnish service." *Id.* Qwest cannot rely on the prospect that some CLECs might opt into the SGAT and become actual commercial alternatives in the future, to prove entitlement to interLATA relief today.

Second, even if the KMC agreement were in effect, the manner in which Qwest has presented its case raises serious questions as to whether the agreement is yet binding. Much to the Commission's and the opposing parties' dismay, Qwest has conducted this proceeding more as an open negotiation rather than an analysis of the state of competition in South Dakota on the date the petition was filed, as is appropriate. At this point, no one (including a court of law) can determine with any degree of confidence what it is precisely that Qwest is offering under its SGAT and QPAP. This raises some very pointed questions regarding Qwest's agreement with KMC. For example, Qwest stated that KMC elected to adopt the then-current SGAT on March 15, 2002. See Qwest's Response to FiberCom's and MidContinent's Motions Re: Track A at p. 7. Throughout these proceedings, Qwest has negotiated and revised the SGAT into what is now the May 2002, version. *See* Qwest Exhibit 81. By its negotiation and revision, it seems apparent that Qwest concedes that the version adopted by KMC does not meet the 14-point checklist. Consequently, Qwest cannot rely on its agreement with KMC as evidence of its checklist compliance in South Dakota.

Another question that arises is whether Qwest's agreement with KMC is as "fluid" and "evolving" as the current SGAT? In other words, is the KMC agreement automatically changing to reflect the changes negotiated in these proceedings? If so, then the binding effect of the KMC agreement is questionable at best and again, Qwest has pointed to not a single binding agreement with a South Dakota CLEC to demonstrate checklist compliance as required by Track A.

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[2] *Memorandum Opinion and Order, Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a/ Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and*

It is apparent that Qwest's proffer of the KMC agreement is merely an attempt to skirt the Track A requirements by holding up a shell agreement rather than pointing to any existing agreement or agreements to prove checklist compliance in South Dakota. FiberCom respectfully submits that this procedure should be met with a summary denial of Qwest's Petition For Recommendation with instructions to prove compliance through the 34 or more interconnection agreements which Qwest claims satisfy checklist rigors.

B. SGAT & QPAP – Fluid Documents:

Further, Qwest failed to meet its burden of proof as outlined by the Commission's April 4, 2002 Order Granting Motions, which stated: ". . . Qwest may not rely solely on its SGAT to prove compliance with the 14-point checklist but should also use interconnection agreements and any other evidence to demonstrate to the Commission that it is in compliance with the checklist items." As the record clearly established – in nearly comical nature – Qwest's SGAT, even as revised, is not consistent with testimony proffered by Qwest (the Commission is reminded of comments related to numerous "typos" and "clerical errors"). Tr. Vol. II, 4/23/02 (Commissioner Sahr) at p. 121. It seems impossible (or at least impractical) that the Commission could pass muster and provide its recommendation given the current fluid condition of the SGAT and QPAP, and Qwest's desire to negotiate the terms of both during this proceeding.

Moreover, Qwest's comprehensive briefs and exhibits do not demonstrate a company that is confident in its compliance or its ability to comply in the future with the public interest component of Section 271 approval. Qwest has apparently resisted in all Section 271 proceedings any effort to remove "financial certainty" from the QPAP. *See* Qwest's Post-Hearing QPAP Brief, p. 37. Qwest's resistance on this point at least indicates Qwest's uncertainty as to future performance in its dealings with CLECs – uncertainty that must be satisfactorily resolved prior to the Commission providing the recommendation sought by Qwest. Qwest's focus to include "financial certainty" in regard to Tier 1 and Tier 2 payments, while perhaps financially prudent from Qwest's perspective,

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Oklahoma, 16 FCC Rcd 6237 ¶ 14 (2001), modified, *Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

demonstrates a company that lacks confidence in its own ability to meet performance requirements under the QPAP. Any inability to comply with the QPAP translates direct harm to competing CLECs! Consequently, Qwest's clear lack of confidence in its ability to comply must be taken as very suspect by the Commission.

C. *Level Playing Field - Secret Agreements*:

From FiberCom's perspective, the "secret" agreements that Qwest recently filed in response to the Commission's on-the-record Question are of concern. Most disturbing are the performance standards that were offered to a few favored CLECs, but were not made generally available to all CLECs – if not an outright violation of the Telecommunications Act of 1996, certainly a violation of the spirit and intent of the Act.

During FiberCom's startup, it longed for any performance standards that Qwest could be held to during its dealings with FiberCom.[3] Tr. Vol. VI, 4/30/02, (White) at p. 64. The secret agreements illustrate that FiberCom's competition was fortunate enough to obtain such performance standards. Little imagination is necessary to appreciate the obvious business advantage that McLeod, for example, has had over FiberCom. McLeod had performance standards with Qwest that it could rely upon in provisioning customer services. FiberCom on the other hand has none and remains entirely at Qwest's mercy in this regard.

Moreover, Qwest's responses to the Commission's on-the-record interrogatories ("Interrogatories") are suspect, at best. Response to Question No. 4 is especially curious and appears carefully crafted by counsel. The Commission's Question No. 4 and Qwest's response are as follows:

> **[Commission's] Question No. 4**. Has Qwest proposed any [agreement with a CLEC to not oppose Qwest's entry into the interLATA long distance market] referenced in Question 3 to any CLEC? If so, provide a written description of any such proposals, the date or dates when the proposals were made, the

[3] During the hearing, Qwest made issue as to the high level of competition in South Dakota. However, it was FiberCom's experience that Qwest did all it could to ensure FiberCom's demise. For that reason FiberCom spent more than $125,000,000 to construct its facilities-based system. But for FiberCom's strong commitment to the Northern Black Hills, robust CLEC competition would be minimal. Tr. Vol. VI, 4/30/02 (White) at p. 54.

name of the CLEC, and the names of the Qwest and CLEC representatives who were involved in the proposed agreements.

[Qwest's] Response. Qwest has not offered or proposed the same terms as stated in the November 15, 2000 Eschelon letter agreement or the McLeod verbal agreement to any CLEC operating in South Dakota. [Emphasis added.]

Qwest's choice of the phrase "the same terms as stated in the November 15, 200 Eschelon letter agreement or the McLeod verbal agreement," is an interesting choice of words. The pregnant question remains whether Qwest has proposed any agreement "similar in nature" to any agreement referenced in its response to Question No. 3. In this regard, it is interesting that Attorney W. Clay Deanhardt, an investigator for the Minnesota Department of Commerce, executed an Affidavit on June 12, 2002, the same day that Qwest filed with the Commission the Affidavits of Dan Hult and Todd Lundy in response to the Questions. (A copy of the public version of Mr. Deanhardt's June 12, 2002 Affidavit is attached hereto as Exhibit 1.) Mr. Deanhardt's investigation and conclusions as to the secret agreements are decisive on several fronts in this proceeding.

First, Qwest's secret agreements clearly provided FiberCom's competition (McLeodUSA) "[an] enormous competitive advantage[,] . . . huge pricing advantage over its CLEC competitors. . . [and] a tremendous cash advantage over its competitors. These advantages cannot be over-estimated, particularly in the very bleak economic climate that has surrounded the telecommunications industry since the fall of 2000." Deanhardt Aff. p. 15.

Second, because Qwest entered into the discriminatory, volume pricing agreements with McLeodUSA (which included price advantages in South Dakota), Qwest cannot comply with checklist Items 1 and 2. Deanhardt Aff. p. 17. The discriminatory pricing directly impacts FiberCom as explained in the June 12, 2002 Affidavit of Blake O. Fisher, a retired executive with McLeodUSA, filed with the Minnesota Department of Commerce, that states: "The volume pricing applies to all purchases made by McLeod USA from Qwest inside and outside of Qwest's 14-state ILEC territory." Fisher Affidavit, ¶ 14, attached as Exhibit 2.

Third, Mr. Deanhardt's Affidavit provides that his investigation uncovered 11 non-public agreements and apparently 2 oral agreements that Qwest entered with CLECs containing terms

and conditions related to interconnection and access to unbundled network elements. Beatterd Aff. pp. 5, 10. Yet in response to the Commission's Questions, Qwest has filed a total of 28 non-public agreements and references only one oral agreement. This issue alone should cause the Commission to dismiss Qwest's Petition for Recommendation (or at least stay all further proceedings) until either the FCC or the Minnesota Department of Commerce has decided certain matters related to the secret agreements and their impact on Qwest's desire to compete in another arena – interstate long distance.

Finally, the secret agreements identified as Exhibits 12 and 13 in Qwest's June 12, 2002 filing are very interesting in light of recent "accounting irregularities" that have apparently plagued a few U.S. corporations. The agreements identified as Exhibits 12 and 13 were executed on the same day. At paragraph 2 of Exhibit 12, Qwest contracts to settle a claim by paying a sum of money to a CLEC. At paragraph 2 of Exhibit 13, the same CLEC contracts to settle a claim by paying a sum of money to Qwest. The question must be asked whether these simultaneous agreements were executed to artificially inflate the respective financial results of these parties (again, favoring one CLEC over the rest)?

FiberCom respectfully submits that Qwest's claim that it is ready, willing and able to maintain a level playing field for all CLECs (the primary purpose of the 14-point checklist) is a ruse. Consequently, until such time that sufficient safeguards are in place to create a level playing field Qwest's Petition for Recommendation should be denied.

II. Specific Concerns With the SGAT and QPAP

A. SGAT – Dispute Resolution:

In response to the Commission's December 19, 2001, Order, FiberCom raised several concerns related to the alternative dispute resolution provisions of Qwest's SGAT. At the Commission's hearing on this matter, FiberCom addressed those concerns principally through its cross-examination of Qwest's witness, Mr. Larry Brotherson. (Tr. Vol. III, 4/24/02 (Brotherson) at 107-119). Qwest has correctly identified FiberCom's dispute resolution concerns in its Post-Hearing Brief, but it has not adequately resolved these issues. (See Qwest Corporation's Opening

Post-Hearing Brief on General Terms and Conditions, Section 272, and Track A at pp. 18-21). (Hereinafter "General Terms and Conditions Brief"). Specifically, FiberCom still has four unresolved concerns with Section 5.18 of the SGAT (Second Revision):

1. *Compelled Arbitration:* The Commission is charged with monitoring and insuring the existence of healthy competition among local exchange carriers in South Dakota. Public interest dictates that this Commission should be the presumptive arbitrator of disputes arising between LEC's if either of them so chooses. FiberCom's concern is to ensure that the SGAT's dispute resolution provisions contain a mechanism whereby a dispute can be brought to the Commission and not be subject to dismissal on a Motion to Compel Arbitration by one of the parties. Instead, disputes should be presumptively justiciable by the Commission (or other appropriate regulatory or judicial body) unless both parties agree to submit the dispute to binding arbitration. As currently drafted, the SGAT "reserves" the right of each party to resort to the Commission or to a court, agency, or regulating authority of competent jurisdiction. *See* SGAT at Section 5.18. This reservation of right to proceed before the Commission and the implied assumption that a party's dispute will remain before the Commission is illusory. The dispute resolution provisions are designed to give arbitration a "head start" over the other resolution vehicles identified therein, and thereby secure the early filing of the "preferred" method of resolution arbitration. For example, Section 5.18 requires that disputes be resolved in accordance with that section and its subparts. *See* Section 5.18.1. ("[the dispute] shall be resolved in accordance with this section"). Section 5.18.2 further provides that if a dispute arises, then "prior to any other formal dispute resolution proceedings, each party shall within seven (7) calendar days after [the Resolution Request of either party] designate a vice-presidential level employee" to negotiate in good faith to resolve the dispute. If a party is correctly following the dispute resolution procedures, it must wait at least seven days after the "resolution request" before bringing an unresolved dispute to a court or to this Commission. *See* SGAT Section 5.18.2. If a party wishes to bring a dispute to arbitration, it may do so as early as the third day after the resolution request. *See* Section 5.18.3. The procedure under Section 5.18 sets up a "race" to the forum, but the party wishing to file an

arbitration has a four-day head start over a party wishing to use a different forum, such as this Commission.

Most importantly, Section 5.18 is unclear on whether a party can be forced into arbitration upon the filing of a request for arbitration, or instead may refuse the arbitration request and proceed in one of the alternative forums. Indeed, Section 5.18 is unclear on whether a party can be assured that any forum it chooses will in fact be the forum in which the dispute is ultimately resolved. Mr. Brotherson's testimony did nothing to clear up this uncertainty. Mr. Brotherson was asked several times at the hearing whether Section 5.18 can be read to mean that if a party files a request for arbitration, but the other party does not agree to arbitrate, then no arbitration will be had. *See* Tr. Vol. III, 4/24/02, (Brotherson) pp. 107-119. Mr. Brotherson never answered the question squarely. Despite Qwest's post-hearing interpretation of his testimony to the contrary, Mr. Brotherson would not concede that a party could avoid arbitration under Section 5.18 if it so chooses. FiberCom encourages the Commission to read Mr. Brotherson's testimony on this point. *See* Tr. Vol. III, Brotherson, 4/24/02, pp. 107-119. It is relatively short and particularly telling about Qwest's ambiguous position on this ambiguous provision of its SGAT. Moreover, regardless of how Mr. Brotherson interprets the provision, and regardless of how Qwest spins his testimony, two or three years after the close of these proceedings when this dispute arises with a small CLEC which is not a party to this proceeding, any court or arbitration panel interpreting the language of Section 5.18 will be doing just that – interpreting the language within the four corners of the document – without the benefit of Mr. Brotherson's less than clear insight into the issue.

The Federal Arbitration Act ("FAA") governs the arbitrability of any dispute under the SGAT. *See* SGAT, Section 5.18.3. This seemingly innocuous clause of the dispute resolution provision bears great significance to any subsequent determination of arbitrability of a dispute. For example, assume a dispute arises between Qwest and a CLEC, and pursuant to Section 5.18.2, CLEC serves a written resolution request on Qwest as described above. Although all other dispute resolution mechanisms are not available until seven days after the request at the earliest, Qwest may file an arbitration request within three days. Under the FAA there is a presumption in favor of

arbitrability. *Ackerberg v. Johnson*, 892 F.2d 1328, 1332 (8th Cir. 1989). Therefore, courts interpret arbitration clauses very broadly in favor of arbitration, and any doubts concerning whether an issue is arbitrable must be decided in favor of arbitration. *Id.* The arbitrator also determines the facts of the dispute and the applicable law, and interprets and applies those portions of the SGAT he or she deems relevant to the dispute. *Eldorado School Dist #15 v. Continental Casualty Co.*, 247 F.3d 843, 846-47 (8th Cir. 2001). The arbitrator's decision is final and binding and essentially non-appealable except on very limited grounds. *Id.* An arbitrator's award based on incorrect facts or law is nevertheless binding in most instances, and is reversible only if the party challenging the award can demonstrate the award is completely irrational or evidences a manifest disregard for the law. *Id.*

Although not entirely clear, Qwest appears to concede that a party cannot be forced unwillingly into arbitration under the SGAT. *See* General Terms and Conditions Brief at p. 20 ("Section 5.18.3 does not mandate arbitration if a party objects to arbitration"). Yet, despite all of the uncertainty in the dispute resolution provisions, Qwest has determined that no further modification is necessary because "these provisions were thoroughly reviewed and negotiated during the Multi-state Proceeding and proceedings in other states." *Id. at 19.* Essentially, Qwest is offering an interpretation of the agreement without actually committing to the interpretation by clarifying the language in the agreement. The mere fact that the parties to this proceeding are haggling over the meaning of the language in Section 5.18 indicates a problem with the language. Even Commission Sahr, who is an attorney, finds the language "could be written more clearly." *See* Tr. Vol. VI, 4/30/02, (White) at p. 150.

Given the demonstrated uncertainty surrounding the interpretation of Section 5.18 and Qwest's apparent concession that arbitration cannot be compelled against a party's wishes, the best way to clear up the uncertainty is to amend Section 5.18 to clarify that a request for arbitration is merely an offer to arbitrate which is nonbinding unless and until both parties agree to proceed in arbitration. Public interest dictates that the SGAT very clearly state that all disputes arising out of

the agreement are presumptively justiciable by this Commission (or other appropriate legal or regulatory body) unless the parties mutually agree to arbitration on a case-by-case basis.

2. *Location of Arbitration*: The arbitration of any dispute arising out of the SGAT currently will be conducted in Denver, Colorado, unless the parties to the dispute can agree to a different location. *See* SGAT at Section 5.18.3. FiberCom's concern with this provision is that it has the potential of being oppressive and unreasonable in a majority of disputes between the parties to the Agreement. For example, a small CLEC in South Dakota would likely not have the time or resources to conduct arbitration in Denver, far away from its principal place of business. This will very likely have a chilling effect on a CLEC's willingness to proceed in arbitration on "smaller" issues which arise. As with most legal disputes, most of the witnesses and relevant documentary evidence will be located in the town or area where the CLEC conducts its business. Arbitration in Denver would require that potentially many of the CLEC's key people would have to spend time and money away from the CLEC's operations to arbitrate an issue several hundred miles away in a different state. The practical effect is to add unnecessary costs and burdens on the CLEC, and therefore, add disincentives to even filing an arbitration in the smaller cases. Qwest points out that Mr. Brotherson could not recall "a single instance where the parties had not chosen an agreeable location." *See* General Terms and Conditions Brief at p. 20. Mr. Brotherson's recollection of past arbitrations, however, is not a guarantee of Qwest's future performance under the SGAT. As it is currently written, if for whatever reason Qwest refuses to arbitrate anywhere else, the parties, their attorneys, witnesses and documents will be shipped to Denver. The burden on the CLEC in having to travel to Denver to resolve a dispute with Qwest is much greater than the burden on Qwest, given Qwest's vast resources relative to the CLECs in South Dakota. Moreover, Qwest presumably maintains people, documents and equipment in the same town or area where the CLEC does business, and where the dispute will likely arise. The CLEC, on the other hand, will likely have no presence whatsoever in Denver.

Public interest dictates that any arbitration under the SGAT will presumably take place in South Dakota, preferably in the CLEC's "home town" (or Sioux Falls or Rapid City, whichever is

geographically closer to CLEC's principal place of business) and that only if the parties so agree, will the arbitration take place in Denver or any other far away city.

3. *Limited Discovery:* Section 5.18.3.2 of the SGAT reads:

> There shall be no discovery except for the exchange of documents deemed necessary by the Arbitrator to an understanding and determination of the Dispute. Qwest and CLECs shall attempt, in good faith, to agree on a plan for such document discovery. Should they fail to agree, either Qwest or CLEC may request a joint meeting or conference call with the Arbitrator. The Arbitrator shall resolve any Disputes between Qwest and CLEC, and such resolution with respect to the need, scope, manner, and timing of discovery shall be final and binding.

FiberCom objects to any attempt to limit the discovery in an arbitration proceeding. FiberCom's concern is that the provision will be interpreted by an arbitrator as a presumption of exclusion of evidence rather than inclusion in those situations where requested discovery materials may bear moderate or marginal relevance, but might lead to discovery of relevant evidence. Both the AAA and JAMS rules provide for discovery in arbitration. The first sentence of Section 5.18.3.2 serves no purpose but to modify those rules and set up a presumption of an exclusion of evidence. This is unnecessary. Discovery in any arbitration should be governed by the rules of the arbitration, subject to the arbitrator's enforcement of those rules. Public interest dictates that Section 5.18.3.2 should be rewritten as follows:

> Qwest and CLEC shall attempt, in good faith, to agree on a plan for discovery. Should they fail to agree, either Qwest or CLEC may request a joint meeting or conference call with the Arbitrator. The Arbitrator shall resolve any disputes between Qwest and CLEC, and such resolution with respect to the need, scope, manner, and timing of discovery shall be final and binding.

As proposed, this language will allow the rules of arbitration to govern the arbitration discovery, without modification.

4. *Statute of Limitations:* Qwest agrees that the statute of limitations applicable to any dispute arising out of the SGAT should be the applicable statute of limitations provided by South Dakota law. *See* General Terms and Conditions Brief at 19. Qwest did not, however, incorporate this change into the latest revision of the SGAT. *See* Qwest Exhibit 81 - Revised South

Dakota SGAT (May, 2002) at Section 5.18.5. FiberCom also objects to Qwest's proposed change of Section 5.18.5. *See* General Terms and Conditions Brief at 19. As proposed, Qwest's new Section 5.18.5 would read:

> No dispute, regardless of the form of action, arising out of this agreement, may be brought by either Party more than two (2) years after the cause of action accrues, or as otherwise provided under South Dakota law.

Id. This language is still confusing and leaves open the door for an argument that the parties have contractually modified the statute of limitations for all noncontractual causes of action. Qwest concedes that its proposed modification "will appropriately incorporate South Dakota law governing the statute of limitations for contract actions." *Id.* This does not, however, address the statute of limitations for any potential tort or negligence or other actions arising out of the SGAT. Are such actions still subject to the contractual two-year statute of limitations? To clear up any confusion on this issue, public interest dictates that Section 5.18.5 should be stricken entirely, or should read substantially similar to the following:

> Any dispute arising out of this agreement must be brought by either party within the time for bringing such action provided by South Dakota law.

With this language, there is no question that any cause of action arising under the Agreement is subject to the applicable state statute of limitations, without modification.

B. QPAP Issues:

1. Accurate Reflection of Concessions: As the Commission is well aware, considerable doubt was raised during Staff's cross-examination of Qwest's witnesses that the filed QPAP does not accurately reflect several of the concessions Qwest otherwise suggested that it had already made. Consequently, consideration must be made as to how best to ensure such concessions have been accurately adopted prior to the Commission providing its recommendation.

2. Commission Authority Over QPAP Issues: In its current form, the QPAP strips the Commission of any independent review, amendment, and enforcement of the QPAP. Rather, pursuant to Section 16.0 of the QPAP (Qwest Exhibit 79), all reviews and amendments must be

conducted as part of the multi-state collaborative, which this Commission chose to avoid. Further (and Qwest's QPAP Brief is unfortunately not sufficiently clear on this point), Section 16.1 of the QPAP must be amended to strike the condition that "Changes shall not be made without Qwest's agreement".

3. *Successor Liability:* The QPAP should clearly provide that any successor to Qwest shall be bound by the terms of the QPAP.

4. *Sufficient Audit Protection* The QPAP should provide sufficient audit protections to extend the sunset provision provided for in 47 USC § 271(f) beyond the statutory 3-year period. Pursuant to 47 USC § 271(f), the biennial audit provision of 47 USC § 271(d) "shall cease" unless the FCC extends such 3-year period by rule or order. *See* Tr. Vol. III, 4/24/02 (Brunsting) at p. 172. Consequently, to preserve audit provisions on behalf of this Commission, FiberCom respectfully suggests that the QPAP be amended to provide for the Commission's ongoing audit privileges beyond the 3-year sunset period.

5. *QPAP Applicable to All South Dakota CLECs:* As part of these proceedings, the Commission should require Qwest to make available to all South Dakota CLECs a program whereby any South Dakota CLEC can take advantage of automatic liquidated damages payments without first being required to adopt the QPAP as part of an interconnection agreement with Qwest. FiberCom's experience in negotiating with Qwest has proven a Draconian experience. When FiberCom initiated "negotiations" with Qwest in regard to an interconnection agreement, FiberCom was only allowed one amendment – a signature line for FiberCom. *See* Black Hills FiberCom Exhibit 1, Affidavit of Kyle White. FiberCom anticipates that Qwest's 15-plus attorneys in this proceeding will respond that FiberCom could have submitted and arbitrated its concerns before this Commission. Unfortunately, however, arbitration is little consequence to a fledgling company that determined to compete with Qwest on Qwest's own turf. Consequently, FiberCom and all other South Dakota CLECs, whether new or old, should be allowed to have the advantage of the QPAP as it deals with Qwest for years to come.

Respectfully submitted this 1st day of July, 2002.

BLACK HILLS FIBERCOM, L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1ST day of July, 2002, I served the foregoing BLACK HILLS FiberCom, L.L.C.'S RESPONSE TO QWEST CORPORATION'S POST-HEARING BRIEF upon all parties of record in this matter by mailing a copy thereof properly addressed, with postage prepaid as follows:

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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Phyllis Reha	Commissioner

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 1, 2, 3, 4, 5, 6, 11, 13 and 14	MPUC Docket No. P-421/CI-01-1371 OAH Docket No. 7-2500-14486-2

AFFIDAVIT OF W. CLAY DEANHARDT

My name is Clay Deanhardt. My business address is 161 Otsego Ave., San Francisco, California, 94112. I am self-employed. I am working with the Minnesota Department of Commerce (the "Department") to evaluate Qwest Corporation's ("Qwest's") ability to comply with Sections 251 and 252 as well as Section 271 of the Telecommunications Act of 1996 (the "Act").

From January 1999 through September 2000 I was Senior Counsel for Covad Communications Company ("Covad") and responsible for Covad's legal relationship with Qwest and its predecessor U S WEST (referred to collectively throughout my affidavit as Qwest). As a result, I dealt with Qwest on an almost daily basis on issues ranging from simple provisioning issues to interconnection negotiations and all regulatory matters. I also managed various business aspects of Covad's relationship with Qwest. While at Covad, I led the operational and business team that determined, for the

first time, how to implement DSL line sharing across telephone lines carrying Qwest voice services. I also led a group of CLECs in negotiating the first ever line-sharing agreement in the telecommunications industry.

In addition, I participated in the ROC Technical Advisory Group that helped design the ongoing testing of Qwest's OSS system and drafted the performance indicator definitions being used there. I also participated, as a representative of Covad, in Section 271 proceedings held in Colorado and Washington.

From September 2000 through July 2001, I served as COO, General Counsel and, eventually, President of Epidemic Networks, a start-up company designing communications software. I have been a lawyer (licensed in the State of California) since 1992 and also have practiced in the area of wireless telecommunications.

I base this affidavit on my professional experience, personal knowledge and my investigation, on behalf of the Department, into issues surrounding Qwest's compliance with the Section 271 checklist items at issue in this docket.

I. SUMMARY OF AFFIDAVIT

My investigation on behalf of the Department has revealed facts and evidence that show Qwest is not in compliance with 47 U.S.C. §271(c)(2)(B) and that Qwest engaged in a specific course of conduct designed to improperly influence both the ROC OSS test and the Minnesota Public Utilities Commission's (the "Commission's") evaluation of Qwest's Section 271 application. As a result, the ROC test is not a reliable indicator of whether Qwest's systems can furnish the checklist items in quantities that competitors may reasonably demand at an acceptable level of quality. Specifically, I found:

(1) That Qwest entered into secret agreements with CLECs that provide the party CLECs with terms and conditions for interconnection and access to unbundled network elements ("UNEs") that were not made available to non-party CLECs. In particular, Qwest provided Eschelon Telecom, Inc. ("Eschelon") and McLeodUSA, Inc. with discounts of up to 10% on every purchase those CLECs make from Qwest, including purchases of interconnection services and UNEs. Qwest also provided Eschelon, McLeodUSA and a handful of other CLECS with operational advantages unavailable to other CLECs. As a result, Qwest is in violation of Checklist Items 1 and 2.

(2) That Qwest entered into agreements with Eschelon and McLeodUSA to prevent them from participating in state or federal review of Qwest's Section 271 application, including the ROC OSS test. During the time the OSS test was being conducted, Eschelon had information of Qwest systems failures that was not available to the testers or to the Minnesota Public Utilities Commission. Because of Qwest's conduct, the ROC OSS test is not a reliable indicator of whether Qwest can provide checklist items in quantities that competitors may reasonably demand at an acceptable level of quality.

(3) That there is evidence of actual systems failures by Qwest demonstrating that their systems are not ready for competitors to use in Minnesota. Specifically, Qwest has never provided accurate billing records to either Eschelon or McLeodUSA for a product Qwest calls UNE Star. Similarly, evidence from Eschelon indicates that Qwest has been unable to provide accurate daily usage

files to Eschelon for Eschelon to use in billing access charges for its UNE Star lines until only recently. Finally, I discovered that Qwest has been making payments to McLeodUSA since March 2000 for Qwest's failure to meet the service quality standards set out in Attachment 11 of the AT&T arbitrated interconnection agreement that McLeodUSA and many other CLECs opted into in Minnesota. These findings also indicate that Qwest has not satisfied the requirements of Checklist Items 1 and 2.

Each of my findings is supported by evidence including documents produced by Qwest, documents introduced as evidence in the Unfiled Agreements Docket (see discussion in Section III, below), and affidavits from CLEC witnesses, each of whom will be available for cross-examination in this docket. My analysis of this evidence and the conclusions I draw are based on my experience in the telecommunications industry, including my experience working with Qwest as Senior Counsel to Covad.

II. THE INVESTIGATION

In the summer of 2001, the Department began an investigation into whether Qwest was providing adequate wholesale service in Minnesota. In November 2001, the Department asked me to assist in that investigation.

Among other things, the Department asked me to investigate whether Qwest had entered into agreements with Competitive Local Exchange Carriers ("CLECs") that should have been filed for approval by the Commission but were not. The Department also asked me to help it investigate Qwest's compliance with the checklist items set out in 47 U.S.C. §271(c)(2)(B).

Over the course of my investigation, I uncovered a series of agreements and documents that evidence conduct by Qwest intended to (a) prevent relevant evidence regarding Qwest's wholesale performance from being considered in the various dockets addressing Qwest's §271 petition, and (b) leverage its wholesale power for the benefit of its retail division. I also discovered that Qwest's systems have never been modified to properly handle the UNE platform product called UNE Star that is the subject of the 8th Amendments to the Eschelon and McLeodUSA interconnection agreements.

III. QWEST ENTERED INTO A SERIES OF UNFILED, SECRET AGREEMENTS THAT VIOLATE CHECKLIST ITEMS 1 AND 2.

My investigation initially uncovered 11 non-public agreements that Qwest entered into with CLECs containing terms and conditions related to interconnection and access to unbundled network elements. Qwest did not file those agreements with the Commission. Those 11 agreements are attached to my affidavit as Exhibits WCD-1 through WCD-11. They address issues ranging from interconnection and UNE rates (Exhibits WCD-1, ¶ 7; WCD-4, ¶¶ 2, 3;WCD-5, ¶ 3; WCD-9, ¶ 2.d) to operational/provisioning issues (Exhibits WCD-1, ¶¶ 11-12; WCD-2; WCD-3, §§ 1-3; WCD-6; WCD-10, §§ 1-3; WCD-11, ¶¶ 1-5) and service quality standards (Exhibits WCD-6, §4; WCD-7).

The most significant provision from these agreements obligates Qwest to provide a 10% discount to Eschelon on every purchase made by Eschelon from Qwest between November 15, 2000 and December 31, 2005. (WCD-4, ¶ 4.)

The Department concluded that the 11 agreements should have been filed with the Commission for approval under 47 U.S.C. §252(e). On February 14, 2002 the

Department filed a complaint against Qwest captioned In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, MPUC Docket No. P-421/C-02-197, OAH Docket No. 6-2500-14782-2 (the "Unfiled Agreements Docket"). Before the hearing in that docket, the parties stipulated to certain facts around the unfiled agreements. A copy of the Statement of Undisputed Facts – which establishes that none of the 11 agreements was filed with the Commission before the Department brought its complaint – is attached as Exhibit WCD-12.

After the hearings concluded in the Unfiled Agreements Docket, McLeodUSA disclosed that it also had an agreement with Qwest to provide McLeodUSA with an 8% to 10% discount on all of its purchases from Qwest. This agreement was oral and was never filed with or disclosed to the Commission. ALJ Klein granted the Department's motion to re-open the Unfiled Agreements Docket and amend its complaint to include this new agreement.

As described below in my affidavit, these agreements show that Qwest is not in compliance with Checklist Items 1 and 2 because it is not providing interconnection or access to network elements on rates, terms and conditions that are just, reasonable and nondiscriminatory.

I am not suggesting here that this Court needs to re-litigate the issues addressed in the Unfiled Agreement Docket. Instead, these agreements demonstrate *on their face* that Qwest is not in compliance with Checklist Items 1 and 2, whether or not Qwest violated 47 U.S.C. §252 by not filing them with the Commission. The question of whether these

agreements demonstrate a violation of Checklist Items 1 and 2 by Qwest is not before the Court in the Unfiled Agreements Docket.

A. Qwest Agreed to Provide Two Different CLECs with Discounts on all Purchases Made by Those CLECs from Qwest.

Qwest has entered into agreements to provide 10% discounts on all purchases made by Eschelon, and 8% to 10% discounts on all purchases made by McLeodUSA.

In October 2000 Qwest entered into an oral agreement to provide McLeodUSA with an 8% to 10% discount on all purchases made by McLeodUSA from Qwest between October 2, 2000 and December 31, 2003. During my investigation, I interviewed Blake Fisher at McLeodUSA who confirmed the existence of this agreement. Mr. Fisher was Group Vice President and Chief Planning and Development Officer in October 2000 and he was the lead negotiator for McLeodUSA in the negotiations that resulted in the agreement. Attached as Exhibit WCD-13 is an affidavit from Mr. Fisher providing the details of the agreement.

As Mr. Fisher's affidavit indicates, the discount applies to all products and services purchased by McLeodUSA from Qwest, including access, unbundled network elements ("UNEs"), collocation, resale services, and tariffed products and services. The discount applies for all purchases made by McLeodUSA from Qwest inside and outside of Qwest's14-state territory. (Fisher Affidavit, ¶ 14). The discount is tied to McLeodUSA's commitment to purchase **[BEGIN TRADE SECRET] [END TRADE SECRET]** in products from Qwest through a "take or pay" purchase agreement

dated October 26, 2000 and effective October 2, 2000.[1] (Fisher Affidavit, ¶¶ 15 - 19 and Exh. 1.)

Because the discount agreement was never put in writing, Mr. Fisher was concerned about ensuring Qwest would live up to its agreement if McLeodUSA entered into the purchase agreement. (Fisher Affidavit, ¶ 21.) Qwest proposed that it too would enter into a "take or pay" agreement to purchase various products from McLeodUSA, thus guaranteeing that McLeodUSA would receive at least some portion of the discount. (Fisher Affidavit, ¶ 22-23.) The Qwest agreement to purchase products from McLeodUSA, however, was a sham. At the time Qwest proposed and entered into it, there was no discussion of any specific products Qwest would purchase from McLeodUSA under this agreement. (Fisher Affidavit, ¶ 23.)

Documents I found in the course of my investigation support Mr. Fisher's statements regarding this discount. Trade Secret Exhibit 3 to Mr. Fisher's affidavit is an Excel spreadsheet prepared by Qwest and sent by Audrey McKenney to Mr. Fisher, Randall Rings (McLeodUSA's General Counsel) and Steve Gray (its co-CEO at the time). The spreadsheet contains a proposal for the discount structure to be applied by Qwest to McLeodUSA's purchases. Ms. McKenney and Qwest made this proposal on October 21, 2000, just five days before Qwest and McLeod entered into the agreement. (Fisher Affidavit, ¶ 26, Exh. 3). Trade Secret Exhibit 4 to Mr. Fisher's affidavit is an e-

[1] A take or pay agreement is one in which Party A agrees to purchase a certain amount of goods and/or services from Party B during a specified time frame. If Party A does not meet its obligation to "take" the goods or services during that time frame, then it must "pay" the difference between the commitment amount and the actual amount purchased to Party B.

mail from Gary Dupler to Jim Balvanz, with handwritten responses by Mr. Balvanz to a series of questions from Mr. Dupler regarding the agreement. At the time the e-mail was created, Mr. Balvanz was McLeodUSA's CFO and negotiated many of the details of the agreement for McLeodUSA.[2] Mr. Balvanz's responses to Mr. Dupler's questions confirm the existence of the agreement and the fact that Qwest required the agreement to remain unwritten and confidential. Mr. Fisher attests to the accuracy of Mr. Balvanz's responses. (Fisher Affidavit, ¶¶ 28 - 29.)

In addition, Qwest has honored the discount agreement – at least through the third quarter of 2001. On June 3 and 4, 2002, I interviewed Lori Deutmeyer of McLeodUSA. Ms. Deutmeyer is responsible for ensuring the accuracy and payment of the discount amount by Qwest. Ms. Deutmeyer describes the process Qwest and McLeodUSA followed to determine the amount of the quarterly discount owed by Qwest to McLeodUSA in her affidavit attached as Exhibit WCD-14. Trade Secret Exhibit 1 to her affidavit contains a spreadsheet prepared by Qwest and sent via e-mail to Ms. Deutmeyer estimating the amount Qwest believed it owed under the discount agreement for Q4 '00, Q1 '01 and Q2 '01. (Deutmeyer Affidavit, ¶¶ 4-6 and TS Exh. 1.) Trade Secret Exhibit 2 to Ms. Deutmeyer's affidavit are three invoices prepared by Ms. Deutmeyer and sent to Ms. McKenney at Qwest for the discount owed by Qwest in Q4 '00 through Q3 '01. (Deutmeyer Affidavit, ¶¶ 7-8 and TS Exh. 2). Qwest paid these invoices by wire transfers confirmed by the documents attached as Trade Secret Exhibits 3 through 5 to Ms. Deutmeyer's affidavit. (Deutmeyer Affidavit, ¶¶ 9-11 and TS Exhs. 3-5.) As a

[2] Mr. Balvanz no longer works for McLeodUSA.

result of the discount agreement. Qwest has refunded **[BEGIN TRADE SECRET]** **[END TRADE SECRET]** to McLeodUSA to date.

The take or pay purchase agreement related to the discount agreement is one of eight written, inter-related agreements executed by McLeodUSA and Qwest in September and October of 2000. The 8th Amendment to the McLeodUSA interconnection agreement is another one of the eight agreements, as is the escalation agreement attached as Exhibit WCD-10. There are two other agreements – both oral – that are part of this transaction: the discount agreement discussed above and McLeodUSA's agreement to remain neutral regarding Qwest's Section 271 applications, discussed below. [3]

At about the same time Qwest entered into the volume discount agreement with McLeodUSA it entered into a second such agreement with Eschelon. The Eschelon discount agreement is written, but is hidden in a sham "consulting" arrangement that is set out in Paragraph 3 of WCD-4. Under that agreement, Qwest is required to pay Eschelon a 10% discount on all aggregate purchases made by Eschelon from Qwest between November 15, 2000 and December 31, 2005 so long as Eschelon meets its take or pay purchase commitments from an agreement attached to this affidavit as Exhibit WCD-15. Paragraph 3 of WCD-4 claims that the Qwest payment to Eschelon is for "consulting" services to be performed by Eschelon for Qwest. My investigation,

[3] Attached as Trade Secret Exhibit WCD-28 is a true copy of McLeodUSA's response to Information Request No. 1230 in the Department's ongoing investigation of anticompetitive conduct by Qwest. That response identifies the eight interrelated agreements. McLeodUSA agreed that the Department should use that response as McLeodUSA's response to Information Request No. 2106 in this docket, which is identical to IR No. 1230.

however, determined that the consulting agreement was in fact designed to hide the 10% discount that Qwest had already agreed to provide Eschelon prior to Eschelon ever suggesting that it could provide consulting services to Qwest.

The fact that the consulting arrangement was intended to evade regulatory scrutiny is evidenced by [BEGIN TRADE SECRET]

[END TRADE SECRET]

Moreover, the agreement itself ties Eschelon's "compensation" only to the amount of its purchases from Qwest. In other words, the payment had no rational relationship to the amount or value of the "consulting" services actually performed by Eschelon. In fact, the agreement provides that if Eschelon did not meet the purchase commitment set out in WCD-1S, then every penny of the discount would go back to Qwest regardless of how much work Eschelon actually did for Qwest. Likewise, if Eschelon purchased more than the $150 million purchase agreement amount, it would still get 10% off of the excess purchases. So, for example, if Eschelon purchased $500

[4] [BEGIN TRADE SECRET]

[END TRADE SECRET]

[5] [BEGIN TRADE SECRET]

[END TRADE SECRET]

million of "products" from Qwest during the term of the agreement, then Eschelon would receive a $50 million discount / refund under the agreement even if it did absolutely nothing else for Qwest under the agreement.

In addition, I have reviewed all of the documents produced by Eschelon and Qwest to the Department during my investigation, including all of the documents in Qwest's position demonstrating the work done by Eschelon under the "consulting" agreement.[6] Based on that review, the "consulting" work performed by Eschelon is no different than the work other CLECs do all the time in order to get products and services provisioned better to them.[7] In fact, the work that Eschelon did with Qwest, including all of the work described by Qwest in the Unfiled Agreements Docket, is almost identical to the work done by the CLECs that worked to implement line sharing for the first time in Minnesota. No company was paid for that work, nor would they have expected to be paid.

Moreover, Exhibits WCD-18 and WCD-19 to this affidavit show that the list of purported Eschelon "consulting" teams that Qwest provided to the Department in response to discovery requests was actually a list of teams intended to work on an entirely different issue – the implementation plan described in WCD-3. The phrase "consulting teams" did not appear on the document for the first time until after the Department issued its discovery request to Qwest on November 27, 2001.

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[6] Attached as Trade Secret Exhibit WCD-17 to this affidavit is the entire set of documents produced to the Department by Qwest as the sum total of the work performed by Eschelon for Qwest through 2001 purportedly for $2.5 million.

[7] My comments here are referring to the work that Qwest has claimed was the justification for the 10% discount – e.g. the work done on the DSL wholesale issues.

Finally, I believe the consulting agreement is a sham because there are simply too many similarities between the structure and timing of the McLeodUSA discount agreement – which McLeodUSA acknowledges exists – and the Eschelon agreement. In sum, those similarities are:

- The McLeodUSA discount agreement and the Eschelon discount agreement were negotiated and entered into by Qwest concurrently. The McLeodUSA written agreements were signed on October 26, 2000 and the Eschelon agreements were signed on November 15, 2000.
- In both cases, the parties entered into a series of interrelated agreements, including take or pay agreements with purchase volume commitments.
- In both cases, one of the interrelated agreements was filed as an interconnection agreement amendment that gave the CLEC access to UNE-Star. The two amendments are substantially similar to each other in form and content.
- In both cases, one of the agreements extracted from the CLEC was an agreement not to participate in the Commission's consideration of Qwest's Section 271 application.
- **[BEGIN TRADE SECRET]**
- **[END TRADE SECRET]**
- The same person at Qwest – Audrey McKenney – was intricately involved in the negotiation of both the Eschelon agreement and the McLeodUSA agreement.

In both cases, Qwest has attempted to hide the discount behind a sham agreement to prevent other CLECs from opting into it.

In short, there are simply too many similarities for this to be a mere coincidence in the real business world.

Based on my review of all of the evidence set out above; my review of the documents produced by Qwest, Eschelon and McLeodUSA; my review of the unfiled agreements; my business experience and my experience working with Qwest while at Covad, I have concluded that Paragraph 3 of Exhibit WCD-4 is a cover for Qwest's agreement to provide Eschelon with a 10% volume discount, the real *quid pro quo* for which was WCD-15, Eschelon's agreement to stay out of proceedings examining Qwest's application for Section 271 authority (discussed below), and Eschelon's agreement to provide other regulatory support to Qwest (also discussed below).

B. Qwest's Agreements to Provide Two Different CLECs with Discounts on all Purchases Made by Those CLECs from Qwest Violates Checklist Items 1 and 2.

The volume discount agreements I describe violate Checklist Items 1 and 2, which require Qwest to provide interconnection and access to network elements on "rates, terms and conditions that are just, reasonable and nondiscriminatory."[8] They do this by providing favorable interconnection and UNE rates to Eschelon and McLeodUSA that are not available to other CLECs.

[8] *See* 47 U.S.C. §271(c)(2)(B)(i), (ii) and 47 U.S.C. §§ 251(c)(2) and (c)(3)

As a result of this discount, Eschelon has received a $2.5 million refund on all of its purchases, including purchases for interconnection, collocation and access to UNEs to date. McLeodUSA has received more than **[BEGIN TRADE SECRET] [END TRADE SECRETS]** in discounts between October2000 and August 2001.

These discounts provided enormous competitive advantages to the CLECs that received them vis a vis the CLECs that did not. A CLEC that knows it will receive a 10% lower rate for the largest cost factor involved in providing services to its customer has a huge pricing advantage over its CLEC competitors. Or, if it chooses not to exercise that pricing flexibility, it can retain the additional funds and gain a tremendous cash advantage over its competitors. These advantages cannot be over-estimated, particularly in the very bleak economic climate that has surrounded the telecommunications industry since the fall of 2000.

One specific example of the difference that these discounts can make can be found in the Affidavit of Sarah Padula and her subsequent live testimony in the Unfiled Agreements Docket.[9] Ms. Padula is the controller for POPP Communications, a Minnesota-based CLEC. In the fall of 2000 Ms. Padula heard that McLeodUSA and Eschelon had entered into new agreements with Qwest. Qwest initially refused her request to review the agreements. Ultimately, however, Ms. Padula obtained and reviewed a copy of the 8th Amendment to McLeodUSA interconnection agreement, and

[9] The Department has informed me that the record in the Unfiled Agreements Docket has been ported into MPUC Docket No. P-421/CI-01-1373 and is therefore considered part of the record here as well. The summary that follows in this affidavit is supported by Ms. Padula's affidavit and testimony.

the exhibits to the 8th Amendment to Eschelon's interconnection agreement, from the Commission. These are the amendments that gave both CLECs access to UNE Star.

POPP was interested in UNE Star because the product contained features – including access to voice mail and DSL – that POPP customers wanted but which were not provided in other Qwest UNE-platform products. POPP felt that it was losing customers to Eschelon and McLeodUSA because those companies could offer customers a product with those features while POPP could not.

When Ms. Padula reviewed the McLeodUSA agreement, however, the economics did not make sense to her. The flat-rated cost of UNE Star contained in the amendment did not make economic sense for POPP. When she asked Kevin Saville, a Qwest attorney at the time, about this issue she was told that there were "non-disclosed" reasons that the deal made sense for Eschelon and McLeod. Qwest would not tell her what those reasons were and did not disclose the existence of the discount agreements.

As a result, POPP never opted into the UNE Star amendment and continued to lose potential customers to its CLEC competitors – Eschelon and McLeodUSA – with the amendment.

The 10% discounts, of course, are a significant part of what made the UNE-Star amendments make sense from an economic perspective.[10] The discount applies to every

[10] Another reason the economics worked for Eschelon is that it never paid the money to Qwest for the conversion of its lines to UNE Star required by Paragraph 2.1 of the 8th Amendment. Instead, Qwest and Eschelon concurrently entered into WCD-4 which required Qwest to pay Eschelon the same amount – $10,000,000 – that Eschelon was required to pay Qwest under the 8th Amendment. The net result was $0 in payments by Eschelon to Qwest. WCD-4 was not publicly disclosed, however, so Ms. Padula and

purchase made by Eschelon and McLeodUSA – not just the UNE Star purchases. The total amount saved spread across the UNE Star lines results in much lower costs for each UNE Star line, and better economics for the UNE Star amendments.[11]

The bottom line on these discounts, from a CLEC business perspective, is that they gave Eschelon and McLeodUSA unfair cost advantages compared to every other CLEC doing business with Qwest. Because Qwest entered into these discriminatory pricing agreements, it does not comply with Checklist Items 1 and 2.[12]

C. Qwest also violated Checklist Items 1 and 2 by failing to provide other CLECs with additional pricing terms that Qwest made available to Eschelon and McLeodUSA in the secret agreements.

Qwest provided both Eschelon and McLeodUSA with other pricing terms in the secret agreements that were not available to other CLECs.

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everyone else reading the 8th Amendment were led to believe Eschelon actually paid Qwest $10,000,000.

[11] This also shows that Qwest artificially inflated the publicly disclosed price of the UNE Star product to keep other CLECs from opting into the UNE Star amendments. In other words, Qwest was willing to accept less for the UNE Star purchases from Eschelon and McLeodUSA as evidenced by its agreements to the discounts. What Qwest wasn't willing to do was put that lesser amount into a publicly filed amendment that other CLECs could opt into under 47 U.S.C. §252(i).

[12] After the Department filed its complaint in the Unfiled Agreements Docket, Qwest apparently terminated WCD-4 in a further attempt to prevent CLECs from being able to opt into it should the Commission decide that the agreement should have been filed under §252. Whether or not the termination will achieve that result is a matter in dispute. The discount agreement with McLeodUSA, however, remains in place today.

In Paragraph 7 of WCD-1, Qwest agreed to provide Echelon with the best reciprocal compensation rates available to any CLEC in any of the 14 states in Qwest's ILEC territory (as opposed to simply the best available rate in Minnesota).[13]

In Attachment 3 to WCD-6, Qwest agreed to a specific methodology for calculating the switching usage fees for UNE Star, the UNE platform product offered by Qwest to Eschelon.

In WCD-4 and WCD-5, Qwest agreed to refund Eschelon $13 (increased to $16 in WCD-5) per line per month for certain UNE platform lines purchased by Eschelon from Qwest in lieu of providing accurate access information for use by Eschelon in billing interexchange carriers ("IXCs") for access.

In Paragraph 2.d of WCD-9, Qwest agreed to allow McLeodUSA to treat all interim rates as final and not to require a true-up to rates finally approved by the Commission as final for UNEs listed in McLeodUSA's interconnection agreement.

Each of these agreements results in pricing for either Eschelon or McLeodUSA that is and was not available to other CLECs in Minnesota. As a result, Qwest is in violation of Checklist Items 1 and 2.

D. Qwest entered into other secret agreements to provide certain CLECs with valuable terms and conditions for interconnection and access to network elements that were not available to other CLECs.

In addition to the UNE and interconnection pricing benefits it gave to Eschelon and McLeodUSA, Qwest agreed to several other terms and conditions for interconnection

[13] In Minnesota, this also violates Checklist Item 13.

and access to UNEs that were available only to the parties to the secret agreements. In each case, Qwest created for itself a concrete and specific legal obligation to do as the secret agreements required when it came to providing interconnection and/or UNE access to the party CLEC. In each case, however, other CLECs were prevented from making these terms and conditions parts of their interconnection agreements with Qwest because of the fact that these agreements were never publicly disclosed.

The following summarizes some of the terms and conditions that Qwest provided only to CLECs that were party to the secret agreements:

(1) Qwest agreed to provide a dedicated, on-site team of Qwest employees with access to Qwest's internal systems to help Eschelon get UNEs ordered from and provisioned by Qwest. The team was also responsible for identifying and solving the root cause of problems arising when Eschelon could not get its orders handled properly.[14] (WCD-1, ¶¶ 11-12 and WCD-2.)

(2) Qwest agreed to provision unbundled loops to Covad within the intervals published in Qwest's Standard Interval Guide 90% of the time. (WCD-7, Section 2.)[15]

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[14] Section 2.10 of the 8th Amendment to Eschelon's interconnection agreement with Qwest states that " For at least a one-year period, Eschelon agrees to pay Qwest for the services of a Qwest dedicated provisioning team to work on Eschelon's premises." This language, however, only commits Eschelon to make payments: it does not create a concrete and specific obligation in Qwest to do anything. In contrast, WCD-1 ¶¶ 11-12 and WCD-2 lay out the specific terms and conditions by which Qwest agreed to improve Eschelon's access to interconnection and UNEs through the on-site team.

[15] As I have disclosed and discussed in the Unfiled Agreements Docket, I was Senior Counsel for Covad at the time Qwest (then U S WEST) and Covad entered into the

(3) Qwest agreed to provide firm order confirmations ("FOCs") to Covad within 48 hours 90% of the time, and to change the FOC process for DSL capable, ISDN capable and DS1 capable loops. (WCD-7, Section 1.)

(4) Qwest agreed to perform line conditioning on UNE loops purchased by Covad within 24 days or less 90% of the time. On the date Qwest entered into the agreement with Covad, loop conditioning was performed on an individual case basis for every other CLEC. (WCD-7, Section 4.)

(5) Qwest agreed to make specified central offices available to USLink, Inc. and InfoTel Communications, LLC for use as local tandems.[16] (WCD-11.)

(6) Qwest agreed to change the dispute resolution terms of Eschelon's interconnection agreement with Qwest to provide Eschelon with alternatives not available to other CLECs. (WCD-1, ¶ 14.)

(7) Qwest agreed to make senior-level executives – including its CEO – available to both McLeodUSA and Eschelon to address issues arising regarding the interconnection relationships between those companies and Qwest. (WCD- 3 and WCD-10.)

In each case, Qwest provided the CLEC party to the agreement with a substantial benefit for interconnection and/or access to UNEs that was not available to other CLECs

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Covad agreement. I did not negotiate the substantive portions of the agreement, but I did compel Qwest to remove a confidentiality provision it placed in the agreement. I also informed Qwest that Covad would produce the agreement to any public body that asked for it.

[16] These terms later became part of the publicly filed settlement between U S WEST, Dakota Telecom Inc. and a group of intervener CLECs in Docket No. P-421/C-00-373, captioned In the Matter of a Complaint by Dakota Telecom, Inc. Against Qwest Corporation.

in Minnesota. For example, the Covad agreement gave Covad an enforceable agreement that Qwest would meet service quality standards for loop deliveries that, at the time, it was not meeting for any CLEC. It also gave Covad an enforceable agreement that Qwest would condition its loops – a very important issue for DSL providers – within 24 days when, at that time, every other CLEC received individual case basis ("ICB") intervals. (An ICB interval is the rough equivalent of a CLEC asking Qwest when a loop would be conditioned so the CLEC could service its customer and Qwest responding "it depends.") The Covad agreement also required Qwest to change its FOC process for certain loop types ordered by Covad.[17]

Likewise, Qwest's agreement to provide an on-site provisioning team for Eschelon gave Eschelon significant advantages over other CLECs. The agreement required, among other things, that Qwest's on-site personnel would have access to Qwest's internal systems. (WCD-1, ¶11.) No other CLEC of which I am aware has ever had on-site access to Qwest's internal systems. I know, based on my work at Covad, how difficult it is for CLECs to interact with Qwest on an operational basis on a daily level to get orders provisioned. One of my responsibilities at Covad was to solve problems that our operational teams had when they had reached the point of frustration trying to deal with Qwest directly. An on-site Qwest team with access to internal Qwest systems and

[17] Interestingly, Qwest's testimony regarding this point in the Unfiled Agreements Docket was that Qwest did not discriminate against other CLECs because it did not change its FOC process and knew, at the time, that it could not do so just for Covad's orders. If true, this suggests something nearly as disturbing: that Qwest does not consider the concrete and specific legal obligations it creates for itself to be either concrete, specific or an obligation. That should be of great concern to the Commission since much of Qwest's Section 271 application is predicated on its promises to adhere to newer written agreements, including the SGAT.

institutional knowledge of Qwest methods and procedures for processing CLEC orders would have been an enormous help. The problem here is that Eschelon got that enormous help, and no one else did.

Each of the provisions I described above gave the CLEC a specific advantage that the CLEC believed was important enough to put into a writing signed by Qwest. Having dealt with Qwest, I know the amount of political / economic capital it generally takes to get Qwest to even put anything in writing, let alone sign any kind of agreement. The bottom line is that if one CLEC believed the agreement would help them, then it is certain the same agreement would have benefited other CLECs as well.

The fact that Qwest made these terms and conditions for interconnection and access to UNEs available to only a handful of CLECs in Minnesota means that it is not in compliance with Checklist Items 1 and 2.

IV. BECAUSE QWEST ENGAGED IN A COURSE OF CONDUCT DESIGNED TO PREVENT INFORMATION REGARDING ITS COMPLIANCE WITH 47 U.S.C. §271(c)(2)(B) FROM BEING OBTAINED BY THE COMMISSION AND THE ROC OSS TESTERS, THE ROC OSS TEST IS NOT AN ACCURATE INDICATOR OF QWEST'S SYSTEMS' COMPLIANCE WITH THE COMPETITIVE CHECKLIST.

I also found during my investigation that Qwest engaged in a course of conduct designed to prevent the Commission and the ROC OSS testers from obtaining information that directly relates to Qwest's Section 271 application. As a result, I believe the ROC OSS test cannot be relied upon as a valid test of Qwest's systems.

Qwest required both Eschelon and McLeodUSA to enter into agreements to remain neutral during Qwest's Section 271 application process as a condition for entering into the interrelated agreements that include both companies' discounts and the UNE Star amendments to their interconnection agreements. In Eschelon's case, the agreement can be found in WCD-3 (which Qwest and Eschelon entered into concurrently with WCD-4, WCD-15 and the 8th Amendment to its interconnection agreement). In McLeod's case, the agreement was oral. McLeodUSA disclosed the agreement to the Department in response to DOC 2035 in this docket, a copy of which is attached as Exhibit WCD- 26.

Qwest's agreement with Eschelon resulted in some very specific and apparently very damning information being withheld from various state public utilities commissions and the ROC testers. In particular, Eschelon hired Price Waterhouse Coopers to perform an audit of Qwest's ability to provide accurate access information in daily usage files for Eschelon to use in billing access charges to IXCs. Price Waterhouse Coopers apparently concluded that Qwest's systems were not providing accurate daily usage files to Eschelon. The ROC OSS testers never had access to this information, however, because of Eschelon's agreement with Qwest.[18]

In addition, Trade Secret Exhibit WCD-27 sets out a number of ways that, according to **[BEGIN TRADE SECRET]**

[END TRADE SECRET]

[18] Qwest also asked Eschelon first **[BEGIN TRADE SECRET]** **[END TRADE SECRET]** and later to provide it and every copy Eschelon had of it to Qwest, apparently so that Qwest could bury it further. *See* Exhibits 235 and 240A in the Unfiled Agreements Docket.

Terry Murray, another consultant for the Department, explains further in her testimony how these Section 271 neutrality agreements specifically affected the ROC OSS testing results. The bottom line, however, is that there would not be any information in this docket related to either Eschelon or McLeodUSA if the Department had not pursued its various investigations. From a CLEC business perspective, the fact that two of Qwest's largest UNE customers in Minnesota have not vigorously participated in testing Qwest's systems or addressing the Commission's investigation into Qwest's Section 271 application would make me concerned that there has not been an adequate test to determine whether Qwest's systems would meet my competitive needs in Minnesota.

V. ADDITIONAL EVIDENCE THE DEPARTMENT UNCOVERED FROM ESCHELON AND MCLEODUSA SHOWS THAT QWEST'S SYSTEMS ARE NOT READY FOR A COMPETITIVE MARKETPLACE.

Over the course of my investigation, I have uncovered three additional facts showing that Qwest's systems are not ready for a competitive marketplace. First, Qwest has never once billed either Eschelon or McLeodUSA the correct amount for their purchase of the UNE Star product. Second, Qwest has been unable to provide accurate daily usage files to Eschelon for its use in billing IXCs for access to Eschelon's UNE Star lines. Third, McLeodUSA has been collecting monthly payments from Qwest for Qwest's failure to meet the service quality standards approved by this Commission in Attachment 11 to the AT&T arbitrated interconnection agreement into which McLeodUSA and so many other Minnesota CLECs have opted.

A. Qwest has never billed either Eschelon or McLeodUSA correctly for UNE Star lines.

As I discussed previously in my affidavit, both McLeodUSA and Eschelon entered into interconnection agreement amendments in the fall of 2000 that gave them access to a product Qwest calls UNE Star.[*]

As the 8th Amendments to the McLeodUSA and Eschelon interconnection agreements make clear, UNE Star was intended to be a UNE platform product. In fact, the agreements refer to it as "the Platform" rather than UNE Star. The product evolved from a desire by both CLECs to convert resold Qwest lines to UNE-P lines after the FCC made it clear that ILECs were required to provide UNE-P. (See Fisher Affidavit, ¶¶ 6-8.) The desire to convert from resale to a UNE platform makes perfect sense because the margins on services provided across UNEs generally can be much higher than the Commission mandated discounts for resale, particularly in business markets. Also, UNE-P gives the CLEC the right to charge IXCs and intraLATA toll carriers for originating and terminating access, resulting in revenue stream for the CLEC that does not exist in resale.

Unfortunately for both CLECs, Qwest's UNE-P product in the fall of 2000 did not provide an adequate alternative opportunity to the lines Eschelon and McLeodUSA were reselling. As Lynee Powers explains in her affidavit attached as Exhibit 23 to my affidavit, Eschelon actually conducted a test of Qwest's ability to provide UNE-P lines

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[*] Qwest refers to UNE Star as "UNE-M" when purchased by McLeodUSA and as "UNE-E" when purchased by Eschelon. Interestingly, UNE Star does not now and never has appeared in Qwest's wholesale product catalog or as Measures SQM.

using Eschelon employees and found significant problems. (Powers Affidavit, ¶ 3-5.) As a result, Eschelon was concerned that it would lose customers if it tried to convert those customers to UNE-P. McLeodUSA recognized the conversion problem up front. McLeodUSA was primarily a Centrex reseller at the time, and it knew that converting customers from resold Centrex to UNE-P lines would be extremely difficult. (Fisher Affidavit, ¶8.)

Unbeknownst to each other, both McLeodUSA and Eschelon began independently discussing ways to convert their existing resold lines directly to UNE-P without having to order new lines for their customers or cause any actual changes to the physical lines connecting their customers to the telephone network. The result was UNE Star, which allowed both CLECs to keep their customers on the same physical links, with the same features (including voice mail and DSL), while obtaining the legal benefits of UNE-P.

UNE Star, therefore, was really a resale product that Qwest agreed with McLeodUSA and Eschelon to convert to a UNE-Platform product. Those agreements were documented in the 8th Amendment to both CLECs' interconnection agreements.

Qwest, however, apparently has never actually converted UNE Star to a UNE Platform product in its systems. As a result, both McLeodUSA and Eschelon continue to receive invoices for UNE Star lines that are based on resale prices. (Affidavit of Ellen Copley (Exhibit WCD-24), ¶ 4; Deutmeyer Affidavit, ¶14.) Those prices, however, differ from the UNE Star flat-rate pricing set out in Attachment 3.2 to each UNE Star amendment. (Copley Affidavit, ¶ 4; Deutmeyer Affidavit, ¶15.) As a result, both

Eschelon and McLeodUSA overpay Qwest each month for their UNE Star lines. They then have to work with Qwest each month to reconcile the amount they paid Qwest pursuant to Qwest's incorrect invoice with the amount they should have paid Qwest under the 8th Amendments. (Copley Affidavit, ¶ 4 - 5; Deutmeyer Affidavit, ¶¶ 14-16.) Qwest then refunds the difference via wire transfers. (Copley Affidavit, ¶ 5; Deutmeyer Affidavit, ¶16.) To date, Qwest has refunded more than **[BEGIN TRADE SECRET] [END TRADE SECRET]** to McLeodUSA alone for UNE Star over billing in Minnesota. (Deutmeyer Affidavit, ¶ 19)

Qwest has never once billed Eschelon or McLeodUSA correctly for UNE Star since the time those CLECs entered into the UNE Star amendments to their interconnection agreements. As a result, we know that any other CLEC opting into those amendments would also receive incorrect invoices. CLECs opting into those amendments, however, might not know what they are getting themselves in for.

Terry Murray and Scott Lundquist both address this issue, and its affect on the ROC OSS test, in much greater detail in their testimony on behalf of the Department. From my business perspective, however, this is a very serious issue for CLECs trying to do business in Minnesota. As a CLEC, I would have no way of knowing that Qwest's systems cannot adequately and accurately support Qwest's provisioning of a UNE-P product that is available to me by opting into an existing agreement and which I might want to sell to my customers.

B. Qwest also has been unable to provide Eschelon with accurate access information for its use in billing access charges.

Another indication of Qwest's systems failures is Qwest's inability, apparently until only very recently, to provide accurate access information to Eschelon for its use in billing access charges.[20] (Powers Affidavit, ¶ 16.)

As I discussed briefly above, one of the great advantages UNE-P has over resale is that it provides CLECs with a new revenue source – access charges to IXCs and intraLATA toll carriers. To bill those carriers, the CLECs need accurate information regarding the minutes of use associated with each carrier that originate and terminate on the UNE-P lines. Qwest is the only entity that can provide the information in the UNE-P context because the minutes of use are measured at the switch. Qwest reports the minutes of use in what are called daily usage files, or DUFs.

Qwest was unable to provide Eschelon with accurate daily usage files for UNE Star from the beginning. As a result, Qwest agreed in WCD-4 to provide Eschelon with a monthly credit of $13 per line to make up for the inaccuracies. This amount was later increased to $16 per line per month (and made subject to a true-up) in WCD-5. In addition, Qwest agreed in WCD-5 to pay Eschelon $2 per month per line in lieu of providing accurate information for terminating Qwest's intraLATA toll traffic on Eschelon's network.

Qwest's inability to provide accurate access information to Eschelon was also the reason for the Price Waterhouse Coopers audit I discussed earlier in my affidavit. As I

[20] In my interviews with McLeodUSA personnel, they explained that McLeodUSA does not know whether Qwest is providing accurate access information to it because it has always calculated access minutes based on reports from Qwest's switch and therefore has no basis for comparison.

noted there, that audit apparently confirmed Eschelon's belief that Qwest was not providing accurate DUF information to Eschelon.

To the best of my knowledge, none of this information was ever brought to the attention of the ROC testers or other state commissions. In Ms. Power's affidavit, she says that Eschelon now believes that it is getting accurate DUFs based on recent changes made by Qwest. However, and again to the best of my knowledge, Qwest's systems have not been tested to confirm Eschelon's current belief. Scott Lundquist addresses the question of how this information affects the ROC OSS test results in much greater detail in his affidavit on behalf of the Department.

I want to point out again how serious an issue like this is from a business perspective. Based on the evidence I have reviewed, I believe it is more than likely that McLeodUSA was receiving inaccurate access information at the same time Eschelon was. Because of McLeodUSA's different operational circumstances, however, and the fact that Qwest kept all of its agreements on this topic with Eschelon secret, McLeodUSA had no way of knowing the information was incorrect. As a result, McLeodUSA may have lost millions of dollars in access revenue it could have received had Qwest's systems been accurate.

CLECs must be able to depend on Qwest's systems to provide accurate information if CLECs are ever going to be able to compete with Qwest in Minnesota. This kind of access information is solely in Qwest's control, so the CLECs are really at Qwest's mercy when it comes to this issue. Because of that, the fact that Qwest's systems never appear to have been adequately tested – at least for UNE Star – raises

serious questions about whether Qwest can demonstrate compliance with Checklist Items 1 and 2.

C. Qwest has been making monthly service quality payments to McLeodUSA, demonstrating Qwest's own acknowledgement that it cannot meet the minimum service quality standards established by the Commission in the AT&T arbitrated interconnection agreement.

Qwest's assertions that its systems are ready to meet the needs of competitors in Minnesota is also belied by the fact that it continues to make monthly service quality payments to McLeodUSA based on Qwest's admitted inability to meet the minimum service quality standards set by the Commission in 1996.

McLeodUSA is one of many Minnesota CLECs that opted into the AT&T arbitrated interconnection agreement. (Affidavit of Todd McNally, ¶ 2.) Attachment 11 to that agreement requires Qwest to issue credits to McLeodUSA when Qwest does not meet certain service quality standards. [21]

As Todd McNally explains in his affidavit, attached as Exhibit 25 to my affidavit, McLeodUSA approached Qwest before January 2000 about Qwest providing the service quality credits required by Attachment 11. McLeodUSA provided its own data measuring Qwest's performance to Qwest to get the credits, but Qwest challenged the validity of that data and whittled the credits down significantly. (McNally Affidavit, ¶ 6.)

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[21] In Mr. McNally's parlance, Appendix A to Attachment 11 sets out specific per-occurrence credits, while Appendix B sets out credits for Qwest's systemic failure to meet the direct measures of quality ("DMOQs") set out in Attachment 11. The phrase "DMOQ," however, is also used to refer to both the Appendix A and Appendix B standards.

As a result, McLeodUSA agreed to use Qwest's own performance data to determine the credits Qwest owed it under Attachment 11. (McNally Affidavit, ¶ 6.) Subsequently, when the ROC created the Performance Indicator Definitions (PID) to measure Qwest performance, McLeodUSA and Qwest began using measures OP-3, OP-5, MR-3, MR-7 and MR-9 to calculate the Attachment 11 credits owed. [22] (McNally Affidavit, ¶ 6.)

Qwest has paid McLeodUSA service quality credits under Attachment 11 for every month between January 1999 and today. (McNally Affidavit, ¶ 8.) For service failures between January and March 2002 alone, those credits total **[BEGIN TRADE SECRET] [END TRADE SECRET]**. (McNally Affidavit, ¶ 8.)

Terry Murray discusses the DMOQ issue extensively in her affidavit on behalf of the department. From my perspective, however, this is simply another indicator that Qwest cannot meet the basic standards for providing interconnection and UNE access that a CLEC needs to be able to compete in Minnesota. The Attachment 11 standards were set as threshold service quality standards when the Commission approved the arbitrated agreement in March 1997. Despite having five years to come into compliance with those minimum standards, Qwest's own data shows that it still cannot meet them. CLECs, however, have no other place than Qwest to go to get access to the telecommunications customers and the phone network. If Qwest, the sole provider of

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[22] Note that Qwest and McLeodUSA are only using 5 measures out of the 20 DMOQ measures in Attachment 11 to determine the credits owed by Qwest to McLeodUSA. Despite trimming down the standards that Qwest has to meet, however, Qwest still is paying McLeodUSA an average of just over **[BEGIN TRADE SECRET] [END TRADE SECRET]** per month in credits over the last 12 months for which data is available. (*See* McNally Affidavit, ¶ 8.)

necessary access, cannot meet the minimum thresholds for service quality established by the Commission, then CLECs cannot effectively compete with Qwest in Minnesota.

VI. CONCLUSION

Based on my investigation and review of the evidence discussed above, I believe Qwest is not in compliance with Checklist Items 1 and 2 and that the Commission should therefore not approve of Qwest's application to provide interLATA long distance services in Minnesota. Further, as a former CLEC business person, I am deeply disturbed by the evidence I have seen suggesting that Qwest would rather cherry-pick CLECs out of the 271 process through undisclosed discounts and other secret agreements than it would do the work necessary to open its network and the market to meaningful competition in Minnesota.

I declare under pain and penalty of perjury under the laws of the United States of America and the State of Minnesota that the foregoing is true and correct.

Further Affiant Sayeth Not

Executed this 12th day of June, 2002.

W. Clay Deanhardt

Signed before me this

Notary Public

AFFIDAVIT OF BLAKE O. FISHER

1. My name is Blake Fisher. I retired in May 2002 from McLeodUSA where I held a variety of senior executive positions, including, at relevant times, Regional President for the Western Region as well as Group Vice President and Chief Planning and Development Officer. I now live in Park City, Utah.

2. This affidavit explains the circumstances surrounding the negotiation and implementation of an agreement with Qwest Corporation ("Qwest") to provide McLeodUSA with volume pricing for all purchases made by McLeodUSA from Qwest. The events described in my affidavit took place when I worked for McLeodUSA.

3. I was McLeodUSA's lead negotiator for the negotiations that resulted in a series of agreements, including the volume purchase agreement. Initially, I was negotiating with John Kelley at U S WEST. Later I was negotiating with my counterpart at Qwest, Greg Casey. Following the merger with U S WEST, Mr. Joe Nacchio, Qwest's CEO attended a meeting in Cedar Rapids, Iowa, where, among other things, the possibility of volume pricing was discussed. I also attended that meeting. Qwest representatives at that meeting informed us that they were meeting with many of Qwest's large customers. They also told us that Qwest intended to treat us as a large customer. Mr. Nacchio explained that Mr. Casey was responsible for our wholesale relationship with Qwest. Mr. Casey told me that Mr. Nacchio had to give final approval to any significant transactions between Qwest and McLeodUSA.

4. The U S WEST negotiating team, and later the Qwest negotiating team, also included Audrey McKenney, who reported to Mr. Casey, and Arturro Ibarra, who reported to Ms. McKenney. Stephen Davis was occasionally involved in the negotiations, particularly when the topic turned to regulatory matters.

5. The McLeodUSA negotiating team included Jim Balvanz, who was a Vice President of Finance and Stacey Stewart, who was a Vice President of ILEC Relations and Performance Measurements at the time. This is the same team that had negotiated with U S WEST before the merger. Once Mr. Casey and I negotiated broad agreement parameters, the other members of our teams would work on negotiating the details of the agreements.

6. The genesis of the agreements that include the volume pricing occurred well before the Qwest / U S WEST merger. Prior to the passage of the Telecommunications Act of 1996, McLeodUSA purchased Centrex Common Blocks from U S WEST under various state retail tariffs and re-sold the services to our customers. On the eve of the signing of the Telecommunications Act of 1996, U S WEST withdrew its offering of Centrex Common Blocks to new customers in all of its 14 states. McLeodUSA sought state regulatory action to stop or reverse U S WEST's unilateral withdrawal of its wholesale Centrex product. We were largely successful in these regulatory cases in retaining our right to resell U S WEST's Centrex product. McLeodUSA continued reselling U S WEST (and then Qwest) Centrex products in those states in which our right to resell the product was upheld. We also began reselling 1FR and 1FB under the resale provisions of the Telecommunications Act. Later, we began to avail ourselves of UNE-Platform products.

7. Personally, the Centrex Common Block products and the subsequent resale products would not work for McLeodUSA over the long term. The margins on both forms of resale were too thin to sustain and grow the company.

8. Before the merger, we approached U S WEST and told them that we wanted to convert all of our customers to UNE-P, which had much better margins. U S WEST said that we could not just convert our customers – that there would be a lot of work and cost involved – and that the conversion would be difficult and time consuming.

9. I explained to U S WEST that all we really wanted to do was to leave our customers on the same lines that they currently had, with the same features, but to get the best pricing available. At the time that was UNE-P pricing and we told U S WEST we were entitled to such pricing for the services we were using.

10. U S WEST responded that it believed it could provide McLeodUSA with an acceptable product at pricing that worked across its region, so we began negotiating the parameters of the product and its pricing.

11. Prior to the Qwest / U S WEST merger, we were unable to agree on pricing that made economic sense for McLeodUSA. After the merger, however, Qwest expressed a desire to improve its relationship with McLeodUSA as a customer. Joe Nacchio indicated at the meeting in Cedar Rapids referenced above that Qwest recognized competition was developing in its local markets. Therefore, Qwest intended to strengthen its wholesale business and relationships with its wholesale customers. Specifically, Qwest indicated that it hoped to find a way to make it economically and operationally attractive to keep our traffic on Qwest's network if possible.

12 The result of our continued negotiations was a product that Qwest calls UNE-M or UNE Star. UNE-M was intended to be a flat-rated, UNE platform product that allowed us to convert our resold Centrex lines directly to UNE-M lines. As we continued to discuss pricing, however, it was clear that the pricing Qwest offered was not good enough for McLeodUSA to warrant keeping our traffic on Qwest's network.

13 When we pointed this out to Qwest, the concept of Qwest providing McLeodUSA with improved pricing on all of our purchases – based on volume commitments – was developed during our negotiations. I do not now recall whether Qwest or McLeodUSA first proposed the idea, but it became a central component of the agreements we were discussing.

14 After substantial negotiations with U S WEST first, and then with Qwest, Qwest agreed to provide McLeodUSA the benefit of volume pricing on all of McLeodUSA's purchases from Qwest. The volume pricing applies to all products and services purchased by McLeodUSA from Qwest, including access, wholesale long distance, capacity trunking, private line, unbundled network elements ("UNEs"), collocation, resale services, and tariffed products and services. The volume pricing applies to all purchases made by McLeodUSA from Qwest inside and outside of Qwest's 14-state ILEC territory.

15 As a result of our negotiations, McLeodUSA and Qwest entered into a number of written agreements between September 19, 2000 and October 26, 2000, including three that are essential to understanding the volume pricing:

a. Purchase Agreement signed October 26, 2000 and effective October 2, 2000 covering purchases by McLeodUSA from Qwest (the "McLeodUSA Purchase Agreement").

b. Purchase Agreement signed October 26, 2000 and effective October 2, 2000 covering purchases by Qwest from McLeodUSA (the "Qwest Purchase Agreement").

c. The 4th Amendment to the McLeodUSA/Qwest interconnection agreement.

16. The 4th Amendment to the McLeodUSA interconnection agreement with Qwest set out the terms and conditions for the UNE Star product, including state-specific flat rate pricing negotiated by Qwest and McLeodUSA.

17. The McLeodUSA Purchase Agreement is a take or pay agreement. That is, McLeodUSA committed to purchase a specified volume of products from Qwest during specified time periods. If McLeodUSA fails to make the requisite purchases, it is still obligated to pay Qwest the difference between the dollar amount of purchases it actually made and the minimum commitment amount in the purchase agreement. In Year 1 of the contract (ending on December 2001), the commitment was [TRADE SECRET BEGINS] [TRADE SECRET ENDS]. By the end of 2002, the cumulative commitment is [TRADE SECRET BEGINS] [TRADE SECRET ENDS] and, by the end of 2003, it is [TRADE SECRET BEGINS] [TRADE SECRET ENDS]. We believed we could exceed these commitments and expected that we would. Exhibit 1 is a true copy of the McLeodUSA Purchase Agreement, which was entered into by McLeodUSA and kept by it in the normal course of business.

[redacted] The Qwest Purchase Agreement is also a "take or pay" agreement. In addition, Qwest orally agreed to increase its commitment to give McLeodUSA a volume purchase discount of up to [redacted]%, to provide an incentive for additional purchases under the McLeodUSA Purchase Agreement. In order to obtain a higher percentage, McLeodUSA had to increase its purchases.

[redacted] The percentage reduction depends on the volume of purchases by McLeodUSA from Qwest. The table below clearly sets forth how the volume pricing works:

Qwest Will Charge McLeodUSA	2001		2002	
Aggregate Purchases	Percentage Reduction	Aggregate Purchases	Percentage Reduction	Aggregate Purchases	Percentage Reduction
[redacted]	[redacted]%	[redacted]	[redacted]%	[redacted]	[redacted]%
[redacted]	[redacted]%	[redacted]	[redacted]%	[redacted]	[redacted]%
[redacted]	[redacted]%	[redacted]	[redacted]%	[redacted]	[redacted]%

[redacted] The volume pricing is applied to every purchase made by McLeodUSA, not just the purchase above the minimum. So, for example, if McLeodUSA spends [TRADE SECRET BEGINS] [TRADE SECRET ENDS] with Qwest in 2002 it will be entitled to a [TRADE SECRET BEGINS] [TRADE SECRET ENDS] million

payment, calculated by multiplying 8% times every dollar spent. If McLeodUSA spends **[TRADE SECRET BEGINS] [TRADE SECRET ENDS]** with Qwest, then it will be entitled to receive **[TRADE SECRET BEGINS] [TRADE SECRET ENDS]** million, calculated by multiplying 10% times every dollar spent. If McLeodUSA purchases fall below certain levels, there is no guaranteed payment.

21. I asked Qwest how I could be sure that it would live up to its agreement to provide the discount if McLeodUSA signed the Purchase Agreement. Qwest responded by suggesting a mechanism to guarantee that McLeodUSA would receive a payment of at least a portion of the agreed-to discount each year in return for its minimum purchase requirements, that increased over time.

22. That mechanism suggested by Qwest is the combination of the Qwest and McLeodUSA Purchase Agreements. The Qwest Purchase Agreement requires Qwest to purchase **[TRADE SECRET BEGINS] [TRADE SECRET ENDS]** million in products from McLeodUSA in 2001, **[TRADE SECRET BEGINS] [TRADE SECRET ENDS]** million in products in 2002, and **[TRADE SECRET BEGINS] [TRADE SECRET ENDS]** million in products in 2003.

23. The Qwest Purchase Agreement identifies products offered by McLeodUSA. We did not discuss any specific products that Qwest would purchase from McLeodUSA. Thus, McLeodUSA viewed the Qwest Purchase Agreement as a mechanism to insure that McLeodUSA would receive some, if not all, of the benefit it was entitled to under the oral volume pricing agreement. The commitment amounts in the Qwest Purchase Agreement were calculated by applying an 8% volume discount percentage

(from Qwest and McLeodUSA's oral agreement) to the maximum McLeodUSA projected expenditures for that percentage.

24. Another component to completing the transaction that gave McLeodUSA access to UNE-M and the purchase volume pricing was McLeodUSA's agreement to remain neutral regarding Qwest's Section 271 application. Qwest made it clear to me that for Qwest to enter into the UNE-M and volume pricing arrangements, McLeodUSA had to agree to remain neutral on Qwest's Section 271 applications. McLeodUSA agreed to remain neutral provided Qwest complied with all of our agreements and with all applicable statutes and regulations.

25. Exhibit 2 to this affidavit is a true copy of a document titled "Outline of Major Terms" and dated September 19, 2000. This document was created jointly by Qwest and McLeodUSA at the September 19, 2000 meeting. It is an accurate description of the terms that had been discussed between the parties as of that date, including the terms hammered out during an all-day negotiation session.

26. Exhibit 3 to this affidavit is a true copy of an e-mail I sent to Jim Balvanz, who forwarded it to Stacey Stewart on October 23, 2000. Attached to Mr. Balvanz's e-mail is an October 21, 2000 e-mail from Audrey McKenney to Mr. Balvanz, Randall Rings (McLeodUSA's General Counsel) and me. Ms. McKenney's e-mail included the attachment printed out on the second page of Exhibit 3. Exhibit 3 was received and kept by me in the ordinary course of business.

27. The second page of Exhibit 3 is an Excel spreadsheet prepared by Qwest showing Qwest's counterproposal to a volume pricing proposed by McLeodUSA during the

negotiations discussed above. In this spreadsheet, Qwest proposed a discount rate ranging from 6.5% to 10%.

28. Exhibit 4 to this affidavit is a true copy of an e-mail found by McLeodUSA in Mr. Balvanz's files in the course of responding to information requests from the Department of Commerce. Mr. Balvanz no longer works with McLeodUSA. I was copied on this e-mail.

29. Exhibit 4 contains five questions asked of Mr. Balvanz by Gary Dupler, then our Group Vice President of Network Development, and Mr. Balvanz's handwritten responses to those questions. The questions all relate to the discount agreement with Qwest. At the time, Mr. Dupler was responsible for network planning at McLeodUSA. I have read through each of the questions and responses on Exhibit 4. I am familiar with Mr. Balvanz's handwriting and recognize the handwriting on Exhibit 4 to be his. Based on my personal knowledge, Mr. Balvanz's handwritten responses to each question are accurate and correct.

I declare under penalty of perjury under the laws of the United States of America and the state of Minnesota that the foregoing is true and correct.

Further affiant sayeth not.

Signed this ___ day of June, 2002

_____
Blake O. Fisher

Signed before me this ___ day of June, 2002.

_____
Notary Public