Exhibit

22-28

BEFORE THE NEW MEXICO 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

Report on Checklist Items 3, 7, 8, 9, 10, and 12

TABLE OF CONTENTS

Scope of This Report 1
Background 1
"Frozen" SGAT Language 2
Summary of Findings and Conclusions 3
Preliminary Issue: CLEC-Specific Information 3
Checklist Item 3: Poles, Ducts, Conduits and Rights of Way 3
Checklist Item 7(I): 911/E911 4
Checklist Item 7(II): Directory Assistance 5
Checklist Item 7(III): Operator Services 5
Checklist Item 8: White Pages Directory Listings 6
Checklist Item 9: Numbering Administration 7
Checklist Item 10: Call-Related Databases and Signaling 7
Checklist Item 12: Local Dialing Parity 8
Deferred Issues 8
Preliminary Issue: CLEC-Specific Information 8
Checklist Item 3: Access to Poles, Ducts, Conduits and Rights of Way 10
Background 10
Issues Outside The Scope Of These Workshops 11
Issues Resolved During This Workshop 11
Issues Remaining in Dispute – Checklist Item 3 16
Checklist Item 7(I): 911 and E911 Services 32
Background 32
Issues Resolved During this Workshop 33
Issues Deferred to Other Workshops 34
Checklist Item 7(II): Directory Assistance 35
Background 35
Issues Resolved During this Workshop 35
Issues Remaining in Dispute 37
Checklist Item 7(III): Operator Services 39
Background 39
Issues Resolved During this Workshop 40
Checklist Item 8: White Pages Directory Listings 41
Background 41
Issues Resolved During this Workshop 42
Issues Remaining in Dispute 45
Checklist Item 9: Numbering Administration 50
Background 50
Checklist Item 10: Call-Related Databases And Signaling 51
Background 51
Issues Resolved During this Workshop 51
Checklist Item 12: Local Dialing Parity 53
Background 53
Issues Resolved During this Workshop 54

Scope of This Report

This report addresses issues associated with the following checklist items:

* Item 3: Access to Poles, Ducts, Conduits, and Rights of Way
* Item 7: 911/E911, Directory Assistance, Operator Services
* Item 8: Directory Listings
* Item 9: Number Administration
* Item 10: Call-Related Databases and Signaling
* Item 12: Local Dialing Parity

The Summary of Findings and Conclusions section of this report identifies the issues raised under each checklist item, including those resolved during the course of the workshops and those that remain in dispute. For those issues remaining in dispute, this summary section describes the recommended resolution of the disagreements. The later sections of this report provide more detailed discussions of the issues, particularly those that remain in dispute. The Summary of Findings and Conclusions and the detailed sections use the same numbering for these disputed issues.

Background

The purpose of this report is to assist the seven state Commissions (Iowa, Idaho, Utah, New Mexico, North Dakota, Montana, and Wyoming) in reaching a decision as to what recommendations to make to the Federal Communications Commission (FCC) on the question of whether Qwest should be granted the authority to provide in-region interLATA services. To be eligible to provide in-region interLATA service, Qwest must meet the competitive checklist and other requirements of Section 271 of the Telecommunications Act of 1996 (the Act). A Qwest May 4, 2000 filing encouraged the several state commissions to consider a multi-state process to jointly review track A (competition issues), various aspects of the 14-point competitive checklist, Section 272 (separate subsidiary issues), and public interest considerations. Iowa, Idaho, Utah, North Dakota and Montana joined together (with Wyoming joining in September 2000) in a multi-state collaborative proceeding, and issued procedural orders to govern the conduct of joint workshops. The joint workshops provide a common forum for all participants in all the states involved to present, for individual consideration by the six commissions, all issues related to Qwest's Section 271 compliance.

The procedural orders require that the checklist items covered by this report, which were deemed to be the "Less Controversial Checklist Items", be treated differently from all of the other checklist items:

> *Based on Qwest's assertion that substantial agreement and progress on checklist Items 3,7,8,9,10 and 12 (Poles/Ducts/Conduits, 911/E911, Directory Assistance, Operator Services, White Pages Listings, Number Administration, Signaling/*

Access Databases, and Dialing Parity) has been reached among parties in other Qwest states and that any outstanding issues should be able to be discussed and resolved among parties without necessitating an in-person workshop, the Commissions agree to develop the record on these checklist items through written filings. Such a process will include the filing of Qwest's case, discovery, comment cycles, and either a joint resolution filed by the parties, or a report from staff (developed with the assistance of the Outside Consultant) to each commission based on the written record. To the extent that agreement cannot be reached on these checklist items, mini-workshops on isolated topics may be scheduled or issues may be deferred to the state commissions for resolution. The remaining checklist items would be addressed through a series of three workshops as outlined below.

Qwest filed written testimony on these six checklist items on September 5, 2000. AT&T, WCOM, and McLeodUSA filed responsive testimony or comments in October 2000. Qwest submitted rebuttal on November 5, 2000. Qwest submitted a brief, as did AT&T and XO Utah. Both Qwest and AT&T submitted reply briefs on January 22, 2001. The parties were given until the week of February 4, 2001 to identify any New Mexico issues that should also be considered in this report. No notice of the existence of such issues was received. Neither have the parties submitted the proposals for joint issue resolution contemplated by the procedural orders.

This report separately discusses two types of issues:

- Those identified in the filings of the parties but apparently resolved during the workshop process
- Those that remain subject to disagreement, or where it is not clear that the parties have reached agreement.

This report describes the disputed issues in more detail and it presents recommended resolutions of them. It is being submitted individually to each of the six commissions, for their independent determinations on the merits of the issues involved, or for their decision on what additional evidence, comment, or argument, if any, should be held as part of their deliberations precedent to providing consultation to the Federal Communications Commission.

"Frozen" SGAT Language

We have adopted a general rule that requires Qwest to file, before briefing of the issues a copy of SGAT language related to those issues. This language is intended to reflect language on which there is general agreement among the parties and language proposed by Qwest to address issues or language on which there is not general agreement. The purpose of this language is to provide a reference base first for the participants' briefs and second for the commissions in reviewing this report. It is not intended to offer new language that has not before been seen or discussed in workshops, filings, or discussions among the parties.

This rule came into being after the participants filed briefs on the issues addressed in this report. Qwest filed the required language here on March 5, 2001. The language is set forth as an appendix

to this report. Therefore, the participants have not had a chance to brief any disagreements with any language that Qwest may have added or changed since its original and rebuttal filings on the issues addressed by this report. The parties may do so in any response they provide to the individual commissions within the 10-day response period provided.

This report assumes that the SGAT language filed by Qwest on March 5, 2001 will remain in effect, except as commission acceptance of any of the findings and conclusions of this report may require such language to change. Therefore, to the extent that any further proposed changes in SGAT changes are proposed (e.g., as a result of agreements reached in similar workshops in other states) they must be separately filed and supported, in order that the commissions may consider any issues associated with such proposed language changes. Absent individual commission approval of any such proposed changes, the language set forth in the appendix hereto shall be considered to be the final language for purposes of any state SGAT review or consultation with the FCC under Section 271.

Summary of Findings and Conclusions

Preliminary Issue: CLEC-Specific Information

AT&T and a number of other CLECs argued that they did not need to present evidence in these workshops concerning their experiences with Qwest service. Rather, most of the CLECs in this proceeding have focused upon SGAT terms and conditions and have not submitted evidence on Qwest's provision of service. In an early ruling, the outside consultant informed all parties that they must raise all relevant issues in this proceeding and that failure to do so could foreclose later arguments before the individual commissions that they were not given the opportunity to raise specific issues about the quantity and quality of Qwest's service.

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

Qwest addressed compliance with the requirements of this checklist item in the direct and rebuttal testimony of Mr. Freeberg. Qwest's evidence that it is providing access now in the participating states was not substantially challenged. Other participants did, however, raise many issues about that compliance. One of them, the non-recurring charge issue of XO Utah, will have to be addressed elsewhere; these workshops are not intended to be costing proceedings. In response to some twenty others, Qwest either made SGAT changes that resolve the underlying concern, or it provided an adequate explanation in support of existing SGAT language. Nevertheless, a significant number of issues remained in dispute (including in this count several MCI and ISA issues that were not pursued after its original list of questions). Those that do not seem further SGAT change include:

1. Reciprocity of Access Obligations: Qwest removed the language that had given rise to the concern
2. Defining Ownership or Control Rights: CLECs did not identify any further changes (beyond those Qwest agreed to make) needed to address the underlying concerns

4. Scope of Access in the MDU Environment: CLECs also did not identify any further changes (beyond those Qwest agreed to make) needed to address the underlying concerns
5. Payment for Facility Re-arrangement Costs: Qwest's existing SGAT language is already appropriate
9. Inspection Costs: the SGAT already limits the application of costs in a reasonable way
10. Time Limits for Remedying Non-Complying Attachments: the SGAT logically adopts a case-by-case approach for establishing limits
11. Schedules and Fees for Inspections: the SGAT appropriately allows consideration of individual CLEC performance history and the needs of particular inspections in setting schedules and fees
12. Unauthorized Attachment Fee Waiver

However, there are three cases in which the participants have identified the need for alteration of the SGAT, in order to satisfactorily establish that Qwest has a legal obligation to serve in a manner that comports with the intent and requirements of this checklist item:

3. Access to Landowner Agreements: CLECs should be given an option, at their risk, to obviate the need for prior landowner consent to secure access to the agreements
8. Curing CLEC Breaches: the obligation for CLECs to secure cure provisions from landowners should be eliminated
6. Large-Request Response Times: Qwest should not have defined cases where it can be relieved of the 45-day interval, but should be able to secure relief on a case-by-case basis.

Qwest should not be deemed to be in compliance with this checklist item before it makes the changes necessary to deal with these three issues. However, upon making those changes, Qwest can be deemed to have met its burden of proof, subject to the completion and commission consideration of the results of any OSS testing that may relate to the item. It is not appropriate to hold this checklist item open for consideration of as-yet unidentified right of way issues that may arise in the emerging services workshop. The participants have agreed that any such issues, if they arise at all, can be adequately dealt with in the workshops and report that will address emerging services.

Checklist Item 7(I); 911/E911

Qwest addressed compliance with the requirements of this checklist item in the Direct and Rebuttal Testimony of Margaret Bumgarner. AT&T stated in the affidavit of Kenneth Wilson that it had no remaining disputes about this item; moreover, AT&T's brief made no mention of this item. All previously disputed issues with respect to Qwest's compliance with this checklist item have been resolved in prior workshops in other states. Qwest has made amendments reflecting the agreed to resolutions in the six state SGATs.

McLeodUSA raised several questions about the item 7(I) provisions of the SGAT, but did not expressly contest any issue. Qwest has provided responsive answers to those questions; the responses justified the current SGAT treatment of the underlying issue; and McLeodUSA filed no brief item.

Qwest has met its burden of proof and, as there are no further issues to be resolved, except for the routine pricing issue, which can be adequately addressed under Workshop One. Qwest has supported a finding that this checklist requirement has been met, subject to the completion and commission consideration of the results of any OSS testing that may relate to the item.

Checklist Item 7(II): Directory Assistance

Qwest addressed operator services and directory assistance in the Direct and Rebuttal Testimony of Lori Simpson. AT&T commented on compliance with checklist item 7(II) (Directory Assistance), and noted that its issues of concern were resolved in workshops in other states. Qwest made changes to the Six State SGATs to reflect these resolutions.

McLeodUSA raised several questions about the item 7(II) and (III) provisions of the SGAT, but did not expressly contest any issue. Qwest has provided an answer to those questions; Qwest also agreed to several SGAT revisions to respond to McLeodUSA's questions. McLeodUSA filed no brief on this checklist item.

WCOM argued that bulk transfer of the CNAM database should be required as a UNE. However, WCOM failed to establish the existence of the circumstances or conditions necessary to a determination that such a UNE should be created in the participating states. Additionally, WCOM did not make a showing that would call for the conclusion that it should be entitled to bulk transfer of the entire CNAM database as a UNE.

The evidence submitted by Qwest therefore supports a finding that it has complied with this checklist item, subject to the completion and commission consideration of the results of any OSS testing that may relate to the item.

Checklist Item 7(III): Operator Services

Qwest presented the direct and rebuttal testimony of Lori Simpson on the issue of operator services. McLeodUSA raised several questions about the item 7(III) provisions of the SGAT, but did not expressly contest any issue. Qwest has provided an answer to those questions; Qwest also agreed to several SGAT revisions to respond to McLeodUSA's questions. McLeodUSA filed no brief on this checklist item. No other party filed any comments or testimony on this item.

Qwest has supported a finding that this checklist requirement has been met, subject to the completion and commission consideration of the results of any OSS testing that may relate to the item.

Checklist Item 8: White Pages Directory Listings

Qwest addressed compliance with the requirements of this checklist item in the direct and rebuttal testimony of Lori Simpson, which discussed Qwest's commitment to provide nondiscriminatory access to white pages directory listings and the Company's processes and procedures for providing listings. AT&T and McLeodUSA commented on Qwest's compliance with this checklist item. Qwest's evidence that it is providing access now in the six states was not substantially challenged. Other participants did, however, raise a number of issues about that compliance. In response to a number of them, Qwest either made SGAT changes that resolve the underlying concern, or it provided an adequate explanation in support of existing SGAT language. Nevertheless, a significant number of issues remained in dispute (including in this count some McLeodUSA issues that were not pursued after its original list of questions). Those that do not merit further SGAT change include:

2. Reciprocity in Release of Listings: McLeodUSA appeared to ask for the CLEC right to release Qwest listings if the CLEC gave the same right to Qwest as to its listings, an approach that is not appropriate from a business perspective and that would be impracticable to administer, even if it were appropriate
3. Applicability of Tariff Liability Limits: the SGAT is actually consistent with existing tariffs
4. CLEC Knowledge of State Laws Involving Listings: CLECS should be responsible for following the requirements of state law when they provide Qwest with information about their own customers
5. Adding a Section 222(e) Reference to SGAT Section 10.4.2.16: McLeodUSA provided no justification or rationale for this addition
7. Dex's Continuation as Directory Publisher: McLeodUSA's concern can be adequately handled if and when Dex no longer publishes directories.

However, McLeodUSA did raise one issue that identified the need for alteration of the SGAT, in order to satisfactorily establish that Qwest has a legal obligation to serve in a manner that comports with the intent and requirements of this checklist item:

6. Adding the Term Contractor to Section 10.4.2.26: If Qwest should contract with a non-affiliate to publish directories, that contractor should have the same obligations as Qwest or its affiliates with respect to customer guide pages.

In addition, there is one issue that must remain open pending the completion of OSS testing and the consideration by the commission of the results of that testing:

1. Parity of treatment for CLEC listings: Qwest has yet to complete changes that it agreed to make in response to findings from the Performance Measures audit.

Qwest should not be deemed to be in compliance with this checklist item before:

* It makes the changes necessary to deal with the "contractor" issue

- The states have considered the results of efforts to change methods for updating directory listings for CLECs.

However, subject to these two qualifications, Qwest can be deemed to have met its burden of proof, subject also to the completion and commission consideration of the results of any other OSS testing that may relate to the item.

Checklist Item 9: Numbering Administration

Qwest addressed number administration issues in the Direct and Rebuttal Testimony of Margaret Bumgarner. AT&T submitted comments on this checklist item; AT&T has acknowledged that its concerns about this checklist item can be deferred to other workshops or addressed after the completion of OSS testing. Concerns about the Qwest policy to provide CLECs one Local Routing Number ("LRN") per LATA was deferred to the workshop addressing Item 1. AT&T's concerns about number reassignment when numbers are ported have been deferred to the Workshops on Item 11. AT&T also agreed that its concerns about provisioning NXX prefixes would be evaluated in the ROC proceedings.

All issues, except for a narrow and procedural one appear to have been either resolved or moved to the ambit of Workshop One issues. The remaining issue is whether there should be a conditional determination of Qwest compliance pending review of audited performance results or whether no determination should be made until after those results become available.

Qwest has met its burden of proof and as there are no further issues to be resolved, except for those to be dealt with in other workshops. Qwest has supported a finding that this checklist requirement has been met, subject to the completion and commission consideration of the results of any OSS testing that may relate to the item.

Checklist Item 10: Call-Related Databases and Signaling

The AT&T concerns appear to be resolved. The WCOM issue that Qwest says is an Item 10 issue is discussed under Item 7II of this report, because WCOM raised it in that context. Qwest responded to the questions raised by McLeodUSA, which filed no further testimony or comment, and which did not file a brief. It appears from the responses of Qwest and the lack of follow-up by McLeodUSA that Qwest has adequately answered its questions.

Qwest addressed access to signaling and call-related databases in the Direct and Rebuttal Testimony of Margaret Bumgarner. AT&T and McLeodUSA commented on this checklist item. All of AT&T's concerns and issues have been resolved in prior workshops in other states. McLeodUSA raised questions about the meaning of certain SGAT terms, but did not take specific note on Qwest's compliance with this checklist item. Ms. Bumgarner answered McLeodUSA's questions in her Rebuttal Testimony, at pages 14-15.

Checklist Item 12: Local Dialing Parity

Qwest addressed dialing parity in the Direct and Rebuttal Testimony of Margaret Bumgarner. AT&T expressed a concern about this checklist item, but stated that it was resolved in Arizona workshops. (See Wilson Affidavit at 22). In its Second Report and Order implementing the local competition provisions of the Act, the FCC determined that performances measures are unnecessary for this checklist item,[1] and, therefore, the ROC has not established any for it. Therefore, there are no unresolved issues concerning this checklist item.

Deferred Issues

Several issues raised in this workshop have been deferred to other workshops or to other proceedings. They are as follows:

- Non-recurring charges for inspections – this issue, raised by XO Utah, will now be addressed in state cost dockets.
- MDU access – deferred to the workshop on subloops.
- Impact of number porting on 911 – deferred to Workshop 1.
- Parity of treatment for CLEC listings – deferred to the completion of OSS testing.
- Local Routing Number (LRN) – to be considered with Checklist 1 issues
- Number Reassignment – to be considered with Checklist 11 issues
- Provisioning of NXX prefixes – conditional approval granted subject to results of OSS tests.

Preliminary Issue: CLEC-Specific Information

AT&T set forth a generally appropriate standard applicable to Section 271 compliance.[2] Specifically, two distinct requirements apply:

- Qwest must demonstrate that it has a concrete and specific legal obligation to provide a checklist item consistently with the requirements of Sections 271, 251 and 252 of the Act. This burden may be met through approved interconnection agreements ("ICAs") or a statement of generally available terms ("SGAT").
- Second, it must be found that Qwest currently furnishes or is ready to furnish, the checklist item in quantities that competitors may reasonably demand and at an acceptable level of quality.

AT&T further argued that these workshops can only focus on the first portion of the test, i.e., the existence of the legal obligation, which is largely a function of what Qwest's SGAT provides.

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[1] *Second Report and Order and Memorandum Opinion and Order*, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *CC Docket 96-98* et al., *FCC 96-333, 11 FCC Rcd 19392 ¶ 162* (Aug. 8, 1996).

[2] *See AT&T's Statement of Position and Brief on Certain Remaining Non-OSS Related Checklist Items, 12/22/00 at 1-3* (hereafter "AT&T's Brief").

AT&T believes that the second portion of the test: i.e., what Qwest currently furnishes or has the capability to furnish must await ROC test completion.

AT&T's assertion about the second portion of the Section 271 compliance standard misapprehends the nature and scope of these workshops. Moreover, the correct nature of the workshops has been repeatedly made clear to AT&T and the other participants, most concisely in the Ruling on Submission of State-Specific Information dated November 2, 2000, issued by the workshop coordinator. That ruling makes quite clear that the participating commissions intend these workshops to give a full and timely opportunity to address the second element of the standard (furnishing or readiness to furnish) in these workshops. All parties have been on notice for a long time that the commissions consider this the opportunity to raise all issues relevant to checklist compliance.

These states, whose resource limits were known to be a principal reason for joining together at the outset of consideration of joint proceedings, never anticipated an extended workshop process followed by potentially equally complex and time consuming individual proceedings to follow. What products and services Qwest currently furnishes, how it furnishes them, and its readiness to furnish them, whether generally or to individual CLECs, is unquestionably relevant to these workshops and every participating commission expects CLECs to have addressed it.

AT&T has cited OSS testing by the Regional Oversight Committee (ROC) as a reason why the second portion of the standard cannot be addressed in these workshops. That testing will indeed continue after some, perhaps all, of the workshops. However, that testing is not intended to provide an assessment of the products and services that Qwest currently provides to each CLEC individually. Nor is it designed as an examination of the nature of existing relationships between Qwest and individual CLECs. While it forms an important part of the process by which Qwest must demonstrate Section 271 compliance to the thirteen states participating (including all that are participating in these workshops), it bears on issues beyond individual CLEC experiences in dealing with Qwest in relationships about which the checklist items focus.

It is true that states will later consider the results of ROC testing, which will address the capability of Qwest to provide service (in certain respects) and the reliability of its measurement of service-quality results. CLECs are presumably free to present evidence of their own experience for the purpose of buttressing or countering the results of that test; however, that CLEC experience is parallel to, not at the heart of, what OSS testing is intending to examine. Thus, while it is not timely to expect CLECS to present evidence and comment on "testing" issues now, no reason precludes or inhibits any participant in these workshops from addressing, as they have been asked to address, how their own experiences with Qwest to date bear upon the second portion of the standard against which Qwest's performance is being examined in these workshops.

All participants have been fully and repeatedly advised that information about the service that they have been getting from Qwest is relevant now, both in terms of the quantity and quality of that service. All that is being deferred is the ability to present evidence that relates to the findings and conclusions that result from the testing of Qwest's OSS and the auditing of its performance measurements.

CLECs have focused virtually entirely upon the SGAT terms and conditions; i.e., the legal obligation portion of the applicable standard. They have, by and large, presented no substantial evidence to suggest that Qwest either is not providing or is not standing ready to provide service of adequate quality and quantity. Qwest, on the other hand, has presented evidence that it is providing access under the checklist items relevant here. Of course, it must be recognized that OSS testing may produce results that bear upon this standard. Should that be the case, then nothing here concluded should be considered a barrier to the consideration by the participating commissions of Qwest's meeting of the second standard. Moreover, CLECs have, despite the clear ruling on the scope of these workshops, indicated that they continue to reserve the right to bring their experiences before the individual commissions (for purposes beyond addressing the findings of the OSS testing), despite being made aware that the commissions may find such efforts untimely.

The remainder of this report focuses upon the first standard, there having been no substantial evidence presented to challenge Qwest's meeting of the second element of the applicable standard.

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

Background

Section 271(c)(2)(B)(iii) requires "nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of Section 224."[3] Section 224(f)(1) requires that a "utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[4] The FCC has interpreted this requirement in its *Bell South Second Louisiana* decision. The FCC concluded there that nondiscriminatory access was shown, *inter alia*, through the establishment of nondiscriminatory procedures for evaluating facility requests and granting access to information on facility availability, two issues that have been raised here.

Qwest reported that, as of September 30, 2000, it was providing space to CLECs on 843 poles and in 109,106 feet of duct in Idaho, Iowa, Montana, North Dakota, Utah, and Wyoming. Qwest has not received CLEC orders for access to rights-of-way in any of the six states. Qwest provided a summary of access to its poles in each of the six states:

[3] *BellSouth Second Louisiana Order*, ¶ 171.

[4] *47 U.S.C. § 224(f)(1). Section 224(a) defines "utility" to include any entity, including a LEC, that controls, "poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1).*

State	CLECS	Poles
ID	1	245
IA	3	350
MT	1	72
ND	2	108
UT	6	31
WY	1	37

The following table shows the number of CLECs Qwest reports as having access to its ducts as of September 30, 2000.

State	Number	Feet
ID	0	0
IA	5	34,062
MT	1	240
ND	1	196
UT	6	74,608
WY	2	11,168

Issues Outside The Scope Of These Workshops

1. Nonrecurring Charges for Inspections

XO Utah's brief asserted that Qwest's SGAT Exhibit A includes non-recurring charges for inspections to determine if sufficient space is available for attachment or occupancy and that such are undocumented and excessive.[5] XO Utah acknowledged that the costs for services are not at issue in these workshops. XO Utah contended that Qwest cannot demonstrate checklist compliance until the Utah Commission sets just and reasonable rates. The Utah Commission has opened two cost dockets: Docket No. 00-049-105 to set UNE prices and Docket No. 00-049-106 to set collocation prices. Several other commissions have similarly opened cost dockets. Therefore, the issue of nonrecurring charges for inspections will be deferred to the cost dockets in each individual state.

Issues Resolved During This Workshop

The participants raised a number of issues about which they have been having ongoing dialogue, particularly in section 271 workshops in other Qwest states. Many of those issues have been resolved among the parties contesting them. The later filings in this workshop and the briefs of

[5] *Brief of XO Utah on Initial Checklist Items, at 1-2.*

the parties explain these resolutions. Other participants, particularly McLeodUSA, raised a number of questions in their initial comments. Qwest generally responded to those questions by providing in its rebuttal filing answers explaining the rationale for the SGAT provisions questioned or by making SGAT changes to address those questions that raised underlying concerns (a number of the questions were manifestly intended only to seek explanation, not to raise specific concerns).

The parties' resolutions of the issues on which they have come into agreement are reasonable and appropriate: Qwest's answers to questions explaining the basis for SGAT sections questioned and the Qwest SGAT changes reasonably respond to the concerns that appear to have underlain other McLeodUSA's questions. Moreover, McLeodUSA made no further inquiry or comment, nor did it file a brief following Qwest's response to the questions raised. Therefore, it is appropriate for the commissions to consider these issues, which are briefly described below, to have been resolved in a manner that is consistent with the public interest and with the requirement that Qwest comply with checklist item 3.

1. Ownership of Innerduct

AT&T raised concerns about Section 10.8.1.2, regarding the issue of ownership of innerduct that a CLEC places in an empty Qwest duct. Qwest modified Section 10.8.1.2 of the SGAT to accommodate this concern.[6]

2. Access to Rooftop Space

AT&T noted that Qwest did not specifically grant access rights to rooftop space on Qwest buildings. Qwest agrees that Section 10.8.1.3 includes such access where the space is owned or controlled by Qwest.[7]

3. Maps, Reports, and Plans

AT&T said that Qwest should be obligated to provide relevant plats, maps, engineering reports and other data relating to facilities to which CLECS seek access within a reasonable time, not to exceed 60 days. Qwest has proposed changes to Section 10.8.2.4 to address this concern.[8]

4. Limitations on Construction of Poles/Innerduct

AT&T said that Section 10.8.2.5 ambiguously limited Qwest's obligations to construct, install, modify, or place poles and innerduct by referring only to the Pole Attachment Act of 1934 or to other factors as "expressly" provided in the SGAT. Qwest has agreed to incorporate all other relevant state and municipal laws into this section's standard.[9]

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[6] *Affidavit of Dominick Sekich Regarding Access to Poles, Ducts, Conduits, and Rights-of-Way (hereafter Sekich Affidavit) at 9.*
[7] *Sekich Affidavit at 9.*
[8] *Sekich Affidavit at 9.*
[9] *Sekich Affidavit at 9-10.*

5. Causes for Denying Access

AT&T said that the SGAT failed to provide that Qwest might only deny an access request for reasons of safety, reliability and generally applicable engineering purposes, to be applied in a nondiscriminatory manner. AT&T sought recognition that Qwest must pursue a nondiscriminatory policy of facility modification if existing facilities have insufficient capacity, and that Qwest must make good faith efforts to accommodate parties seeking access. Qwest revised section 10.8.2.6 to address AT&T's concern.[10]

6. Reservation of Space

AT&T said that the SGAT was silent on when and how Qwest could reserve space for itself. This silence raised a concern about applicable prohibitions on Qwest's ability to reserve space for itself. Qwest revised Section 10.8.2.6 to address this AT&T issue.[11]

7. Central Office Manhole Splices

AT&T objected to what it considered a discriminatory prohibition on CLEC splices in the central office manhole, because Qwest was not similarly prohibited from doing so. Qwest amended Section 10.8.2.9 to resolve this concern.[12]

8. Equipment Replacement Costs

AT&T expressed concern that the SGAT did not reflect a number of FCC requirements about the cost of replacement or modification of existing poles, ducts, conducts or innerduct. Qwest revised Section 10.8.2.10 to conform its cost requirements to the relevant requirements in the FCC Orders.[13]

9. Inspection Costs

AT&T said that Sections 10.8.2.15 and 10.8.2.16 required CLECs to pay for inspections during and after construction, while permitting Qwest to disclaim liability for such construction and inspections. AT&T argued that this dichotomy allowed Qwest to be paid without assuming any responsibility. Qwest has agreed to delete the Section 10.8.2.16 provision that disclaimed such liability.[14]

10. Qwest's Right to Terminate Orders

AT&T voiced concerns about Qwest's ability to terminate an order for poles, ducts, conduits and rights-of-way in Section 10.8.2.18. AT&T was concerned that the lack of a precise SGAT

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[10] *Sekich Affidavit at 10.*
[11] *Id.*
[12] *Sekich Affidavit at 11.*
[13] *Id.*
[14] *Id.*

definition of "cause" would allow Qwest too much discretion in terminating orders for poles, ducts, conduits and rights-of-way. Qwest made changes to this provision to address this issue.[15]

11. CLEC Use After Qwest Facility Abandonment

AT&T said that an earlier version of SGAT Section 10.8.2.19 required CLECs either: (a) to stop the use of poles, ducts, conduits and rights-of-way when Qwest decides to abandon them, or (b) to buy the facilities from Qwest. AT&T believed that the SGAT appeared to preclude CLEC rights to ongoing use of poles or innerduct after Qwest has transferred them to another party (e.g., by sale). This preclusion could be expensive and disruptive to existing service for CLECs. AT&T sought provisions in any contract for sale of poles, innerduct or rights-of-way that protect existing and continuing CLEC use. AT&T also wanted Qwest to further protect CLECs' interests in poles, ducts, conduits and rights-of-way when Qwest sells an entire exchange. Qwest amended the SGAT section to accommodate these concerns.[16]

12. Inspection Costs

Section 10.8.2.14 allowed Qwest to recover the costs of any Qwest inspection that discovered a violation, hazard, or other breach of the SGAT. AT&T objected to the lack of a materiality standard qualifying this right of recovery. Qwest agreed to limit recovery of its inspection costs to cases where a verified material violation or breach has occurred, as Section 10.8.2.20 defines them.[17]

13. Recording MDU Agreements

AT&T opposed the requirement that it record its interest in Qwest MDUs. WCOM[18] made a similar argument. In order to resolve this issue, Qwest revised Exhibit D of its SGAT to eliminate this requirement. (See rebuttal Exhibit QWE-TRF-6).

14. CLEC Ownership and Control of Innerduct:

McLeodUSA questioned what the SGAT Section 10.8.1.2 term "control" means generally and with regard to reserving spare innerduct capacity, and whether a CLEC can provide its own conduit.[19] Qwest responded[20] that the changes it proposed should answer the general question. Qwest also said that it maintains control of all spare innerduct within Qwest's ducts, by whomever it has been placed. However, CLECs retain ownership of facilities that they place. Qwest will allow CLECs to reserve space in innerducts that CLECs place in Qwest ducts, subject to dealing with any concerns about space "hoarding."

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[15] *Id. at 11-12*
[16] *Id. at 12.*
[17] *Id.*
[18] *WCOM Comments on Checklist Items3, 7,8,9,10 and 12 (hereafter WCOM) at 13-16.*
[19] *McLeodUSA's Comments on Subsections 271(c)(2)(B)(iii), (vii)-(x), and (xii), of the Competitive Checklist, October 17, 2000 (hereafter McLeodUSA's Comments).*
[20] *In the Rebuttal Testimony of Thomas Freeburg, 11/03/00, (hereafter Freeburg Rebuttal Testimony) at 13-23 Qwest responded to McLeodUSA's comments on checklist item 3.*

15. Filling Conduits to Capacity

McLeodUSA questioned why there exists an SGAT Section 10.8.2.6 obligation to fill conduits to capacity.[21] Qwest responded that it is standard ILEC procedure to install three innerducts simultaneously. Filling them to capacity at one time is both more practical, efficient, and prudent, because it avoids the risk of damaging existing facilities, which can occur when installation does not occur all at once. Qwest noted that it charges CLECs only for installation labor, not for innerduct material, and that the spare capacity created is available for all carriers.

16. Feasibility Study Intervals

McLeodUSA questioned whether the SGAT Section 10.8.2.7 time frame for completing feasibility studies is 10 calendar days.[22] Qwest said that the feasibility study is incorporated into the 45-day response time for a standard request, and that there is not a separate interval for reporting feasibility-study results.

17. Cost Sharing

In cases where Qwest must secure additional authority to allow CLEC occupancy, McLeodUSA questioned whether, under SGAT Section 10.8.2.8, Qwest will share costs if it has other uses for the legal authority it acquires, provided that they arise within a reasonable period of time.[23] Qwest responded that it would consider joint requests with CLECs to secure authority, but that the occasions likely to be involved are too speculative to reduce to SGAT language. McLeodUSA also questioned SGAT Section 10.8.2.10 limits on when usage by another party must commence (for cost-sharing purposes) and limits on contributions by additional parties seeking use. Qwest said that the SGAT already deals with carriers using the facilities at the time of modification; therefore it interpreted McLeodUSA's question as relating to subsequent users. Qwest proposed new SGAT language, which it said tracked the FCC language of the Local Competition Order and the Order on Reconsideration, to address the issue:

> *10.8.2.10.3 The modifying party or parties may recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification. The proportionate share of the subsequent attacher will be reduced to take account of depreciation to the pole or other facility that has occurred since the modification. The modifying party or parties seeking to recover modification costs from parties that later obtain attachments shall be responsible for maintaining all records regarding modification costs. Qwest shall not be responsible for maintaining records regarding modification costs on behalf of attaching entities.*

[21] *McLeodUSA's Comments at 1.*
[22] *Id. at 2.*
[23] *Id.*

18. Qualifications, Training, and Contractor Approval

McLeodUSA questioned: a) how one can determine under SGAT Section 10.8.2.17 what the qualifications and training of Qwest workers are, and b) how one can determine what contractors have been approved by Qwest.[24] Qwest responded that its language tracks FCC limits on imposing on third-party workers qualifications comparable to those applied to Qwest's own workers. With respect to approved contractors, Qwest's rebuttal witness Freeberg said that Qwest would tell CLECs whether Qwest has approved a contractor that the CLEC proposes to use. Qwest provided responsive answers to McLeodUSA's remaining questions.

19. Definition of an "Order"

McLeodUSA questions how the term "order" as used in SGAT Section 10.8.2.18 is defined.[25] Qwest responded that it is defined for this context in SGAT Section 10.8.4. Qwest provided responsive answers to McLeodUSA's remaining questions.

Issues Remaining in Dispute – Checklist Item 3

1. Reciprocity of Access Obligations

AT&T objected to the SGAT requirements that imposed on CLECs reciprocity of access obligations concerning poles, ducts, conduit and rights of way. SGAT Section 10.8.1.4 imposed on Qwest and an interconnecting CLEC obligations to "afford access to its poles, ducts, conduits and rights-of-way of telecommunications services to the other party." AT&T argued that the Act and the FCC's implementing rules and orders do not obligate the CLECs to provide Qwest access. Section 251(b)(4) of the Act imposes on each LEC "the duty to afford access ... to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title." The FCC has determined[26] that Qwest is not a telecommunications carrier, because of the Section 224(a)(5) provision that excludes "incumbent local exchange carriers" from the definition of "telecommunications carriers" for purposes of § 224. The Ninth Circuit recently upheld the FCC's interpretation.[27] Therefore, AT&T argued that SGAT Section 10.8.1.4 should be amended to delete reciprocal access requirements.

WCOM made a similar argument.[28]

Qwest has modified its position to respond to the Ninth Circuit's order, which came after its initial testimony filing. Qwest has agreed to eliminate the reciprocity provision from the SGAT. Qwest's Exhibit QWE-TRF-5 shows that SGAT Section 10.8.1.4 has been stricken entirely. However, Qwest did note separately that, while all reference to reciprocal obligations have been removed from the SGAT, it reserves any rights it may have to seek access to CLEC facilities under state law.

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[24] *Id. at 3.*
[25] *Id. at 3.*
[26] *See* 47 C.F.R. §§ 1.1403(a), 1.1402(h), § 51.219 and *Local Competition Order*, ¶ 1231.
[27] *U S WEST Communications v. Hamilton*, 2000 WL 1335548 (9th Cir. Sept. 13, 2000).
[28] *WCOM at 8-11.*

Proposed Issue Resolution: Qwest's removal of the reciprocity language in its entirety responds fully to AT&T's concern. While AT&T continued to argue this issue in its brief,[29] there is no foundation for arguing that Qwest inappropriately seeks reciprocal obligations as to access to poles, ducts, conduits, and rights of way.

2. *Defining Ownership or Control Rights*

AT&T raised a concern that the SGAT did not provide assurances to CLECs that Qwest would provide access where it "controls" rather than "owns" the facilities involved. More narrowly, the concern related to cases where Qwest's control of rights of way was less than "direct."[30] WCOM expressed similar concerns.[31] Qwest addressed much of this concern through revisions to SGAT Sections 10.8.1.1 and 10.8.1.2. The remaining disagreement concerns a difference in the language that AT&T and Qwest propose for Section 10.8.1.5. Qwest did, as AT&T requested, expand the section to include granting access beyond those cases where Qwest's rights of occupancy amount to a legally conveyable property interest. Qwest changed the language to include cases where it can "provide access to a third party and receive compensation for doing so."[32] AT&T's proposed Section 10.8.1.5 language goes further, providing that phrase "ownership or control to do so" also means:

> *(ii) the authority to afford access to third parties as may be provided by the landowner to Qwest through express or implied agreements, or (iii) through Applicable Rules*

Proposed Issue Resolution: It is not clear that Qwest's language encompasses all access situations that may be relevant. The FCC has stated that:

> *we conclude that a right-of-way exists within the meaning of Section 224, at a minimum, where (1) a pathway is actually used or has been specifically designated for use by a utility as part of its transmission and distribution network and (2) the boundaries of that pathway are clearly defined, either by written specification or by an unambiguous physical demarcation.*[33]

The FCC test clearly contemplates situations beyond those where occupancy is authorized by commonly used means. It should be clear from the SGAT that cases where Qwest's underlying rights are implied (rather than express) under state law should be accommodated. There are two difficulties with Qwest's proposal, one of which arises from its words and the other from how Qwest describes it, particularly in its brief. First, Qwest's wording makes its obligation to provide access a function of whether or not it may receive compensation for providing it. Whether Qwest can or cannot charge for providing access to a CLEC should not be the test: the only material test should be whether anything prohibits Qwest from allowing access to a CLEC.

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[29] *AT&T's Brief at 6-8.*
[30] *AT&T's Brief at 10.*
[31] *WCOM at 14.*
[32] *Qwest's Legal Brief on Checklist Items 3,7,8,9,10, and 12 (hereafter Qwest's Brief) at 11.*
[33] *MTE Order*, ¶ 82. (Citations omitted).

Second, Qwest appears to have a specific concern about allowing access to a CLEC where Qwest's rights arise by implication under state law. Its SGAT language does not expressly exclude such situations, but there is reason to believe that how Qwest may intend to interpret that language may create delay and confusion, if the SGAT is not made clear on the matter.

Accordingly, it is appropriate to include in the SGAT clause (ii) as proposed by AT&T, in order to mitigate the possibility of a later dispute about whether rights Qwest has by implication under state law are covered by the section or not. AT&T's clause (iii) also represents an appropriate addition: if there are any rules (beyond those situations already addressed by the preceding two clauses) that give Qwest access rights that it can make available for CLECs, then there is no reason why Qwest should be excused from making such access available.

It is important to note in the case of each of these two proposed additional clauses that the SGAT should not be read as requiring Qwest to convey any thing that it does not have (or anything that it may have but be unable to make available) under state law. AT&T has not provided any authority to support a conclusion that the underlying rights at issue are other than as defined by state law. Nor has it provided an example of a case where Qwest's occupancy or occupancy rights rest upon some foundation other than what is provided by the law of the individual states in which Qwest operates.

SGAT Section 10.8.1.5 would thus read as follows:

> *The phrase "ownership or control to do so" means the legal right, as a matter of state law, to (i) convey an interest in real or personal property or (ii) afford access to third parties as may be provided by the landowner to Qwest through express or implied agreements, or through Applicable Rules*

Should the SGAT be changed to so read, it will encompass a scope that is consistent with FCC requirements and that places CLECs in a reasonably comparable position to that of Qwest, in terms of access to rights of way.

3. Access to Landowner Agreements

AT&T asserted that CLECs must sometimes have access to the agreements that Qwest has with private landowners and building owners, in order to determine the scope of Qwest's ownership and control.

The parties disagreed about whether landowners must give consent before Qwest may disclose to CLECs the agreements that give Qwest permission to occupy their property. Qwest said that it has agreed to provide CLECs with copies of *all* of its right-of-way *and* MDU agreements, in order to allow them to verify the extent to which Qwest has ownership and control rights and can provide third-party access.[34] The dispute relating to such access concerns those agreements that are not already publicly recorded. The SGAT requires that unrecorded agreements not be

[34] *Qwest's Brief at 5.*

disclosed, unless the property owner consents. AT&T would agree to the need for such consent only where Qwest and the landowner have explicitly protected the privacy of the agreement.

AT&T had described Qwest's proposal as requiring a CLEC who seeks access to an unrecorded access agreement to first secure from the landowner an executed, notarized "Consent" from the subject property owner for both: (a) disclosure of Qwest's access agreement to the CLEC, and (b) CLEC access to the property. However, it appears that Qwest has changed the SGAT to limit the requirement to consent in the first case, not the latter. Qwest no longer requires a CLEC to obtain the consent of the property owner to an Access Agreement before Qwest will provide the CLEC a copy of underlying right-of-way agreement. Qwest only requires consent of the landowner to allow CLEC access to the agreement with the landowner.[35] In Colorado workshops and in negotiations with AT&T there, Qwest eliminated the requirement that the landowner consent to the Access Agreement itself.

Qwest argued that landowners have a legitimate expectation that these two-party dealings would remain private, because landowners entered into these agreements without any expectation that they would be available to other carriers to use in negotiations (presumably with CLECs for similar or related access rights) against them.[36] Qwest considered it unrealistic to presume that property owners generally would agree that such agreements that they have reached with Qwest would be available to potential negotiating adversaries, merely because the agreeing parties did not include a confidentiality provision. Qwest framed its argument as a concern that the Six State Commissions not jeopardize the rights of third parties who have not been able to represent their interests in these workshops.

AT&T argued[37] that requiring consent is neither necessary nor appropriate in the absence of an explicit consent requirement. AT&T believes that Qwest has unduly burdened CLECs by, in effect, creating a presumption that all Qwest access agreements with property owners are confidential and subject to a prohibition against disclosure. AT&T based its opposition to a blanket consent requirement upon FCC requirements that oblige RBOCs to make all "relevant data" related to ROW inquiries available for inspection and copying, subject to reasonable conditions to protect proprietary information.[38]

AT&T argued that nondisclosure of information about existing agreements would constitute a violation of the Act, particularly Sections 224(f)(1) and 271(c)(2)(B)(iii). It asked for SGAT language clarifying that Qwest would make these contracts available upon request (if necessary, under an agreement to maintain any required confidentiality). AT&T said that Qwest's landowner-consent provisions are unduly burdensome and unnecessary. AT&T also labeled them as discriminatory, noting that Qwest does not apply them to itself.

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[35] *See Exhibit QWE-TRF-6, § 2.1. The CLEC must provide Qwest with an executed copy of either the Consent to Disclosure or the Consent Regarding Access Agreement forms that are included in Attachment 4 to Exhibit D.*

[36] *Qwest's Brief at 5.*

[37] *AT&T's Brief at 15-27.*

[38] *Local Competition Order, ¶ 1223. The FCC made this determination in the context of considering a denial of access to rights-of-way, and it concluded that efficiently resolving such disputes demanded that all necessary information be made available up front.*

This dispute focused primarily on already existing access rights, most of which arise from agreements that Qwest entered without the expectation that there would be a later obligation to make them available to CLECs. AT&T, however, also expressed a concern about future agreements that Qwest may enter with property owners. Specifically, AT&T questioned why Qwest would be motivated in the future to secure the ability to disclose the ROW agreement to third parties without prior written consent. In fact, AT&T raised the possibility that Qwest might have reason to incorporate explicit restrictions on disclosure, now that competition has made it an issue. AT&T believes that Qwest should in the future inform prospective landowners of its obligation to disclose such agreements to CLECs.

To counter the claim that Qwest could use agreement secrecy to enter anti-competitive access agreements, Qwest agreed, in SGAT Section 10.8.2.26, to certify to a landowner that an agreement with Qwest does not preclude the landowner from providing access to a CLEC:

10.8.2.26	*Upon CLEC request, Qwest will certify to a landowner with whom Qwest has an ROW agreement, the following:*
10.8.2.26.1	*that the ROW agreement with Qwest does not preclude the landowner from entering into a separate ROW agreement with CLEC; and*
10.8.2.26.2	*that there will be no penalty under the agreement between the landowner and Qwest if the landowner enters into a ROW agreement with CLEC.*

Proposed Issue Resolution: Qwest has substantially relied not on its own interests or those of its customers, but on the interests of landowners that it claims were not present to protect their presumed privacy interests at the workshop. It is not clear why it should be presumed that those landowners are predominantly of one mind as to the "privacy" of agreements with utilities for access. The argument that they might consider themselves disadvantaged by having others know the terms on which they have dealt with others has some conceptual appeal, but there is no basis for concluding that any harm will necessarily or even commonly result from that knowledge. It might also be presumed that a large portion of the landowners involved are supportive of the general benefits of competition (as their federal legislature certainly was in adopting the Act) or of the benefits that they might individually secure in pursuing competitive alternatives.

There is on this record no evidentiary basis for concluding that interests in privacy outweigh the benefits of streamlining the acquisition of rights of way, even in the collective mind of the public, in the capacity of landowners. Certainly, Qwest has not presented any evidence that is grounded upon formally surveying or even informally querying landowners. Therefore, this issue should not turn on what we might surmise to be the feelings of landowners as a group.

AT&T's argument contains a similarly troubling aspect. One of its arguments for securing the underlying agreements with landowners is to allow it to bargain for its own access with knowledge of the terms that a landowner has already agreed to with Qwest. This argument misses the point of why access to these agreements is material under the Act. Access is material as it relates to access to Qwest facilities, and its particular relevance is on the issue of allowing a

CLEC to make its own determination of the sufficiency of Qwest rights to support the CLEC's occupancy.

It is evident why a CLEC should be allowed an independent determination of those rights, and why it should have access to these agreements. If a CLEC must rely upon Qwest's rights, their sufficiency can bear directly upon whether investments in facilities and commitments to potential customers should be made. It is not evident how this aspect of the Act can give comfort to a CLEC wishing to make its own arrangements that are independent of, or at least materially distinct from, Qwest's rights. The CLEC information needs that Qwest must meet are not related to providing commercial information that CLECs can use to make their own more economical or efficient arrangements with those who supply needed goods, services, or the like. The pertinent issues are not economic ones, but concern issues such as, for example, questioning a Qwest claim that no rights exist or that existing rights are not sufficient to accommodate CLEC access. We should be careful not to construe the Act as allowing a form of discovery whose purpose is to give CLECs superior bargaining position vis-à-vis landowners.

Even if we cannot conclude that a blanket presumption of privacy is warranted, we must still recognize that some property owners will likely object on the grounds of privacy to Qwest's disclosure of agreements without prior landowner consent. A material factor to consider is that Qwest takes legal risk, even if it may be small, in providing to CLECs agreements that some landowners will consider private. If a CLEC wants access to an agreement without asking a landowner first for consent (or even after a landowner has been asked for, but has denied it) it, not Qwest, should take the risk of landowner claims. It is, after all, the CLEC's need or desire for information that causes the risk to arise.

The SGAT should continue to incorporate a consent mechanism for those CLECs who do not want to take the risk of legal action by a landowner who might claim a loss of protected privacy. However, the SGAT should also allow a CLEC who is willing to take the risk (presumably in the interest of getting service to its customers more quickly) to obviate the necessity for securing consent. Specifically a CLEC that agrees to indemnify Qwest in the event of any subsequent legal action arising out of Qwest's provision of the agreement to that CLEC should be entitled to the agreements without having to comply with the landowner-consent provision.

The addition to the SGAT of a new Section 10.8.4.1.3.1, as follows, would accomplish this purpose:

> *Alternatively, in order to secure any agreement that has not been publicly recorded, a CLEC may provide a legally binding and satisfactory agreement to indemnify Qwest in the event of any legal action arising out of Qwest's provision of such agreement. In that event, the CLEC shall not be required to execute either the Consent to Disclosure form or the Consent Regarding Access Agreement form.*

There remains the issue of motivating Qwest to consider CLEC disclosure in future agreements. AT&T's proposal is overly broad. It would appear to restrict Qwest from entering into (or perhaps enforcing) agreements that require nondisclosure, even in cases where such a provision arises entirely at a landowner's insistence. This approach is insensitive to the Qwest obligation to

serve. Meeting that obligation can be frustrated or made much more inefficient if Qwest is to be effectively precluded from dealing with landowners who will not bargain, except under assurances of nondisclosure. Moreover, such a remedy does not appear to be necessary. If Qwest engages in a pattern of conduct that is deliberately designed to frustrate CLEC access to agreements, then it will expose itself to regulatory, not to mention other requirements that are intended to penalize anti-competitive conduct. Moreover, to the extent that the SGAT contains general procedures for addressing conduct alleged to violate Qwest's obligations (but not specifically addressed elsewhere in the document) it will be appropriate to consider in the upcoming General Terms and Conditions workshop whether the potential future conduct at issue here can be addressed under those procedures.

4. Scope of CLEC Access (MDUs)

AT&T asserted that Qwest must explicitly be obligated to provide access to all poles, ducts, conduits and rights-of-way, whether on public property, private property or owned property, that is owned or controlled by Qwest.[39] AT&T was concerned that Qwest did not explicitly make reference to Multiple Dwelling Units ("MDUs") and other multiple tenant situations. AT&T said that the FCC has tentatively concluded that the obligations under Section 224 encompass in-building conduit (e.g., risers) that Qwest may own or control.[40]

AT&T raised concerns regarding Qwest's provisioning of access to MDUs, particularly regarding the use of exclusive arrangements with MDU and campus business owners/operators that may tend to exclude CLECs from gaining access to MDU and campus-business rights of way. AT&T was concerned that this exclusion would prevent CLECs from providing service to residential and business customers located within the complexes.

Qwest, according to AT&T, previously contended that the access it obtains in MDUs does not constitute "right of way" to which CLEC access is required. Qwest has agreed to offer CLECs whatever access rights Qwest may have, but AT&T had contended that the scope of this promise is too vague to assure that CLECs will get what they are entitled to have.

WCOM took a position similar to that of AT&T.[41]

Qwest has argued that AT&T's concern is no longer apt. Qwest believes that its SGAT includes a commitment to provide access to any conduit, duct, and right-of-way over which it has ownership or control, even in MDUs. Qwest has made SGAT Section 10.8.1.3 revisions that it believes will fully address this issue. The rebuttal testimony of Qwest witness Freeburg sets forth the revised language, underlining the portions relevant to this issue:

> *10.8.1.3 Rights of Way (ROW) – Where it has ownership or control to do so, Qwest will provide to CLEC, via an Access Agreement in the form of Attachment 4 to Exhibit D, access to available ROW for the purpose of placing*

[39] *AT&T's Brief at 8-11.*
[40] *Promotion of Competitive Networks in Local Telecommunications Market,* Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 99-217, FCC 99-141, ¶ 44 (rel. July 7, 1999).
[41] *WCOM at 11-12.*

telecommunications facilities. ROW includes land or other property owned or controlled by Qwest and may run under, on, above, across, along or through public or private property or enter multi-unit buildings.

10.8.1.3.1 ROW means a real property interest in privately-owned real property, but expressly excluding any public, governmental, federal or Native American, or other quasi-public or non-private lands, sufficient to permit Qwest to place telecommunications facilities on such real property; such property owner may permit Qwest to install and maintain facilities under, on, above, across, along or through private property or enter multi-unit buildings.

Qwest also changed the definition of conduit to address a recent FCC order on access to commercial multi-tenant buildings,[42]

10.8.1.2.1 The terms Duct and Conduit mean a single enclosed raceway for conductors, cable and/or wire. Duct and conduit may be in the ground, may follow streets, bridges, public or private ROW or may be within some portion of a multi-unit building. Within a multi-unit building, duct and conduit may traverse building entrance facilities, building entrance links, equipment rooms, remote terminals, cable vaults, telephone closets or building riser. The terms Duct and Conduit include riser conduit.[43]

Qwest also proposed to modify the definition of "Right of Way":

10.8.1.3.1 ROW means a real property interest in privately-owned real property, but expressly excluding any public, governmental, federal or Native American, or other quasi-public or non-private lands, sufficient to permit Qwest to place telecommunications facilities on such real property; such property owner may permit Qwest to install and maintain facilities under, on, above, across, along or through private property or enter multi-unit buildings. Within a multi-unit building, a ROW includes a pathway that is actually used or has been specifically designated for use by Qwest as part of its transmission and distribution network where the boundaries of the pathway are clearly defined either by written specifications or unambiguous physical demarcation.

Proposed Issue Resolution: In its brief, AT&T's focus was more on the right of way agreement disclosure issue than on the sufficiency of the SGAT's provisions to include MDUs. Qwest's SGAT changes reflect the inclusion of the MDU environment in its access obligations. AT&T

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[42] *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, 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, In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, CC Docket Nos. 96-98, 88-57, FCC 00-366 (rel. Oct. 25, 2000) ("MTE Order").*

[43] *Qwest has combined the terms Duct and Conduit into the same definitional section. In addition, Qwest has inserted the term "Duct" in various provisions of Section 10.8 that referred to "Poles/Innerduct" to clarify that "duct" is included in those provisions.*

has not identified any other specific changes that it considers to be necessary to assure that Qwest does not inappropriately address access questions in the MDU context. Therefore, it appears that Qwest has adequately addressed the need to assure that CLECs will obtain sufficient access in the MDU environment.

5. . *Curing CLEC Breaches*

When a CLEC using access it has gained from Qwest breaches the terms of that access, Qwest wants CLECs to secure from the landowners involved the express right to be able to cure that breach, for the expressed purpose of protecting its underlying access rights and those of all carriers using those rights.

Without a cure opportunity, Qwest argued, a CLEC breach of the Qwest right-of-way agreement that the CLEC uses to obtain access could cause Qwest to forfeit its right-of-way.[44] The injury according to Qwest would not easily be curable by awarding damages. Qwest would have to purchase a new right-of-way and move its facilities. Qwest noted that the damage to non-breaching CLECs using that same right of way would be similar. Therefore, Qwest argued that an opportunity for Qwest to cure breaches would protect all carriers, not only Qwest.

Qwest stated that the CLEC burden to negotiate with landowners for cure rights is minimal in comparison to the risks involved. Qwest also said that it would not be proper to place upon Qwest the burden to negotiate cure rights. When CLECs must also negotiate with the landowner, for their access, this additional requirement should cause no delay according to Qwest. Qwest has drafted a notice provision for CLECs, which is included as one of the attachments to proposed Exhibit D of the SGAT, along with the Access Agreement.

Qwest has written SGAT Exhibit D, ¶ 2.2, and Exhibit D, Attachment 4 to require CLECs to obtain the agreement of an owner (who has an access agreement with Qwest) to provide Qwest with notice and opportunity to cure any default that CLEC use of the agreement might cause for Qwest. AT&T objected to this provision[45] and WCOM took a similar position.[46] AT&T argues that neither the Act nor the FCC impose any requirement for a CLEC to secure such a concession from a landowner in order to gain access under the agreement pursuant to which the landowner has granted rights of access to Qwest.[47] AT&T cites the FCC's emphasis on expediting access to rights of way:

> *Procedures for an attachment application should ensure expeditious processing so that "no [BOC] can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications . . . equipment by those seeking to compete in those fields.*[48]

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[44] *Qwest's Brief at 7.*
[45] *AT&T's Brief at 20-23.*
[46] *WCOM at 20-25.*
[47] 47 U.S.C. § 251(b)(4); *Local Competition Order*, ¶¶ 1119 - 1158
[48] *Bell South Second Louisiana Order*, ¶ 176 (citing Local Competition Order, 11 FCC Rcd at 16007).

AT&T said that Qwest generally includes free assignability clauses in its agreements with landowners. Should they not provide sufficient protection, the responsibility lies with Qwest, which could have negotiated for the inclusion of appropriate cure clauses in its existing agreements. AT&T also stated that the SGAT already contains indemnification and liability provisions intended to protect Qwest should CLEC access expose Qwest to liability.[49] Qwest should not, according to AT&T, be allowed to disclaim the value of these provisions because of uncertainty over the financial ability of any particular CLEC. Financial ability is implicit in the provision of any services under the SGAT and Qwest already has an SGAT right to seek a demonstration of financial ability before serving CLECs.

AT&T raised other concerns with the Qwest language. AT&T argued that the standard form Qwest proposes for this purpose would make it unlikely that a CLEC would readily gain landowner acceptance, thus producing an extended period to secure landowner approval. AT&T also believes that Qwest's proposals are discriminatory, because a CLEC must comply with arrangements that are more burdensome to CLECs than they are to Qwest, because: (a) CLECs incur greater liabilities, and (b) Qwest does not require an agreement to provide notice and opportunity to cure where transfer of an interest from Qwest is made. CLECs are exposed to forfeiture if Qwest breaches an agreement, yet Qwest does not require that landowners give CLECs a right to cure Qwest breaches.

Qwest disagrees that the SGAT's risk management provisions already give it adequate protection. Qwest says that those provisions provide only for damages (§ 5.9.1.1); they cannot protect against the extinguishments of rights of way due to CLEC defaults. Qwest also says that it should not have to trust to the financial resources of "unstable" CLECs. Qwest says that the Section 224 requirement to provide access to rights-of-way should not be read as requiring it to jeopardize the existence of that the right-of-way.

Proposed Issue Resolution: There is risk to Qwest and to other carriers using Qwest rights of way, in the event that a CLEC does not use the underlying Qwest rights of way in accordance with agreements. However, that risk, as AT&T notes is contingent, and is substantially mitigated by the SGAT's other indemnity and liability provisions. In contrast, the impact of imposing Qwest's blanket provision on CLEC operations is not contingent, and it will be regularly recurring. The need to negotiate a cure provision with all landowners will present a constant and sometimes insurmountable barrier. Landowners will find negotiating such provisions at best to be a nuisance. Qwest's requirement will make CLEC use of Qwest right of way slower and less efficient, not to mention unavailable at all when a landowner says no to ceding cure rights. Moreover, Qwest's requirement is under-inclusive. A breach by Qwest exposes occupying CLECs to similar risks; yet Qwest does not offer a similar protection to them.

A balancing of the interests involved favors the elimination of the requirement for CLECs to secure cure provisions from landowners. That requirement will encumber the ability of CLECs to gain access, particularly since Qwest will have substantial protection against the consequences that concern it. There may be questions about the financial viability of some CLECs. However, this question affects many aspects of their relationship with Qwest. They are best addressed

[49] See, e.g. *SGAT §§ 5.1, 5.9, 5.13*

generally, rather than in this specific checklist item context. To the extent that Qwest considers the SGAT's general provisions on CLEC financial security to be inadequate in this context, it may raise the issue in the General Terms and Conditions workshop that will follow this one. Therefore, the SGAT's cure provisions should be removed.

6. Large-Request Response Times

AT&T observes that SGAT Section 10.8.4 and Section 2.2 of Exhibit D permit Qwest, in the case of large orders for access, to provide an initial response approving or denying a portion of the order within 35 days after order receipt, thereafter continuing to approve or deny on a rolling basis and without time limits until it has completed responding to the order. AT&T believes that Qwest is required to respond to all requests, regardless of size, within 45 days under Section 47 CFR 1.1403(b).[50] The rule allows no extension beyond 45 days for large requests and the FCC has confirmed the firm 45-day obligation in the recent *Cavalier* decision, according to AT&T.[51]

Qwest believes that the *Cavalier* decision[52] endorsed a rolling approval process for large requests for access.[53] The FCC held that pole owners must "act on each permit application" within 45 days of receipt. In the case of an application involving a "large" number of poles, the FCC also said that the owner must "approve access as the poles are approved, so that [the requesting carrier] is not required to wait until all the poles included in a particular permit are approved prior to being granted any access at all."[54] Qwest interprets the 45-day requirement as requiring response to as many of the poles covered by the application as can be completed within 45 days, but not necessarily all of them. After the 45 days, Qwest must then grant access as poles are approved, so that CLECs need not wait for access to any until access to all has been decided.[55] Qwest Exhibit QWE-TRF-6 proposed language for Section 2.2 of Exhibit D that paraphrases the language of the *Cavalier* decision.[56]

Qwest argues that any other reading of the *Cavalier* decision would be counterintuitive, because it would suggest that Qwest must make access decisions on large requests in a shorter duration than applies to small requests. For example, Qwest could wait the entire 45 days to decide on access to a 2-pole request, but presumably would be expected to allow access in less than 45 days to two or more poles that formed part of a 100-pole request. Qwest's witness Freeberg indicated that, in the case of very large requests for access to poles and duct, 45 days will be

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[50] *AT&T's Brief at 29-30.*

[51] *See, In the Matter of Cavalier Telephone, LLC v. Virginia Electric and Power Company; 15 FCC Rcd. 9563, June 7, 2000.*

[52] Id. *¶15.*

[53] *Qwest Brief at 12*

[54] *Cavalier (footnotes omitted; emphasis added).*

[55] Id. *(emphasis added).*

[56] *This language appears in Section 2.2 of Exhibit QWE-TRF-6.*

sometimes an impossibility, and will produce unpredictable service fulfillment expectations for CLECs. Witness Freeberg cited paved-over manholes as an example.[57]

AT&T says that Qwest's interpretation of the decision is incorrect; the FCC did not permit a response to large orders outside the 45-day period.[58] Rather, the *Cavalier* decision merely directed the utility to begin approving access as poles are approved, so as to provide the Complainant with access as soon as possible. Nowhere did it create an exception to the 45-day rule. XO Utah's brief also argues that the FCC has authorized no exception to this time limit for large orders.[59]

Qwest believes that the revised schedule in Section 2.2 complies with the FCC's guidance on responding to large requests, but is willing to make further changes, which it has taken from SBC's Master Agreement in Texas,[60] in Section 2.2 of Exhibit D. Under the Texas Master Agreement, Southwestern Bell committed to complete all orders within 45 days, provided that a single attachment order would be limited to no more than 300 poles or more than 20 manholes. The FCC's approval of Southwestern Bell's Section 271 application implicitly endorsed this approach as consistent with the Act and the requirements of Section 271(c)(2)(B)(iii).[61] Qwest would agree to the following language to respond to requests for access to rights-of-way over which Qwest has ownership or control:

> *No more than three (3) miles shall be the subject of any single ROW Order not relating to multi-unit buildings. This provision assumes a maximum of seventeen (17) properties per mile or fifty-one (51) owners in three (3) miles.*
>
> *No more than one campus shall be the subject of any single Order for access to ROW within multi-unit buildings. This provision assumes a maximum of fifteen (15) buildings.*

Proposed Issue Resolution: The *Cavalier* decision cannot be logically read as requiring access to all poles in a large order to be determined within 45 days. Otherwise, it stands for the odd proposition that if a CLEC orders 3 poles, it may have to wait 45 days for responses on all of them; however, it can get decisions on a number greater than 3 if it submits a large order. Nevertheless, Qwest's proposal does not satisfactorily address the issue; it invites a CLEC to

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[57] *Freeberg Rebuttal at 12.*
[58] *AT&T Brief at 29-31.*
[59] *Brief of XO Utah on Initial Checklist Items at 3.*
[60] *T24, Master Agreement For Access To Poles, Ducts, Conduits, And Rights-Of-Way (Texas), § 9.03(c) ("No more than 300 poles shall be the subject of any single pole attachment license application") and § 9.03(d) ("No more than 20 manholes shall be the subject of any single conduit occupancy license application.").*

[61] *The* SBC Texas Order *notes that Southwestern Bell relies upon the Texas Master Agreement to demonstrate Southwestern Bell's compliance with checklist item 3.* 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 ¶ 245 n. 694 (June 30, 2000) ("SBC Texas Order").*

submit a 150-pole order in two parts, which by making each order one of less than 100 poles, makes the 45-day limit applicable to all the poles involved. In addition, Qwest's proposal would have it responsible for responding to all of an order that is for up to 99 poles, while obliging it to respond to no certain portion of an order for 101 poles. The granting of rolling access appears to raise other problems as well. For example, a CLEC might get early approval of a portion of a several mile, integrated facility run only to find itself later to be denied access to the remainder. The trouble that both the FCC and Qwest find themselves in is clearly a function of trying to establish an overly simplistic arithmetic approach to an order-processing challenge that is too complex to be addressed that way. It would be good to find a way that addresses the issue simply, yet objectively, but no approach imaginable would be free from the concurrent problems of under and over inclusivity.

Absent carefully constructed alternatives by the participants, it is therefore more practical to treat cases where Qwest has large access-request workloads as possible exceptions to the base interval requirements. Overall workload may not be a function of the size of a particular order; *e.g.*, a significant number of medium sized orders from multiple CLECs and in the same vicinity may be much more difficult to handle than a single large order from one CLEC.

Accordingly, the SGAT should provide that Qwest is obligated to meet the baseline intervals (*i.e.*, no specifically defined exceptions to the 45-day rule) unless Qwest can secure relief (under whatever measures the SGAT or state commission regulations may provide). Admittedly, this approach may take some time to develop in a satisfactory manner, because it will take real cases, perhaps examined partially after the fact, to establish clear courses of dealing. However, it will have the advantage of actual circumstances, needs, and limitations to inform it. Again, if Qwest believes that the SGAT's general sections have not been drawn to support a request for relief of this type, Qwest can address it in the General Terms and Conditions workshop to follow.

Specifically, in Section 2.2 of Exhibit D of the SGAT, Qwest should strike from the third paragraph everything after the first sentence. In place of the stricken language, Qwest should insert the following:

> *In the event that Qwest believes that circumstances require a longer duration to undertake the activities reasonably required to deny or approve a request, it may petition for relief before the Commission or under the escalation and dispute resolution procedures generally applicable under this SGAT.*

Finally, it should be understood that this resolution does not necessarily narrow nor expand the exception that Qwest has sought. There are likely to be cases where individual orders smaller than those targeted by Qwest will justify an exception, just as there may be cases where larger orders do not qualify.

7 *Relationship to Other Checklist Items*

AT&T says that there was agreement in other states that the MDU access issue be addressed in the workshop on subloops. MDU and subloop issues are integrally related; CLECs should not be foreclosed from addressing MDU access issues in the subloop workshop. Qwest has also stated

an intention to offer a new product called "field collocation." There is no current SGAT language or testimony describing field collocation, but it appears that it will raise right of way issues. Therefore, right of way issues may arise in Workshop 2, which will address Qwest's field collocation offering. AT&T said that Checklist Item 3 should remain open until those concerns have been addressed in subsequent workshops. AT&T and WCOM further supported a delay in closing this checklist item by citing the FCC's October 25, 2000 order on access to multi-tenant environments.[62]

Qwest has agreed to consideration in those workshops of any subloop and field collocation issues that may arise, but have not yet arisen. Qwest asserted that AT&T agreed with this approach in Colorado workshops; that agreement obviates any need to defer closure of Checklist Item 3.

Proposed Issue Resolution: It is not certain at present that these potential right of way issues will arise. Moreover, if they do, all parties, including Qwest, agree that they can be addressed in subsequent workshops. There is thus no need to address this issue here or to defer consideration of Qwest's compliance with Checklist Item 3.

8. Payment for Facility Re-arrangement Costs

McLeodUSA also objected to requiring CLECs to pay under SGAT Section 10.8.2.11 to re-arrange their facilities if the need for modification is solely a Qwest one.[63] Qwest noted that it gives CLECs 60-day notice of such re-arrangements, which is what the FCC requires.[64] CLECs are only required to pay to rearrange their facilities if they fail to respond timely. Qwest considers this provision to provide a proper incentive for CLECs to respond promptly to Qwest re-arrangement needs.

Proposed Issue Resolution: This provision provides a reasonable means to assure that CLECs do not unreasonably delay Qwest facility modifications that are necessary for it to provide service. No change to the SGAT is necessary or appropriate.

9. Inspection Costs

McLeodUSA questioned the difference between on-site and final inspections under SGAT Section 10.8.1.12.[65] McLeodUSA also said that Qwest should bear the expense of on-site and

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[62] *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, 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,* In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, *WT Docket No. 99-217, CC Docket Nos. 96-98, 88-57, FCC 00-366 (rel. Oct. 25, 2000)* ("MTE Order").

[63] *McLeodUSA's Comments at 2.*

[64] Local Competition Order ¶ *1209; Order on Reconsideration,* 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 No. 96-98, CC Docket No. 95-185, FCC 99-266 ¶ 100-102 (rel. Oct. 26, 1999)* ("Order on Reconsideration").

[65] *McLeodUSA's Comments at 2-3.*

final construction inspections under SGAT Section 10.8.2.12, because they benefit Qwest. McLeodUSA believes that the inspection burden should be the same as that of SGAT Section 10.8.2.14. Moreover, McLeodUSA would not shift the cost burden on the basis of whether violations are found, because that could produce an incentive to find violations. Qwest testified that the term "on-site/final" inspection in Section 10.8.2.12 contemplates a physical, visual review of CLEC's facilities after installation. Qwest also said that SGAT Section 10.8.2.14 requires Qwest to pay for any inspection of CLEC attachments, except where a material violation is found. Qwest considers the requirement that the violation be "material" to provide sufficient control over abuse of the inspection process to transfer cost responsibility to CLECs.

Proposed Issue Resolution: McLeodUSA filed no brief nor did it in any way follow up on the list of questions that comprised its filing in this workshop. Nevertheless, since that filing did take specific issue with Qwest's inspection-charge provision, the issue is considered to be in dispute. Qwest acknowledges that it will only charge if there are material violations. It is reasonable to presume that Qwest will re-inspect after material violations have been found. If a re-inspection finds no material violations, then it will cause no charge, as Qwest explained this SGAT provision. Thus, a CLEC that brings its access into compliance will in fact cause a final inspection for which there is no charge.

This SGAT provision fairly balances Qwest's need to assure that construction is compliant with CLEC concerns about "trumped up" violations. The argument that an inspection "benefits" Qwest misses the point, which is cost causation. Qwest does not perform these inspections because they confer on Qwest a benefit that is independent of a CLEC's occupancy of its premises or occupancy rights. The occupancy of the CLEC causes the need for the inspection, which is to ensure that CLEC installation complies with valid requirements. It is proper to charge CLECs for them as Qwest proposes. In effect, only where there are material problems, which by definition leave open for later inspection ultimate CLEC compliance, do CLECs pay separately at all for inspections.

10. Time Limit for Remedying Non-Complying Attachments

McLeodUSA said that the SGAT Section 10.8.2.13 term "reasonable period" should be specified, or should be as determined by mutual agreement.[66] Qwest opposes this change. Qwest said that the intent of the suggestion was to give CLECs a correction interval that matches the nature of the non-compliance. Qwest thinks that a case-by-case approach, which the current language supports, is necessary, because there are ranges of modification times and safety or reliability considerations at issue.

Proposed Issue Resolution: Again, McLeodUSA filed no brief nor did it make any follow-up to Qwest's response to its questions. In the event that the issue remains in dispute, Qwest's approach is preferable. McLeodUSA's approach presumes that a standard correction interval is definable. Qwest's approach strikes a proper balance, because the existence of safety and reliability concerns makes a "one-size-fits-all" interval that problematic. The use of the term

[66] *Id. at 2.*

"reasonable" in the existing language affords the basis for relief to CLECs who may feel that Qwest is interpreting the section inappropriately.

11. Schedules and Fees for Inspections

McLeodUSA recommends an SGAT Section 10.8.2.14 inspection schedule that is definite enough to allow CLECs to project the costs involved.[67] McLeodUSA also favors fixed fees, rather than an individual-case-basis ("ICB") approach to charging for them. Qwest responded that the base obligation for Qwest to pay for the inspections (subject to finding material violations) is sufficient protection against too many inspections. Qwest considers it appropriate to establish inspection frequency for individual CLECs on the basis of past performance and on the basis of the safety or reliability concerns that may be present. Qwest also believes that the widely differing nature of the kinds of inspections involved requires an ICB pricing approach.

Proposed Issue Resolution: Again, McLeodUSA has not pursued this issue past inclusion of it in its list of questions. There is no basis for concluding that Qwest is in error in concluding that the inspection frequency should be a function of an individual CLEC's performance record or in observing that the scope of possible inspections is too broad to support a single fixed price. Therefore, the existing SGAT language should be considered a satisfactory means for governing inspection schedules and fees.

12. Unauthorized Attachment Fee Waiver

Qwest rebuttal witness Freeberg unilaterally proposed a change to SGAT Section 10.8.2.22.[68] The change would provide for waiver of half the unauthorized attachment fee (the original language waived it all) where a CLEC meets the cure obligations. Qwest made the change because the lack of financial consequences might induce unlawful attachments or occupancy. No party has commented on or challenged the provision.

Proposed Issue Resolution: The current language strikes an appropriate balance. First, it provides that no unauthorized attachment fee will be required in the case of Qwest error. Second, it establishes a financial incentive not to make such attachments. The prior provision would have allowed CLECs to obtain a no-harm cure, simply by placing the order that should have been made in the first instance. Such a provision would inevitably tend to undercut the obligation to make proper applications in advance. Third, by continuing to waive a substantial portion of the fee after a cure, the provision works to mitigate the effects of good-faith CLEC errors and to encourage resolution of instances where Qwest claims unauthorized attachments. The lack of objection to the proposal (although it appears to have drawn no affirmative comment by CLECs) further supports the conclusion that it is appropriate for inclusion in the SGAT.

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[67] *Id. at 2-3.*
[68] *Freeburg Rebuttal Testimony at 24.*

Checklist Item 7(I): 911 and E911 Services

Background

Section 271(c)(2)(B)(vii) of the Act requires Qwest to provide "nondiscriminatory access to – (I) 911 and E911 services."[69] The FCC has defined this obligation as requiring "a BOC to provide competitors access to its 911 and E911 services in the same manner that a BOC obtains such access, or, at parity."[70] AT&T and McLeodUSA have raised concerns or questions about Qwest's compliance with this requirement.

Qwest witness Bumgarner, on rebuttal, provided a summary of services that Qwest was providing to CLECs as of August 31, 2000:

Qwest 911/E911 Services
To Facilities-Bases CLECs

	Facilities-Based		Resellers
State	**No.**	**State**	**No.**
ID	3	ID	10
IA	7	IA	11
MT	2	MT	10
ND	0	ND	12
UT	3	UT	7
WY	0	WY	4

[69] 47 U.S.C. § 271(c)(2)(B)(vii).
[70] *BellSouth Second Louisiana Order*, ¶ 235 *(citing Ameritech Michigan Order*, ¶ 256).

Issues Resolved During this Workshop

The participants raised a number of issues about which they have been having ongoing dialogue, particularly in section 271 workshops in other Qwest states. Some of those issues have been resolved among the parties contesting them. The later filings in this workshop and the briefs of the parties explain those resolutions. Other participants, particularly McLeodUSA, have raised questions in their initial comments. Qwest generally responded to those questions by providing in its rebuttal filing answers explaining the rational for the SGAT provisions questioned (a number of the questions were manifestly intended only to seek explanation, not to raise specific concerns).

The parties' resolutions of the issues on which they have come into agreement are reasonable and appropriate; Qwest's answers to questions explaining the basis for SGAT sections questioned reasonably responded to the concerns that appear to have underlain other McLeodUSA's questions. Moreover, McLeodUSA made no further inquiry or comment, nor did it file a brief following Qwest's response to the questions raised. Therefore, it is appropriate for the commissions to consider these issues, which are briefly described below, to have been resolved in a manner that is consistent with the public interest and with the requirement that Qwest comply with checklist item 7(i).

1. Documentation for direct connection interconnection arrangements

AT&T raised concerns about being required to connect through an intermediate frame. However, AT&T has since stated that its direct connection concerns have been resolved by an agreement from Qwest to allow parties to connect directly to its COSMIC or main frame, which will eliminate the prior requirement that connection be through an intermediate frame, such as an ICDF or SPOT frame. Qwest has agreed to the revised processes that are described in Attachment A to AT&T's Wilson Affidavit.[71]

2. Lack of SGAT specificity on what Qwest will do to assure parity

AT&T recognized that the SGAT generally adopts a proper standard in providing that, "E911 functions provided to CLEC shall be at the same level of accuracy and reliability as for such support and services that Qwest provides to its end users for such similar functionality." However, AT&T claimed that the lack of further detail makes it impossible for Commissions or CLECs to assess whether parity will be provided. AT&T recommended no correction to address this concern. The Wilson affidavit, however, also stated that all of AT&T's concerns about the Qwest SGAT insofar as this checklist item is concerned have been resolved. [72] Therefore, this issue should be considered closed.

[71] *Affidavit of Kenneth L. Wilson Regarding Access to 911, Signaling &Databases, Directory Listings, Numbering Administration and Dialing Parity (hereafter Wilson Affidavit)*
[72] *Wilson Affidavit at 6.*

3. McLeodUSA Questions

McLeodUSA raised a number of questions about 911/E911, but did not express any discernible, specific objections or concerns.[73] A number of these inquiries appeared to solicit information, rather than to make objections or raise concerns. Inquiries of this type, to which Qwest has provided responses in its rebuttal filing, included:

- Distinguishing between 911 and E911 at various points in the SGAT
- Seeking information about database maintenance for 911 (Qwest replied that there is only a database for E911)
- Determining when a CLEC becomes "facilities-based" under SGAT Section 10.3.4.2 and whether there is a difference between a "CLEC" and a "facilities-based CLEC" in Section 10.3.4.1
- Asking whether Qwest provisions E911 through a tandem at all Qwest locations.

4. Responsibility for Database Errors

McLeodUSA questioned whether Qwest would assume responsibility for database errors and whether Qwest would provide indemnity in connection with database errors.[74] Qwest witness Bumgarner stated that CLECs provide their own updates directly to the database administrator, which is not Qwest, but Qwest's contractor, who is SCC. Therefore, Qwest argues, it is not in a position to ensure the accuracy of updates or to take responsibility for errors in those updates. Qwest's answer was responsive and it provided a foundation for its claim that it should not bear responsibility for data base errors. Given the lack of further evidence or briefing of the issue from McLeodUSA, this issue should be considered to be resolved.

5. Definition of the Term "Nondiscriminatory"

McLeodUSA questioned what the term "nondiscriminatory" means in the provisioning context, particularly where facility availability problems exist.[75] On rebuttal, Qwest witness Bumgarner stated that no party has alleged a shortage of 911/E911 trunking facilities in any of the participating states. Ms. Bumgarner also testified that ROC performance measures would identify any variances in providing trunking within the prescribed limits. Qwest's answer was responsive and it provided a foundation for its claim that there exists an objective standard for determining the question of discrimination as it concerns facility availability. Given the lack of further evidence or briefing of the issue from McLeodUSA, this issue should be considered to be resolved.

Issues Deferred to Other Workshops

1. Impacts of Number Porting on 911/E911 Services

This issue was addressed in detail in Workshop One. It concerns the timing problem that occurs if service from Qwest is disconnected before the telephone number of a customer migrating from

[73] *McLeodUSA's Comments at 3-4.*
[74] *Id. at 3.*
[75] *Id. at 3.*

Qwest to a CLEC is ported. That issue will be resolved in the report to be issued following the conclusion of that workshop and subsequent briefing there, which will include this issue. The issue will not be addressed in this report. Qwest witness Bumgarner did present testimony that addresses the procedures adopted by Qwest with the intent of minimizing out-of-service conditions regarding 911/E911. That testimony was not rebutted in this workshop. The Bumgarner testimony will be considered in that workshop.

Checklist Item 7(II): Directory Assistance

Background

Sections 271(c)(2)(B)(vii)(II) and 271 (c)(2)(B)(vii)(III) of the Act require Qwest to provide nondiscriminatory access to "directory assistance services to allow the other carrier's customers to obtain telephone numbers" and "operator call completion services."[76] Section 251(b)(3) requires each LEC to give all competing providers of exchange and toll service nondiscriminatory access to "operator services, directory assistance, and directory listing, with no unreasonable dialing delays."[77]

The FCC's *Local Competition Second Report and Order*, provides that "nondiscriminatory access to directory assistance and directory listings" means that all customers of all carriers:

> *should be able to access each LEC's directory assistance service and obtain a directory listing on a nondiscriminatory basis, notwithstanding: (1) the identity of a requesting customer's local telephone service provider; or (2) the identity of the telephone service provider for a customer whose directory listing is requested.*

All customers "must be able to connect to a local operator by dialing '0,' or '0 plus' the desired telephone number."

Qwest's obligations extend to its national directory assistance service. Earlier this year, the FCC ruled that the nationwide component of Qwest's nonlocal directory assistance service violated the Act.[78] The FCC concluded that the region-wide component of Qwest's nonlocal directory assistance service falls within the scope of the exception provided in section 271(g)(4),[79] and required Qwest to "make available to unaffiliated entities all of the in-region directory listing information it uses to provide region-wide directory assistance service at the same rates, terms, and conditions it imputes to itself."[80]

Issues Resolved During this Workshop

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[76] 47 U.S.C. §§ 271(c)(2)(B)(vii)(II) & (III).
[77] 47 U.S.C. § 251(b)(3). *See also Bell Atlantic New York Order*, ¶ 351.
[78] *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding The Provision of National Directory Assistance, Petition of U S WEST Communications, Inc. for Forbearance*, Memorandum Opinion and Order, CC Docket No. 97-172, FCC 99-133, ¶ 2 (rel. Sept. 27, 1999).
[79] *Id.*, ¶ 23.
[80] *Id.* ¶ 37.

The participants raised a number of issues about which they have been having ongoing dialogue, particularly in section 271 workshops in other Qwest states. Some of those issues have been resolved among the parties contesting them. The later filings in this workshop and the briefs of the parties explain those resolutions. Other participants, particularly McLeodUSA, have raised questions in their initial comments. Qwest generally responded to those questions by providing in its rebuttal filing answers explaining the rational for the SGAT provisions questioned (a number of the questions were manifestly intended only to seek explanation, not to raise specific concerns).

The parties' resolutions of the issues on which they have come into agreement are reasonable and appropriate; Qwest's answers to questions explaining the basis for SGAT sections questioned reasonably responded to the concerns that appear to have underlain other McLeodUSA's questions. Moreover, McLeodUSA made no further inquiry or comment, nor did it file a brief following Qwest's response to the questions raised. Therefore, it is appropriate for the commissions to consider these issues, which are briefly described below, to have been resolved in a manner that is consistent with the public interest and with the requirement that Qwest comply with checklist item 7(I).

1. Access to Qwest's Directory Assistance List

AT&T expressed a concern that Qwest's SGAT did not provide nondiscriminatory access to its list of all the in-region telephone numbers Qwest uses to provide directory assistance.[81] Qwest agreed to revise Section 10.6.1.1 of its SGAT in a matter that fully addresses this concern.

2. Contacting Customers in Emergencies

AT&T was concerned that it would not have the same ability as Qwest has to contact customers with non-published telephone numbers in emergencies. AT&T wanted the same access that Qwest directory assistance personnel have to these numbers for this purpose.[82] Qwest amended Section 10.6.2.10 of the SGAT in a manner that addresses this concern.

3. Limiting CLEC Use of Listing Information to Local Exchange Customers

AT&T said that the SGAT prohibited CLECs from using the Directory Assistance List on directory-assistance calls from customers who are not local exchange end users. As Qwest appears not to so limit its own use, AT&T considered this limitation on CLECs to be discriminatory and difficult to enforce (as CLECs could not identify the caller with sufficient particularity).[83] Qwest modified SGAT Section 10.6.2.1 in a manner that addresses this concern.

4. Restrictions on Use of Proprietary Information

[81] *Wilson Affidavit at 9.*
[82] *Id.*
[83] *Id.*

AT&T considered SGAT Section 10.6.2.5 restrictions on use of proprietary information to be overly broad, because the restrictions do not explicitly allow CLECs to use such information that they obtain from a source other then Qwest. AT&T has been satisfied with prior Qwest affirmations that Section 5.16.4 would allow such use; therefore, this issue was not argued.[84]

5. *Definition of the Term "Nondiscriminatory"*

McLeodUSA questioned what the term "nondiscriminatory" means in the SGAT Section 10.5 context of access to directory assistance.[85] Qwest responded by saying that the term generally has the same meaning as the FCC intends in its orders addressing directory assistance. This interpretation, which McLeodUSA did not later contest by evidence or brief, is reasonable.

6. *Audit Duplication*

McLeodUSA observed that Section 18.2.4 of the SGAT already provides for two audits, suggesting that Section 10.6.2.8.1 may be duplicative. It also questioned why Qwest is the only party that can "seed" information to trace compliance.[86] Qwest responded that the Section 10 audits had distinct purposes from those of Section 18, which, unlike Section 10 is reciprocal. Qwest also proposed new SGAT audit language to address the "seeding" issue:

> *10.5.2.10.1 In accordance with Section 18, CLEC may request a comprehensive audit of Qwest's use of CLEC's directory assistance listings. In addition to the terms specified in Section 18, the following also apply: as used herein, "Audit" shall mean a comprehensive review of the other Party's delivery and use of the directory assistance listings provided hereunder and such other Party's performance of its obligations under this Agreement. CLEC may perform up to two (2) audits per 12-month period commencing with the effective date of this Agreement of Qwest's use of CLEC's directory assistance listings in Qwest's directory assistance service. CLEC shall be entitled to "seed" or specially code some or all of the directory assistance listings that it provides hereunder in order to trace such information during an Audit and ensure compliance with the disclosure and use restrictions set forth in this Agreement.*

Qwest satisfactorily distinguished the nature of the Section 18.2.4 and the Section 10.6.2.8 audits and it made an SGAT change that addresses the seeding issue.

Issues Remaining in Dispute

1. *Access to Qwest's CNAM Database*

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[84] *Id. at 10.*
[85] *McLeodUSA's Comments at 3.*
[86] *Id. at 4.*

WCOM raised only this one directory-assistance issue, although Qwest considers it a call-related database issue.[87] WCOM believes that the Act requires access to CNAM database as a network element under 47 U.S.C. § 251(c)(3); id. § 153(29), which defines network elements to include "databases." WCOM also cites the *Local Competition Order*, §§ 484 and 485 and the *UNE Remand Order*, FCC 99-238, § 406. WCOM specifically objects, on the basis of discriminatory treatment, to Qwest's proposal to limit access to individual queries, rather than to provide a bulk transfer of the entire database. WCOM said that it would only be able use the CNAM database effectively if it can, like Qwest, populate and maintain its own databases. WCOM said that bulk transfer would allow it to structure its databases to suit its customer needs and offer innovations. Qwest responded by saying that the FCC decided in the *Local Competition Order* not to require direct access to call-related databases. Qwest cites language holding that:

> *We . . . emphasize that access to call-related databases must be provided through interconnection at the STP (signaling transfer point) and that we do not require direct access to call-related databases.*

Similarly, Qwest said the FCC's *UNE Remand Order* limited access "for the purpose of switch query and database response through the SS7 network."[88] Further, the FCC required incumbent LECs to provide access "by means of physical access at the signaling transfer point linked to the unbundled databases."[89] Qwest does not object to access on a query-response basis. However, Qwest said that the kind of access that the FCC requires is less than the bulk transfer of the entire database.

WCOM did not agree that the FCC would limit access to a "per query" basis. WCOM says that the FCC decided only that complete and global access to a LEC's CNAM database was not "technically feasible" over a signaling network.[90] Thus, the FCC direction to provide access to databases at the signaling transfer point should not be read as limiting access only to that which can be provided through the signaling network. Therefore, WCOM continued, because it has been shown that what WCOM seeks is technically feasible, Qwest should provide access to the entire database in order to avoid discrimination against CLECs. In support of its discrimination argument, WCOM offered Caller ID as an example where per query access would reduce efficiency, inhibit service-quality management, and limit the addition of new features. Specifically, WCOM claimed that it must be given "bulk access" to the CNAM database, because it cannot obtain access to the database on a "query-response" basis in the short amount of time during the first silent interval in the ringing cycle.

Qwest responded by saying this "first-silent-interval" claim should have been raised in the FCC's *UNE Remand* proceeding, which addressed CLEC access to CNAM database. Also, Qwest said that it has no advantage, but must undertake the same Caller ID activities that

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[87] *WCOM at 28-31.*

[88] *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *CC Docket No. 96-238, FCC 99-238, 15 FCC Rcd 3696 ¶ 402 (Nov. 5, 1999) ("*UNE Remand Order*") (emphasis added).*

[89] UNE Remand Order ¶ *410.*

[90] *Local Competition First Report & Order*, ¶ 485.

WCOM must. Finally, even if Qwest were to provide bulk transfer, it believes that WCOM would still have to update the database and make queries of other database providers. Qwest also said that it already is meeting the industry standard, which only requires response to a query before the second, not the first, ring. Finally, Qwest recited the FCC *UNE Remand Order* holding that "the costs incurred by a requesting carrier to self-provision or use alternative databases does not appear to materially diminish the carrier's ability to provide the services it seeks to offer."[91]

Proposed Issue Resolution: WCOM seeks access to the CNAM database through bulk transfer as a network element. It cites technical feasibility, prevention of discrimination against CLECs, and promoting its ability to innovate in support of its claim that such access should be considered to be a UNE. WCOM has not claimed that the FCC has determined such access to be a UNE. Neither, however, has there been a substantiated claim that the participating states cannot decide that circumstances applicable in their jurisdictions make it appropriate to establish such access as a UNE.

Taking WCOM's position as a request that the state commissions declare CNAM database bulk transfer as a UNE, in addition to those UNEs established by the FCC, what the FCC has said is adequate in the context of signaling databases is not dispositive. Nevertheless, WCOM has not laid a proper foundation for a determination that the access it seeks qualifies as a UNE under the applicable standards, including the impairment test, that states are to consider in making decisions about UNEs beyond those already established by the FCC. The only specific application cited by WCOM involved Caller ID. The unrebutted Qwest evidence is that:

- Qwest has no advantage over CLECs here, because it must still undertake the same activities as WCOM
- Bulk transfer of the database would leave WCOM still required to query the databases of entities other than Qwest.

Finally, WCOM has not presented any evidence that would demonstrate that self-provisioning or the use of alternative databases would materially affect its ability to offer its services. The absence of substantial evidence contrary to Qwest's evidence on these two points and the failure to make more than a very general and factually unsupported claim of necessity and impairment lead to the conclusion that WCOM has not established the conditions that would call for the establishment of bulk transfer of the CNAM database as an unbundled network element.

Checklist Item 7(III): Operator Services

Background

MeLeodUSA's initial filing in this workshop raised a number of questions about operator services; beyond these initial questions, no participant filed testimony, comments, or brief.

[91] UNE Remand Order ¶ 415.

Issues Resolved During this Workshop

McLeodUSA raised several questions in its initial comments. Qwest generally responded to those questions by providing in its rebuttal filing answers explaining the rationale for the SGAT provisions questioned (a number of the questions were manifestly intended only to seek explanation, not to raise specific concerns) or by making SGAT changes that address issues underlying certain questions. Qwest's answers to questions reasonably explained the basis for SGAT sections questioned and its SGAT changes responded to the concerns that appear to have underlain other McLeodUSA's questions.[92] Moreover, McLeodUSA made no further inquiry or comment, nor did it file a brief following Qwest's response to the questions raised. Therefore, it is appropriate for the commissions to consider these issues, which are briefly described below, to have been resolved in a manner that is consistent with the public interest and with the requirement that Qwest comply with checklist item 7(iii).

1. Definition of the Term "Nondiscriminatory"

McLeodUSA sought further explanation of the SGAT Section 10.7 use of the term "nondiscriminatory."[93] Qwest responded that the term generally has the same meaning that the FCC intends in its orders regarding addressing operator services. This response is reasonable, and, given the lack of follow-up by McLeodUSA, means that this issue can be considered closed.

2. Forecasting Process

McLeodUSA raised several questions about the SGAT Section 10.7.2.3 forecast process.[94] Qwest responded by modifying the section, by adding a new one on operator services, and by adding a corresponding forecasting provision related to customer service (the strikeout shows the deletion from Section 10.7.2.3):

> *10.7.2.3 In order for CLEC to use Qwest's operator services as a facility-based CLEC, CLEC must provide an operator service trunk between CLEC's end office and the Interconnection point on the Qwest operator services switch for each NPA served.* ~~*CLEC must provide a forecast of the expected volume of calls.*~~
>
> *10.7.2.14 At least ninety (90) days prior to using Qwest's operator services, CLEC will provide a written forecast of the expected volume of operator services calls. Should CLEC plan to substantially increase or decrease its actual usage as forecast by more than twenty-five percent (25%) of originally forecast usage, CLEC will give Qwest advance written notice of such planned change at least sixty (60) days prior to implementing such changed use. CLEC will update its forecasts of operator services use, in writing annually, at least sixty (60) days prior to the anniversary date of its first forecast.*

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[92] *Qwest's response to the McLeodUSA questions on checklist item 7(III) is found in the Rebuttal Testimony of Lori A. Simpson, 11/03/00.*
[93] *McLeodUSA's Comments at 4.*
[94] *Id.*

10.5.2.12 At least ninety (90) days prior to using Qwest's directory assistance services, CLEC will provide a written forecast of the expected volume of directory assistance service calls. Should CLEC plan to substantially increase or decrease its actual usage as forecast by more than twenty-five percent (25%) of originally forecast usage, CLEC will give Qwest advance written notice of such planned change at least sixty (60) days prior to implementing such changed use. CLEC will update its forecasts of directory assistance service use, in writing annually, at least sixty (60) days prior to the anniversary date of its first forecast.

These changes respond to the questions raised, and given the lack of follow-up by McLeodUSA, mean that this issue can be considered closed.

3. Vagueness of SGAT Section 10.7.2.8

In response to McLeodUSA's question about the vagueness of this provision,[95] Qwest proposed a clarification (strikeouts shows deletions; underlining shows additions):

10.7.2.8 It ~~is understood that~~ Qwest will ~~shall not be obligated to~~ provide ~~specific~~ operator services to CLEC where ~~there are facility or~~ technically feasible and facilities are available ~~limitations~~. Qwest, ~~in its reasonable discretion,~~ may from time-to-time modify and change the nature, extent, and detail of specific operator services available to its retail end users, and to the extent it does so, Qwest will provide forty-five (45) days advance written notice to CLEC of such changes.

These changes respond to the questions raised, and given the lack of follow-up by McLeodUSA, mean that this issue can be considered closed.

4. Measuring Resource Commitment Fulfillment

McLeodUSA asked how a commission could measure Qwest's performance in providing the personnel and equipment necessary to perform operator services commitments under SGAT Section 10.7.2.9.[96] Qwest responded by noting the existence of ROC Performance Measures OS-1 and OS-2 and the fact that CLECs would know if Qwest is unable to provision an Operator Services trunk, which Qwest believes should be adequate to address the question of meeting commitments. This answer responds to the question raised, and given the lack of follow-up by McLeodUSA, means that this issue can be considered closed.

Checklist Item 8: White Pages Directory Listings

Background

Section 271(c)(2)(B)(viii) requires "[w]hite pages directory listings for customers of the other carrier's telephone exchange service." Section 251(b)(3) requires all LECs to provide

[95] *Id.*
[96] *Id.*

nondiscriminatory access to directory listings. The obligation includes: a) nondiscriminatory appearance and integration of white pages listings for CLEC customers, and b) CLEC customer listing that have the same accuracy and reliability as those of the ILEC's own customers.[97]

Issues Resolved During this Workshop

The participants raised a number of issues about which they have been having ongoing dialogue, particularly in Section 271 workshops in other Qwest states. Some of those issues have been resolved among the parties contesting them. The later filings in this workshop and the briefs of the parties explain those resolutions. Other participants, particularly McLeodUSA, have raised questions in their initial comments. Qwest generally responded to those questions by providing in its rebuttal filing answers explaining the rationale for the SGAT provisions questioned (a number of the questions were manifestly intended only to seek explanation, not to raise specific concerns) or by making SGAT changes to address the issues underlying the questions.

The parties' resolutions of the issues on which they have come into agreement are reasonable and appropriate; Qwest's answers to questions explaining the basis for SGAT sections questioned reasonably responded to the concerns that appear to have underlain other McLeodUSA's questions. Moreover, McLeodUSA made no further inquiry or comment, nor did it file a brief following Qwest's response to the questions raised. Therefore, it is appropriate for the commissions to consider these issues, which are briefly described below, to have been resolved in a manner that is consistent with the public interest and with the requirement that Qwest comply with Checklist Item 8.

1. Obliging Dex to Meet Qwest Commitments

AT&T noted that Dex, the Qwest affiliate that publishes white pages listings, had no legal obligation under the SGAT to fulfill the requirements of Section 271.[98] AT&T sought a contractual obligation or warranty from Dex to commit the affiliate to publish listings in accord with Qwest's Section 271 obligations. AT&T offered language, which Qwest agreed to accept, to address this need:

> *Qwest represents and warrants that any arrangement for the publication of white pages directory listings with an affiliate (including without limitation, Qwest Dex, Inc.) (an "Affiliate") requires such Affiliate to publish the directory listings of CLEC contained in Qwest's databases so that CLEC's directory listings are nondiscriminatory in appearance and integration, and have the same accuracy and reliability that such Affiliate provides to Qwest's customers.*

2. CLEC Listing Format

[97] *Telecommunications Act, supra.*, ¶ 253.
[98] *Wilson Affidavit at 12-13.*

McLeodUSA sought the deletion of the first sentence of SGAT Section 10.4.2.1, because there is no legal requirement that CLECs provide listings in any particular format.[99] Alternatively, McLeodUSA would not object if this sentence were discretionary. Qwest has proposed language that would allow CLECs to submit their listing electronically or by facsimile. The language is:

> *10.4.2.1 CLEC will provide in standard format, by mechanized or by manual transmission to Qwest, its primary, premium, and privacy listings ~~format, and Qwest will accept at no charge, one primary listing for each main telephone number belonging to CLEC's end users.~~ Qwest will accept one primary listing for each main telephone number belonging to CLEC's end users at no charge.*

3. *Language Changes for SGAT Section 10.4.2.4*

McLeodUSA recommended two clarifications to the language of this provision.[100] Qwest agreed to the first, but altered the second, because it requires written permission from a CLEC to include its listing in files provided to white-pages directory publishers:

> *10.4.2.4 If CLEC provides its end users' listings to Qwest, CLEC grants Qwest access to CLEC's end user listings information solely for use in its Directory Assistance List Service, except as provided in Section 10.4.2.5, and subject to the terms and conditions of this Agreement. Qwest will incorporate CLEC end user listings in the directory assistance database. Qwest will incorporate CLEC's end user listings information in all existing and future directory assistance applications developed by Qwest. Should Qwest cease to be a telecommunications carrier, by virtue of a divestiture, merger or other transaction, this access grant automatically terminates.*

4. *Identifying Steps Required to Retain Privacy Indicators in Listings Databases*

McLeodUSA questioned what the term "reasonable steps" means in SGAT Section 10.4.2.9.[101] Qwest responded that it would follow "industry practices," which is what the section explicitly requires. There may or may not be a need for more specificity to inform McLeodUSA about what industry practices entail. However, no other carrier expressed a problem about understanding what the term means. Moreover, while the SGAT offers only a general standard, it is nevertheless one that is not uncommon in establishing an allowed course of dealing between two experienced participants in an industry. Finally, to the extent that disputes arise, this standard provides a rational and adequate basis for a dispute resolver to determine what kind of evidence to take and how to make a final judgment.

5. *Reciprocity of SGAT Section 10.4.2.13*

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[99] *McLeodUSA's Comments at 4.*
[100] *Id. at 5.*
[101] *Id. at 5.*

In response to the McLeodUSA request that this provision be reciprocal[102], Qwest stated that it was made so through language proposed for SGAT Section 10.4.2.23.1 (see Simpson Exhibit QWE-LAS-2). In response to a definition of what "commercially reasonable efforts" are in directory publishing, Qwest observed that the language was proffered by WCOM.

6. Proofs of Authorization

McLeodUSA questioned what proof is required under SGAT Section 10.4.2.18.[103] Qwest responded by proposing to revise the provision:

> ~~*10.4.2.18*~~ *Prior to placing listings orders on behalf of end users, CLEC shall be responsible for obtaining and have in its possession Proof of Authorization ("POA"), as set forth in Section 5.3 of this Agreement.* ~~*Upon request by U S WEST, CLEC shall submit proof to U S WEST of authorization from each end user for which CLEC submits a change in end user's listing.*~~

Qwest's change makes the question of proof explicitly defined under another SGAT section. It adequately responds to the question.

7. Opportunity to Verify CLEC Listings Accuracy

Section 10.4.2.20 addresses Qwest's distribution of verification proofs and other means for CLECs to verify their listings' accuracy. McLeodUSA asked for a definition of what comprises that opportunity and how this provision relates to SGAT Section 10.4.2.21.[104] Qwest noted that Section 10.4.2.20 provides CLECs the opportunity to review their listings, while Section 10.4.2.21 expressly provides that they may edit them prior to the directory closing date. This answer responded to the question, which McLeodUSA did not further address through testimony, comment, or brief.

8. Technical Amendments to SGAT Section 10.4.2.23

Qwest agreed to make changes pursuant to McLeodUSA's suggestion[105]; the changes are set forth below:

> *10.4.2.23 Pursuant to Sec. 222 (a), (b), (c), (d), and (e) of the Telecommunications Act,* ~~*U SWEST*~~*Qwest will provide subscriber lists information gathered in Qwest's capacity as a provider of local exchange service on a timely and unbundled basis, under non-discriminatory and reasonable rates, terms and conditions to CLEC upon request for the purpose of publishing directories in any format. Rates may be subject to federal or state law or rules, as appropriate. Upon request by CLEC, Qwest shall enter into negotiations with*

[102] *Id. at 5.*
[103] *Id. at 6.*
[104] *Id. at 6.*
[105] *Id. at 6.*

CLEC for CLEC's use of subscriber list information for purposes other than publishing directories, and Qwest and CLEC will enter into a written contract if agreement is reached for such use.

Qwest's change addressed the suggestion of McLeodUSA.

Issues Remaining in Dispute

1. Parity of Treatment for CLEC Listings

AT&T raised in Arizona a concern that the information filed by Qwest suggested unequal treatment of CLEC listings, despite the suggestion of SGAT Section 10.4.2.11 that Qwest would "use the same processes and procedures" for CLEC listings. AT&T was concerned that additional steps required of CLECs create the potential for differential error and timeliness between CLEC listings and listing for Qwest's own end-use customers. AT&T was willing to consider the issue resolved, on the basis of workshop statements that CLEC and Qwest listings information was to treated exactly the same throughout the Qwest region. However, AT&T's discrimination concern resurfaced as a result of the Regional Oversight Committee's Performance Measures Audit. That audit found that there are differences in treatment of CLEC and Qwest listings updates.[106] AT&T believes that this audit finding demonstrates that Qwest is not providing nondiscriminatory access to white page listings, as required by the Act.[107]

There are two Regional Oversight Committee Performance Measures (DB-1 and DB-2) that address parity between CLEC and Qwest customers in the areas of listing accuracy and reliability. AT&T had agreed that Checklist Item 8 could be conditionally approved, subject to examining post-testing and audit performance under these two measures. AT&T is no longer willing to make that agreement, given the aforementioned Regional Oversight Committee audit finding. AT&T's position is that Qwest cannot be considered to satisfy Checklist Item 8 until after it changes its white-page listings practices to assure parity of treatment.

Qwest says that AT&T's performance concerns are of the type that should be considered when the six states address Regional Oversight Committee's testing, audit, and other performance concerns. This workshop process, which is designed to work in parallel with the testing and audit processes, should not become duplicative of those parallel activities. Qwest acknowledges that it is obliged to respond to testing and audit findings in a manner that assures that recognized "problems" are corrected. Qwest believes that the audit response process will work adequately to determine whether Qwest provides white pages listings with the same accuracy and reliability as it provides listings to its own retail end users. Thus, according to Qwest, there is no reason why this workshop process should defer addressing the issue of whether Qwest has a legally binding obligation to provide white pages directory listings in a manner that satisfies checklist requirements. The workshop recommendation is conditional; it is clear that there will be later state review of the results of the testing and performance-measure auditing.

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[106] *See Attachment C to the Direct Testimony of Kenneth L. Wilson, Exceptions 1005 and 1006 of the Qwest OSS Evaluation, dated September 19, 2000.*

[107] *AT&T Brief at 34-35.*

Qwest also believes that AT&T has inappropriately transformed a parity standard into a standard of equality. The Act, according to Qwest, does not require Qwest identical processes for CLECs, but only end results that are nondiscriminatory.[108] Qwest believes that its witness Simpson demonstrated substantial process similarity in treating CLEC and Qwest listings, where feasible.[109] In addition, Qwest argues that it has adequate procedures for minimizing errors in the distinct process aspects applicable to CLEC listings. The examples it cited include monthly verification proofs to CLECs, "on demand" reports that provide all of that CLEC's listings as of the date of the request, (processes that do not exist for Qwest's retail listings), and the ability to call Qwest's Listings Group to verify an individual listing.[110] Finally, Qwest has committed to providing electronic processing (where it does not already exist) for CLEC listings submitted electronically via IMA-GUI by April 1, 2001.[111]

AT&T contends that Qwest's request to modify the performance measures and Qwest's promise of future system changes to eliminate manual processing of CLECs listings does not put Qwest in compliance with the requirements of Checklist Item 8.[112] To support its claim that present, not future, compliance is the test, AT&T cites an FCC statement in another RBOC's 271-approval context:[113]

> *The timing of a section 271 filing is one that is solely within the applicant's control. We therefore expect that, when a BOC files its application, it is already in full compliance with the requirements of section 271 and submits with its application sufficient factual evidence to demonstrate such compliance. Evidence demonstrating that a BOC intends to come into compliance with the requirements of section 271 by day 90 is insufficient.*

Proposed Issue Resolution: Qwest is admittedly in the process of making changes to its handling of directory-listing updates. Those updates are related to the completion of OSS testing that is now being performed by the ROC. In particular, Qwest is in the process of making these changes to respond to findings that have resulted from the Performance Measures Audit. The ROC has established audit-tracking mechanisms that are intended to validate the successful implementation of agreed changes in the methods by which Qwest measures its performance in

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[108] *Memorandum Opinion and Order*, In the Matter of Application of BellSouth Corporation . . . for Provision of In-Region, InterLATA Service in Louisiana. *CC Docket No. 98-121, FCC 98-271, 13 FCC Rcd 20599 ¶ 253 (1998)* ("Second BellSouth Louisiana Order").

[109] *Simpson Rebuttal Testimony at 11-15*

[110] *Simpson Direct at 37; Simpson Rebuttal at 12.*

[111] *As noted, facilities-based CLECs that use IMA-EDI have their listings electronically processed today. Some CLECs, including AT&T on occasion, choose to submit listing information via facsimile rather than electronically, and those listings necessarily require manual processing. This is no surprise to those CLECs who choose to submit their listings manually.*

[112] *AT&T's Brief at 37.*

[113] *Ameritech Michigan Order*, ¶ 55.

serving CLECs. Therefore, there currently exists a comprehensive means by which Qwest's performance, insofar as it affects parity in database updates, will be examined. Moreover, the participating states already have stated that they will consider OSS test results, which necessarily includes the results of the Performance Measures Audit, at a later date.

The existence of parallel means of examining parity and of a later forum for addressing any lingering issues makes determination of them here premature. Moreover, since the issue raised goes to the heart of compliance with this checklist item, it would similarly be premature to recommend now that Qwest be deemed to have demonstrated compliance with all aspects of this checklist item. That recommendation can be made only after further examination of the information resulting from the still pending steps by Qwest to change its methods for updating directory listing and of the yet to commence audit activities that will examine the sufficiency of those changes after they are made.

2. *Reciprocity Concerning Release of Listings to Third Parties*

McLeodUSA said that SGAT Section 10.4.2.5 should be reciprocal.[114] Qwest objected on grounds related to its own concerns about use of its data and concerns about violating conditions under which it has received data from independent telephone companies and from other CLECs. Moreover, Qwest observed that the section does not give Qwest an unfettered right to provide CLEC listing information to third parties that are not directory assistance providers; CLECs must consent to that release.

McLeodUSA provided no testimony, comment, or brief to identify or describe what it means by the term "reciprocal" in this context. Nor is it self-evident how the term would be applied. The rebuttal testimony of Qwest witness Simpson suggested that it may mean that Qwest should allow a CLEC to sell Qwest listings in cases where that CLEC has allowed Qwest to sell the CLECs listings.

Ms. Simpson's interpretation does not necessarily capture the issue underlying McLeodUSA's concern, but no other logical interpretation is apparent. If Qwest correctly judges the intent of McLeodUSA, then it may be concluded that McLeodUSA has taken an inappropriate view of reciprocity from a business perspective. The existing language does provide reciprocity in a direct and tangible sense; it gives each of the involved carriers the same right, which is to decide whether the other should be allowed to sell its listings. This approach allows each carrier to judge and capture the value of its information in the marketplace. The other approach would make each carrier the judge for the other. Such an approach cannot make sense as a default rule, assuming it ever can, unless it is reasonably certain that there is relative equality in market value or utility between the two sets of listings.

There is no basis for making such a presumption about value; therefore, the McLeodUSA suggestion, as interpreted by Qwest's rebuttal testimony, would not constitute an appropriate approach. Moreover, Qwest cited concerns about limits on use of its information that arise from the specific circumstances under which Qwest has secured it from other CLECs and from

[114] *McLeodUSA's Comments at 5.*

reasons of listing privacy. Thus, even if reciprocal permission to sell information based on the unilateral decision of a CLEC were a reasonable approach in concept, it would raise substantial implementation problems: Qwest would still have to comply with the conditions under which it has secured listing information from other CLECs and assurances made to its customers that private information will remain so.

Accordingly, there is no basis for finding that the obligations under SGAT Section 10.4.2.5 should be made reciprocal.

3. *Applicability of Tariff Liability Limits*

McLeodUSA argued that SGAT Section 10.4.2.6 violates the "filed tariff" doctrine.[115] Qwest rebuttal witness Simpson said she was not aware of that doctrine or of the basis for the argument. Moreover, according to Qwest witness Simpson, the section clearly preserves what existing state tariffs provide. To the extent that one might argue that the SGAT becomes a tariff for purposes of McLeodUSA's argument (whether or not that argument is sound), all Section 10.4.2.6 does is effectively incorporate prior tariffs by reference into the SGAT. Therefore, there is no basis for questioning the efficacy of this SGAT section on the grounds alleged by McLeodUSA.

4. *CLEC Knowledge of State Laws Involving Listings*

McLeodUSA recommended deletion of SGAT Section 10.4.2.15, because it makes CLECs solely responsible for knowing and adhering to state laws regarding listings.[116] Qwest responded that the provisions' purpose is to protect Qwest from failures of CLECs to follow state law in what they provide to Qwest, not to absolve Qwest of any of its obligations for its own actions.

The issue of who is responsible is principally relevant in cases where a CLEC has provided Qwest with CLEC listing information that does not conform to state requirements. To the extent someone bears responsibility to customers or to regulators for CLEC-supplied information, it logically should be the entity providing the information (which is the CLEC), not the party receiving it. This is particularly true where the information is about customers served by the CLEC, not by Qwest. This rule should apply unless there are special circumstances that give the recipient more ability to control information accuracy than the provider has. It is not apparent that such circumstances might exist. Therefore, it is reasonable to make the information provider, i.e., the CLEC, responsible for conformity with state requirements involving CLEC-customer information that CLECs provide to Qwest.

5. *Adding a Section 222(e) reference to SGAT Section 10.4.2.16*

McLeodUSA suggested a rewrite of the SGAT section to cite its consistency with Section 233(e) of the Act and to include the FCC's rates for CLEC provision to Qwest of listing information.[117] Qwest declined, stating that it is not required to "serve as the conduit for providing CLEC

[115] *Id.* at 5
[116] *Id.*
[117] *Id.* at 5

subscriber list information to directory publishers."[118] Qwest also considers the revision outside the scope of Checklist Item 8. McLeodUSA has made no argument connecting its request with compliance under this checklist item, nor is any apparent. Therefore, there is no basis for determining that Qwest is not in such compliance in the absence of the inclusion of the reference requested by McLeodUSA.

6. *Adding the Term "Contractor" to SGAT Section 10.4.2.26*

First, McLeodUSA suggested adding the "contractor" after the word "Affiliate" to the section addressing Qwest's responsibility for the customer guide pages.[119] As written, the section applies to Qwest and to any affiliate that may publish directories. Qwest opposed adding the term, because contractors are not subject to the same legal obligations as are Qwest and its affiliates.

Qwest's concern about the use of the term contractor is misplaced. Qwest agrees (by the explicit language of Section 10.4.2.26) that an affiliate should have to include customer guide pages. Suppose that Qwest made an arrangement by which an unaffiliated party, rather than an affiliate, undertook directory-publishing responsibilities. There is no evident reason why that unilateral decision by Qwest should affect whether the directory includes customer guide pages. This section of the directory has the same purpose and value to CLECs and their customers, whether Qwest, an affiliate or an unaffiliated party (*i.e.*, a "contractor") publishes the directories involved. Therefore, this SGAT section should include the term "contractor" in order to extend the obligation to provide customer-guide pages to any party who publishes directories under an agreement with Qwest. Otherwise, there may be competitive harm should the CLEC information provided by those pages be omitted.

Second, McLeodUSA sought to include language requiring the customer guide section to identify state commission and consumer advocate contacts. Qwest objected, because it is not clear what "state law or regulation" requires publication of the information or how it relates to compliance with Checklist Item 8.

McLeodUSA overreaches in seeking to use the SGAT as the vehicle for assuring that directories include any required state commission or consumer advocate contacts. If law requires such contact information, then each commission can adequately determine under its general regulatory authority how notice should be provided. McLeodUSA has not shown how such notice requirements might be a function of what type of carrier provides local exchange service. In fact, requirements of this type are generally applicable to all customers of all carriers. Insofar as the need for advising customers of the ways to contact regulators or consumer advocates, there is nothing peculiar to the CLEC/Qwest relationship that suggests the issue should be addressed in an SGAT.

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[118] *Third Report and Order in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273*, Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Provision of Directory Listing Information under the Telecommunications Act of 1934, as Amended, *CC Docket Nos. 96-115, 96-98, 99-273, 14 FCC Rcd 15550 ¶ 8 (Sept. 9, 1999).*

[119] *McLeodUSA's Comments at 6..*

7. *Dex's Continuation as Directory Publisher*

McLeodUSA said that Qwest should anticipate the possibility that Dex may not continue as Qwest's primary directory publisher by changing SGAT Section 15.0 to account for it.[120] Qwest said it would make changes to the SGAT if and when that event occurs. The Qwest approach is reasonable; the SGAT cannot be expected to anticipate events that are speculative.

Checklist Item 9: Numbering Administration

Background

Section 271(c)(2)(B)(ix) requires "nondiscriminatory access to telephone numbers" for assignment to the telephone exchange service customers of CLECs. Such access must be provided until the establishment of telecommunications numbering administration guidelines, plans, or rules. After that, Qwest must comply with such guidelines, plans, or rules."[121] The FCC has said that nondiscriminatory access to telephone numbers requires a LEC "to permit competing providers access to these numbers that is identical to the access that the LEC provides to itself."[122] The FCC will look specifically at the circumstances and business practices governing Central Office code administration.[123] The FCC also prohibits LECs from unduly favoring or disfavoring any particular segment or group of telecommunications consumers.[124]

Only Qwest and AT&T offered testimony or comments about numbering administration. The Wilson Affidavit on behalf of AT&T raised three issues[125]:

- Location Routing Number ("LRN")
- Number Reassignment
- Qwest's Provisioning of CLEC NXX Prefixes.

There is agreement among the parties to treat the LRN issue under Checklist Item 1 and the number reassignment issue under Checklist Item 11. Workshop One, which is still in progress, addresses these checklist items.

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[120] *Id. at 6.*
[121] *47 U.S.C. § 271(c)(2)(B)(ix).*
[122] *In the Matter of the Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 Local Competition Second Report and Order*, Second Report and Order and Memorandum Opinion and Order, CC Docket No. 96-98, FCC 96-333, 11 FCC Rcd at 19446-47, (released August 8, 1996) ("*Local Competition Second Report and Order*").
[123] *Id.*
[124] *Id.* at amendment to Part 52, Subpart B, 52.9 (a)(2).
[125] *Wilson Affidavit at 13.*

The third AT&T concern is about slow provisioning of new CLEC prefixes in the past. Qwest has stated that these problems have been corrected. Both Qwest and AT&T appear to agree that actual Qwest performance under ROC Performance Measure NP-1 will provide the best evidence on the question of parity of service. AT&T recommends deferring the consideration of this issue until after completion of the ROC collaborative PMA of OSS testing activities.[126] Qwest objects to complete deferral, asking instead for a conditional determination that Qwest complies with this checklist item, subject to review of audited performance results under Performance Measure NP-1.

Checklist Item 10: Call-Related Databases And Signaling

Background

Section 271(c)(2)(B)(x) of the competitive checklist requires "nondiscriminatory access to databases and associated signaling necessary for call routing and completion."[127] The FCC has designated signaling networks and call-related databases as network elements, and has concluded that incumbent LECs must provide for the exchange between CLECs of signaling information necessary to exchange traffic and access call related database.[128] The FCC has identified the scope of required access as including "(1) signaling networks, including signaling links and signaling transfer points; (2) certain call-related databases necessary for call routing and completion, or in the alternative, a means of physical access to the signaling transfer point linked to the unbundled database; and (3) Service Management Systems ("SMS"); and to design, create, test, and deploy Advanced Intelligent Network ("AIN") based services at the SMS through a Service Creation Environment ("SCE").[129]

Issues Resolved During this Workshop

The participants raised a number of issues about which they have been having ongoing dialogue, particularly in section 271 workshops in other Qwest states. Some of those issues have been resolved among the parties contesting them. The later filings in this workshop and the briefs of the parties explain those resolutions. Other participants, particularly McLeodUSA, have raised a number of questions in their initial comments. Qwest generally responded to those questions by providing in its rebuttal filing answers explaining the rational for the SGAT provisions questioned (a number of the questions were manifestly intended only to seek explanation, not to raise specific concerns).

The parties' resolutions of the issues on which they have come into agreement are reasonable and appropriate; Qwest's answers to questions explaining the basis for SGAT sections questioned, and the Qwest SGAT changes reasonably responded to the concerns that appear to

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[126] *Wilson Affidavit at 18.*
[127] *47 U.S.C. § 271(c)(2)(B)(x).*
[128] 47 C.F.R. § 51.319; *BellSouth Second Louisiana Order*, ¶ 266.
[129] *BellSouth Second Louisiana Order*, ¶ 267; *Bell Atlantic New York Order*, ¶ 365.

have underlain other McLeodUSA questions.[130] Moreover, McLeodUSA made no further inquiry or comment, nor did it file a brief following Qwest's response to the questions raised. Therefore, it is appropriate for the commissions to consider these issues, which are briefly described below, to have been resolved in a manner that is consistent with the public interest and with the requirement that Qwest comply with checklist item 10.

1. Commingling of Access to Signaling in the SGAT

AT&T expressed concern about commingling of access to signaling for interconnection and signaling as an unbundled element in the Qwest SGAT, as a result of the placement of the discussion of signaling in the SGAT section (9.4) dealing with unbundled loops. Qwest has agreed to clarifying language that AT&T finds acceptable.[131] That language is set forth below:

> *9.13.1.1 Qwest will offer unbundled access to its signaling network to CLECs that request signaling as an unbundled network element or as part of a UNE combination. Access to Qwest's signaling network for purposes of interconnection and the exchange of traffic is addressed in Section 7 of this Agreement.*

2. Requiring the Use of Intermediate Frames

AT&T also objected to the Qwest requirement that signaling trunks traverse ICDF or SPOT frames in collocation situations. This issue is essentially the same as the direct interconnection issue, which, as described in the discussion of Checklist Item 7(I) (911/E911) section of this report, has been resolved to the satisfaction of both parties.

3. Language Consistency between SGAT Sections 9.15.1.2 and 9.15.1.4

As it did with respect to the other checklist items at issue here, McLeodUSA provided a series of questions about various sections of the Qwest SGAT, but did not raise any explicit objections to any of them.[132] Qwest responded to these questions in the rebuttal filing of its witness Bumgarner. At least one of the questions, why Qwest did not use the term "to the extent possible" in one SGAT Section dealing with the Line Information Database (9.15.1.2), but did do so in another (9.15.1.4), appeared to be simply a request for information.

4. Need for Established Time Frames for Data Uploads

McLeodUSA also questioned whether there is a need to establish time frames regarding the loading and updating of data to ensure parity.[133] Qwest's response in its rebuttal testimony noted that this issue is addressed in both SGAT Section 9.15.2.2, and in two performance measures (DB-1 and DB-2) that the ROC has established. This answer responds to McLeodUSA's question.

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[130] *Rebuttal Testimony of Margaret S. Bumgarner, 11/03/00 at 13-14.*
[131] *Wilson Affidavit at 20.*
[132] *McLeodUSA's Comments at 6.*
[133] *Id. at 6-7.*

5. Electronic Access to LIDB Storage

In the context of SGAT Section 9.15.1.3, McLeodUSA asked when electronic access to LIDB storage would be available and what it would cost.[134] Qwest responded in its rebuttal testimony by stating that it performs daily electronic updates by loading electronic files supplied by CLECs, but that low CLEC demand for LIDB access has caused Qwest not to make further updates to date. As to cost, Qwest says that it charges only its outside vendor costs for the initial load of a CLEC's data, but does not charge for updates. No party, including McLeodUSA has challenged Qwest's evidence about low CLEC demand.

6. Overload Conditions

McLeodUSA raised several questions about overload conditions and remedies, in connection with SGAT Sections 9.17.2.8, 9.17.2.9, and 9.17.2.12.[135] Qwest responded in the rebuttal testimony of Ms. Bumgarner that network controls to prevent SS7 network overloading will generally be imposed on all messages, and that Qwest will place specific controls on an individual carrier when it determines that abnormal volumes from that carrier are the ones causing or threatening detrimental effects on all carriers. Qwest also said in this testimony that it defines "excessive" CLEC calls as those exceeding SGAT-defined, industry standards and requirements or the terms and conditions for SS7 signaling.

Qwest's answer establishes that the general controls will apply to all messages, which is responsive to the concern about placing a disproportionate impact on CLECs. Additional controls will only apply where a carrier is producing "abnormal" volumes, which is a Qwest determination that will be subject to outside review of its reasonableness. It is not clear (McLeodUSA made no specific proposal either before or after Qwest supplied its answer) how detailed, objective criteria covering all or even most network conditions could be established to address these abnormal situations. Moreover, the term "excessive" is defined by reference to industry standards.

Checklist Item 12: Local Dialing Parity

Background

Section 271(c)(2)(B)(xii) requires "nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3)." Section 251(b)(3) creates "the duty to provide dialing parity to competing providers of telephone exchange service". Section 153(15) of the Act defines parity as requiring that a CLEC be able to:

[134] *Id. at 7.*
[135] *Id. at 7.*

> *"... provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation from among 2 or more telecommunications services providers (including such local exchange carrier)."*

Qwest argues that approval of this checklist item need not await the completion of the ROC PMA any OSS testing, for two reasons. First, Qwest notes that the ROC has not developed performance measures or standards for dialing parity. Second, Qwest states that the FCC's *Second Local Competition Order* has determined that such measures are unnecessary.[136]

Issues Resolved During this Workshop

1. Dialing Parity for Lines Provisioned by UNE-Ps

AT&T expressed concern about dialing parity for lines provisioned by Unbundled Network Element Platforms ("UNE-Ps"). Both Qwest and AT&T agree that Qwest has made modifications to Sections 9.23.3.9.1 and 9.23.3.9.3 of the SGAT that are sufficient to address this concern.[137]

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[136] *Second Report and Order and Memorandum Opinion and Order*, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *CC Docket 96-98* et al., *FCC 96-333, 11 FCC Rcd 19392 ¶ 162 (Aug. 8, 1996).*

[137] *Wilson Affidavit at 23.*

BEFORE THE NEW MEXICO 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
	)	

Report on Checklist Items 1, 11, 13 and 14

Table Of Contents

Table Of Contents i

I. Scope Of This Report 1

II. General Background 2

III. Summary of Findings and Conclusions 4

General Issues 4

Checklist Item 1 – Interconnection 4
1. Indemnification For Failure to Meet Performance Standards 4
2. Entrance Facilities as Interconnection Points 4
3. EICT Charges for Interconnection Through Collocation 5
4. Mid-Span Meet POIs 5
5. Routing of Qwest One-Way Trunks 5
6. Direct Trunked Transport in Excess of 50 Miles in Length 5
7. Multi-Frequency Trunking 6
8. Obligation to Build To Forecast Levels 6
9. Interconnection at Qwest Access Tandem Switches 6
10. Inclusion of IP Telephony as Switched Access in the SGAT 6
11. Charges for Providing Billing Records 7
12. Combining Traffic Types on the Same Trunk Group 7

Checklist Item 1 – Collocation 7
1. "Product" Approach to Collocation 7
2. Adjacent Collocation Availability 8
3. Precluding Virtual Collocation at Remote and Adjacent Premises 8
4. Cross Connections at Multi-Tenant Environments 8
5. Listing of Space-Exhausted Facilities 9
6. ICB Pricing for Adjacent and Remote Collocation 9
7. Conversion of Collocation Type – Payment of Costs 9
8. Recovery of Qwest Training Costs 9
9. Removal of Equipment Causing Safety Hazards 10
10. Channel Regeneration Charges 10
11. Qwest Training Costs for Virtually Collocated Equipment 10
12. Requiring SGAT Execution Before Collocation May Be Ordered 10
13. Forfeiture of Collocation Space Reservation Fees 10
14. Collocation Intervals 11
15. Maximum Order Numbers 11

Checklist Item 11 – Local Number Portability 11
1. Coordinating LNP and Loop Cutovers 11

Checklist Item 13 – Reciprocal Compensation 12
1. Excluding ISP Traffic from Reciprocal Compensation 12
2. Qwest's Host-Remote Transport Charge 12
3. Commingling of InterLATA and Local Traffic on the Same Trunk Groups 12
4. Exchange Service Definition 13
5. Including Collocation Costs in Reciprocal Compensation 13

Checklist Item 14 – Resale 13
1. Indemnification 13

2. Marketing During Misdirected Calls 13
3. Special Contract Termination Charges 14
4. Electronic Interface for Centrex Resale 14
5. Inaccurate Billing of Resellers 14
6. Ordering and Other OSS Issues 14
7. Other Pricing Issues 14
8. Qwest Centrex Contracts 14
9. Merger Related PIC Changes 14
10. Breach of Confidentiality Agreements 14
11. Superior Service to Qwest's Internal Sales Force 15

IV. Common Issues 16

1. Lack of Available Facilities 16
2. The Need for A "Real World" Test of Qwest's Performance 16

V. Checklist Item 1 -Interconnection 18

Background - Interconnection 18

Issues Resolved During This Workshop – Interconnection 18
1. Interconnection Service Quality 18
2. Limiting Interconnection Options 18
3. Single Points of Interconnection in Each LATA 19
4. Hub Interconnection Arrangements 20
5. Charges for Interconnection Trunking 21
6. Limits on LIS Trunk Traffic Types 22
7. Reciprocal Compensation for Toll Traffic Exchanged 22
8. Defining Jointly Provided Switched Access Traffic 22
9. One-Way Trunk Groups 22
10. Obliging CLECs to Provide Transport to Qwest 23
11. Interconnection Over Direct Trunks Where Available 23
13. Acceptance of Transit Traffic 23
14. Applying Tariff Prices to Signaling for LIS Trunks 23
15. 64 CCC Availability 24
16. MF Signaling 24
17. LIS Trunk Forecasting 24
18. Commission Monitoring of LIS Trunk Provisioning 25
19 Switch Growth Time Intervals 25
20. Responsibility to Build to Forecasts 25
21. Information Exchange for Joint Planning Meetings 25
22. Other Planning Information 26
23. Updates to Information Qwest Makes Available Through Databases 26
24. Protection of Sensitive Forecast Information 26
25. Resizing Underutilized Trunk Groups 26
26. Assessment of Construction Charges 27
27. Trunking Service Standards 27
28. Preference for Two-Way Trunking 27
29. Exchange of Traffic Only in Qwest Local Calling Areas 28
30. Alternate Traffic Routing 28
31. Delivery of CLEC Traffic to Qwest Remote Switches 28
32. LIS Acceptance Testing 28
33. Sharing the Costs of Testing 28
34. Repair Testing 29
35. LIS Trunk Ordering Information 29
36. Using the LERG to Obtain Ordering Information 29
37. Channel Information For Entrance Facilities 29

CONTINUATION

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38. Joint Planning Meetings 34
39. Provisioning Intervals for Interconnection Trunks 34
40. Defining the Service Date For LIS Charges 36

Issues Remaining in Dispute - Interconnection Checklist Item 1 36
1. Indemnification For Failure to Meet Performance Standards 36
2. Entrance Facilities as Interconnection Points 32
3. EICT Charges for Interconnection Through Collocation 33
4. Mid-Span Meet POIs 34
5. Routing of Qwest One-Way Trunks 36
6. Direct Trunked Transport in Excess of 50 Miles in Length 36
7. Multi-Frequency Trunking 37
8. Obligation to Build To Forecast Levels 38
9. Interconnection at Qwest Access Tandem Switches 41
10. Inclusion of IP Telephony as Switched Access in the SGAT 45
11. Charges for Providing Billing Records 45
12. Combining Traffic Types on the Same Trunk Group 46

VI. Checklist Item 1 - Collocation 47

Background - Collocation 47

Issues Resolved During This Workshop – Collocation 47
1. Limiting Collocation to Wire Centers 47
2. ICDF Collocation 48
3. Virtual Collocation Repair 48
4. Maximum Caged Physical Collocation Space 49
5. Minimum Square Footage Requirements 49
6. Subleasing Collocation Space Among CLECs 49
7. Adjacent Collocation Definition 50
8. Adjacent Collocation Terms and Conditions 50
9. Limiting Obligations to Feasibility and Technical Standards 51
10. Collocation of Switching-Capable Equipment 51
11. UNE Demarcation Points in Collocation Situations 52
12. Direct Connection of CLEC and Qwest Equipment 52
13. Incorporating Technical Publications By Reference 53
14. Safety Standards 53
15. Deadline for Providing CLECs Certain Collocation Information 54
16. Including Power Availability Information in Space Availability Reports 54
17. Expansions of Space Available for Collocation 55
18. Tours of Space-Limited Collocation Premises 55
19. Providing Floor Plans for Space-Limited Premises 55
20. Listing of Space-Limited Premises 56
21. Reclamation of Space to Use for Collocation 56
22. Unauthorized Access 57
23. Facility Access 57
24. CLEC to CLEC Interconnection 57
25. Direct Connections 58
26. Converting from Virtual to Cageless Collocation 58
27. Subcontracting Construction 59
28. Power Outages 59
29. Performance Standards for Qwest Virtual Collocation Installations 59
30. Providing Software Options and Plug-In Information to Qwest 59
31. Costs for Virtual Collocation Maintenance and Repair 59
32. Efficient Space Use 60
33. Efficient Space Design 60
34. Leasing of Collocated Equipment 60

35. Early Access to Collocation Space 61
36. Halting Non-Compliant CLEC Work 61
37. Space Reclamation 61
38. Use of Other Technologies 62
39. Fiber Entrance Facilities 62
40. Dual Entrance Facilities 62
41. Dedicated Interoffice Transport 62
42. ICDF Construction Charges 62
43. Express Fiber Entrance Facilities 62
44. Minimum Inspector Labor Charge 63
45. Security Charges 63
46. Prorating Preparation and Installation Charges; Contractor Selection 63
47. Housekeeping Charges 63
48. CLEC Order Changes: Impact on Intervals 64
49. Space Reservation After Quote Delivery 64
50. Timing Between Collocation Completion and Transport Orders 64
51. Determining When Virtual Collocation Is Complete 65
52. Virtual Collocation Failure Notices and Repairs 65
53. ICDF Repair 65
54. Minimum Blocks for Termination Orders 65

Issues Deferred or Addressed Elsewhere - Collocation 66
1. Reciprocal Compensation for Collocation Facilities Used for Interconnection 66
2. Collocation Costs 66
3. Lack of Available Facilities 66
4. APOTS-CFA Information 66

Issues Remaining in Dispute – Collocation 67
1. "Product" Approach to Collocation 67
2. Adjacent Collocation Availability 68
3. Precluding Virtual Collocation at Remote and Adjacent Premises 69
4. Cross Connections at Multi-Tenant Environments 71
6. ICB Pricing for Adjacent and Remote Collocation 74
7. Conversion of Collocation Type – Payment of Costs 75
8. Recovery of Qwest Training Costs 78
9. Removal of Equipment Causing Safety Hazards 78
10. Channel Regeneration Charges 79
11. Qwest Training Costs for Virtually Collocated Equipment 79
12. Requiring SGAT Execution Before Collocation May Be Ordered 79
13. Forfeiture of Collocation Space Reservation Fees 80
14. Collocation Intervals 81
15. Maximum Order Numbers 83

VII. Checklist Item 11 – Local Number Portability 84

Background 84

Issues Resolved During This Workshop – Local Number Portability 84
1. Restricted Numbers 84
2. Identifying NXXs Available for Porting 84
3. Porting of Direct Inward Dial Block Numbers 85
4. LIDB De-Provisioning 85
5. Introductory Section Amplification 85
6. Service Management System 85
7. Applicability of "Operations Team" Guidelines 86
8. Database and Query Services 86
9. Ordering Standards 86

10. Managed Cuts 90
11. Maintenance and Repair 92
12. Prices 93
13. Provisioning Intervals 93

Non-SGAT Issues 94

Issues Remaining in Dispute – Local Number Portability 94
1. Coordinating LNP and Loop Cutovers 94

VIII. Checklist Item 13 - Reciprocal Compensation 97

Background 97

Issues Resolved During This Workshop – Reciprocal Compensation 98
1. Tandem Switching Definition 98
2. Including IP Telephony in Switched Access 99

Issues Remaining in Dispute – Reciprocal Compensation 99
1. Excluding ISP Traffic from Reciprocal Compensation 99
2. Qwest's Host-Remote Transport Charge 101
3. Commingling of InterLATA and Local Traffic on the Same Trunk Groups 103
4. Exchange Service Definition 104
5. Including Collocation Costs in Reciprocal Compensation 105

VIII. Checklist Item 14 – Resale 107

Background 107

Issues Resolved During This Workshop 107
1. Description of Resale Obligation 107
2. Qwest's Purchase of Services from CLEC's 107
3. Restrictions on Resale 108
4. Training Materials 108
5. Resale to the Same Class of End User 109
6. Consecutive Promotional Offerings 109
7. Market Trials Not Available For Resale 110
8. 911 Not Available For Resale 110
9. Restrictions on Contract Service Arrangements 110
10. Grandfathered Services 110
11. Aggregation of Optional Features 110
12. Separate Centrex Service 110
13. Private Line Service 111
14. Megabit Service Resold From Interstate Tariff 111
15. Forecasts 111
16. Numbering Obligations 112
17. CLEC Payment for Unbranding 112
18. Primary Interexchange Carrier (PIC) Assignments and Slamming 112
19. Nonpayment Claims 113
20. Availability of Resold Services 113
21. Limitations on Resold Services 114
22. Customer Transfer Charges 114
23. Information for Billing CLEC Customers 114
24. Application of Wholesale Discount Miscellaneous Charges 114
25. Notice of Changes to Available Services 115
26. Billing Changes 115
27. Use of Commission-Approved Rates 115
28. Applying the Wholesale Discount to Non-Recurring Charges 116

29. Incorporating Ordering Information By Reference ... 6
30. Parity Standard Definition ... 6
31. Billing End Date for Resold Services ... 6
32. Proofs of Authorization to Change Providers ... 6

Issues Remaining in Dispute – Resale ... 6
1. Indemnification ... 6
2. Marketing During Misdirected Calls ... 6
3. Special Contract Termination Charges ... 6
4. Electronic Interface for Centrex Resale ... 6
5. Inaccurate Billing of Resellers ... 6
5. Ordering and Other OSS Issues ... 6
6. Other Pricing Issues ... 6
7. Qwest Centrex Contracts ... 6
8. Merger-Related PIC Changes ... 6
9. Breach of Confidentiality Agreements ... 6
10. Superior Service to Qwest's Internal Sales Force ... 6

I. Scope Of This Report

This report addresses the second group of issues that fall within the seven-state workshop process addressing Qwest's compliance with the Section 271 Checklist of the Telecommunications Act of 1996. This report covers the issues assigned to "Workshop One" by the initial procedural orders, which are the first of a series of orders under which the workshop process has operated. This report addresses issues associated with the following checklist items:

- Item 1: Interconnection
- Item 1: Collocation
- Item 11: Local Number Portability
- Item 13: Reciprocal Compensation
- Item 14: Resale

The Summary of Findings and Conclusions section of this report identifies the issues raised under each checklist item, including those resolved during the course of the workshops, those deferred to other workshops or proceedings for resolution, and those that remain in dispute. For those issues remaining in dispute, the summary section describes the recommended resolution of the disagreements. The later sections of this report provide more detailed discussions of the issues, particularly those that remain in dispute. The Summary of Findings and Conclusions and the detailed sections use the same numbering for these disputed issues.

II. General Background

The purpose of this report is to assist the seven state Commissions (Iowa, Idaho, Utah, New Mexico, North Dakota, Montana, and Wyoming) in reaching a decision as to what recommendations to make to the Federal Communications Commission (FCC) on the question of whether Qwest should be granted the authority to provide in-region interLATA services. To be eligible to provide in-region interLATA service, Qwest must meet the competitive checklist and other requirements of Section 271 of the Telecommunications Act of 1996 (the Act). A Qwest May 4, 2000 filing encouraged the several state commissions to consider a multi-state process to jointly review track A (competition issues), various aspects of the 14-point competitive checklist, Section 272 (separate subsidiary issues), and public interest considerations. Iowa, Idaho, Utah, North Dakota and Montana joined together (with Wyoming joining in September 2000 and New Mexico thereafter) in a multi-state collaborative proceeding, and issued procedural orders to govern the conduct of joint workshops. The joint workshops provide a common forum for all participants in all the states involved to present, for individual consideration by the seven commissions, all issues related to Qwest's Section 271 compliance.
Qwest filed written testimony for Workshop One on July 31, 2000. The Qwest witnesses and the items they addressed were:

- Thomas R. Freeberg – Interconnection and Reciprocal Compensation
- Lori A. Simpson - Resale
- Margaret S. Bumgarner[1] - Collocation and Number Portability

On September 5, 2000, the following intervenors filed testimony: MCI WorldCom, Inc. (WCOM), McLeodUSA Telecommunications Services, Inc. (McLeodUSA), AT&T Communications of the Mountain States, Inc., AT&T Communications of the Midwest, Inc. and TCG affiliates (AT&T), Electric Lightwave, Inc. (ELI), NEXTLINK Utah, Inc. (NEXTLINK), Jato Communications, Inc. (Jato), Wyoming Consumer Advocate Staff (WCAS), Sprint Communications Company L.P. (Sprint), Net Wright LLC (NET WRIGHT), OPCOM Inc., Visionary Communications, Wyoming.com, and Contact Communications. Qwest filed the Rebuttal Testimony of the following witnesses on September 18, 2000:

- Thomas R. Freeberg
- Lori A. Simpson
- Margaret S. Bumgarner

Net Wright filed rebuttal on that same date. On September 29, 2000, WCOM filed rebuttal testimony. In New Mexico, e.spire filed testimony on December 6, 2000;Qwest responded on January 3, 2001. During the first workshop, Rhythyms Links, Inc. introduced written testimony that was marked as Exhibit WS1-RYT-DHS-1.[2]

[1] Judith L. Brunsting and Marie E. Schwartz also filed testimony at the same time on Section 272 issues. These issues will not be addressed until Workshop Session 7.

[2] Transcript of October 5, 2000 at 667.

We have adopted a general rule that requires Qwest to file, before briefing of the issues, a copy of SGAT language related to those issues. This "frozen SGAT language" is intended to reflect language on which there is general agreement among the parties and language proposed by Qwest to address issues or language on which there is not general agreement. The purpose of this language is first to provide a reference base first for the participants' briefs and second for the commissions in reviewing this report. It is not intended to offer new language that has not before been seen or discussed in workshops, filings, or discussions among the parties.

Qwest filed the required language here on March 9, 2001.[3] The language is set forth as an appendix to this report.

Briefs were filed on April 10, 2001 by the following parties: Qwest, AT&T, XO/ELI, Sprint, Visionary and InTTec, and the Wyoming Consumer Advocate Staff. Qwest's timely filing of the frozen SGAT language has provided the participants a fair opportunity to brief any disagreements with any language that Qwest may have added or changed since its original and rebuttal filings on the issues addressed by this report.

This report assumes that the SGAT language filed by Qwest on March 9, 2001 will remain in effect, except as commission acceptance of any of the findings and conclusions of this report may require such language to change. Therefore, to the extent that any further changes in SGAT language are proposed (e.g., as a result of agreements reached in similar workshops in other states) they must be separately filed and supported, in order that the commissions may consider any issues associated with such proposed language changes. Absent individual commission approval of any such proposed changes, the language set forth in the appendix hereto shall be considered to be the final language for purposes of any state SGAT review or consultation with the FCC under Section 271.

[3] Hereafter, the Frozen SGAT.

III. Summary of Findings and Conclusions

The following summary addresses the deferred and disputed issues and it provides a brief description of how each issue was resolved.

General Issues

There were arguments that a lack of Qwest facilities caused delays for CLECs in serving customers. Those issues should be addressed after the completion of OSS testing under the auspices of the Regional Oversight Committee. That testing will measure Qwest performance in meeting established standards that set intervals for providing service to CLECs. There were also arguments that Qwest's history of performance problems in serving CLECs requires a substantial forward-looking period of actual performance before concluding that those problems have been adequately solved. Those issue will also be addressed in OSS testing.
The participating states have made it clear that they will provide an opportunity to address such issues after the completion of OSS testing. Therefore, it is premature to decide them in the context of these workshops.

Checklist Item 1 – Interconnection

The parties raised and resolved prior to the briefs a total of 40 issues related to the Interconnection aspects of Checklist Item 1. Twelve issues remained to be resolved by the facilitator. Of these twelve issues, eight require SGAT language changes (issues 2, 3, 4, 6, 7, 8, 9, and 10 below), three require no change (issues 1, 5 and 11) and one issue is being resolved in the Reciprocal Compensation section of this report (issue 12). Qwest should not be deemed to be in compliance with this checklist item before it makes the changes necessary to deal with the eight issues. However, upon making those changes, Qwest can be deemed to have met its burden of proof, subject to the completion and commission consideration of the results of any OSS testing that may relate to the item. The twelve issues and the proposed resolutions are summarized below.

1. Indemnification For Failure to Meet Performance Standards

AT&T proposed an SGAT section that would hold CLECs harmless in the event that Qwest failed to meet the service quality standards of Section 7.1.1.1. AT&T characterized this language as an "incentive" for Qwest to perform. Qwest objected to this language on several grounds, including the fact that this provision would duplicate the Post-Entry Performance Plan. Because AT&T's proposal was not balanced and did not consider adequately the unique circumstances of a particular state's performance standards, it should not be adopted in the context of interconnection. Moreover, the upcoming workshop on general SGAT terms and conditions and the PEPP workshops provide more appropriate opportunities to address the broader aspects of AT&T's request.

2. Entrance Facilities as Interconnection Points

AT&T wanted to be able to use a portion of the entrance facilities it has already acquired under interstate tariffs to provide interLATA service to provide for interconnection to exchange local traffic. Such use raises several considerations: (a) should CLECs be able to use such facilities to

gain access to UNEs, (b) should CLECs be able to combine local with other types of traffic on the same trunk groups, and (c) whether the portion of such trunk groups used to provide for the exchange of local traffic should be priced at TELRIC rates, rather than at the interstate tariff rate under which a CLEC initially secured the trunks. In similar workshops in Washington, Qwest agreed to modify the SGAT and permit access to UNEs: Qwest should change the SGAT here to reflect that commitment. The second two aspects of this issue have been resolved in the ***Reciprocal Compensation*** section of this report.

3. EICT Charges for Interconnection Through Collocation

AT&T recommended a change to the SGAT Section 7.1.2.2 to: (a) eliminate the requirement that CLECs pay for Interconnection Tie Pairs, and (b) remove EICT charge references from Section 7.3.1.2. Qwest has agreed to accept the resolution of this issue as proposed in the Draft Washington Order, which comports substantially with AT&T's request. This issue can be considered resolved if the same SGAT change is made here.

4. Mid-Span Meet POIs

AT&T objected to the requirement that mid-span meet POIs be required to be within Qwest wire center boundaries and sought the right to interconnect in this fashion at any technically feasible point. AT&T also objected to precluding the use of mid-span meet points to gain access to unbundled network elements. Qwest agreed to allow this form of interconnection to be used for access to UNEs, provided that the CLEC pay the UNE rate for the entire facility. CLECs should be permitted to pay TELRIC rates for the portion of the facility used to secure access to UNEs, under a rule that apportions costs first by assigning to UNE access the portion of the facilities that would be required for interconnection in the absence of concurrent use for interconnection. The rule would also allow relief to Qwest if the provision were misused to secure the installation of new facilities for UNE access.

5. Routing of Qwest One-Way Trunks

Where a CLEC chooses one-way trunks, Qwest must install its own one-way trunks to terminate its traffic to that interconnecting CLEC. AT&T wanted CLEC, rather than Qwest, control over the routing of Qwest's one-way trunks back to a CLEC, in order to prevent Qwest from penalizing (through routings that unnecessarily consume CLEC facilities) a CLEC for choosing one-way trunks. AT&T's request would deny Qwest control over its own network configuration and costs. Concerns about Qwest's retaliation are better solved directly (which can be addressed in the upcoming general SGAT terms and conditions workshop) rather than by giving CLECs control over Qwest network decisions and costs.

6. Direct Trunked Transport in Excess of 50 Miles in Length

Qwest proposed a new SGAT section limiting its obligation to provide direct trunk transport to 50 miles in length. AT&T argued against this SGAT section as denying it the right to choose interconnection points. Qwest did not provide evidence to support a conclusion that it would not be able to recover the costs of longer trunks and it did not at all address the question of whether distance-sensitive pricing would provide a less draconian means of avoiding its risks of cost recovery. While Qwest should be free to address such issues in a cost docket, it failed here to justify the mileage limit. This SGAT provision should be eliminated.

7. Multi-Frequency Trunking

AT&T sought such trunking where there is SS7 capability, but where it cannot be provided over multiple routes. Qwest argued that it does not provide such redundant capability for itself when it must rely on that single link routing and that the FCC has not ever addressed the issue. However, the record shows that: (a) the operational consequences are greater for CLECs who must depend on a single route and (b) sophisticated customers may make carrier-selection decisions on the basis of the differences in those consequences. Therefore, the SGAT should be changed to add MF trunking if the Qwest central office does not have SS7 diverse routing.

8. Obligation to Build To Forecast Levels

The dispute was over which forecast should serve as the measure of Qwest's obligation to provide interconnection trunks where Qwest forecast of a CLEC's needs was lower than the CLEC's own forecast. Qwest agreed that it would use a CLEC's forecast, but wanted a deposit before doing so, in order not to be at risk of recovery of its installation costs, should CLEC actual needs prove to be lower than the forecast at issue. Qwest's basis for requiring and refunding deposits was a target of 50 percent of forecasted usage. The 50 percent level was appropriate, but it should be based on usage of installed trunks not forecasted trunks. Moreover, Qwest's proposal did not oblige it to return deposits if parties other than the CLEC that provided a deposit make use of the facilities. Therefore, Qwest's deposit language should be accepted, but only after: (a) changing the measurement base for utilization and (b) making deposit refunds contingent upon use by any party, not solely the party that provided the deposit.

9. Interconnection at Qwest Access Tandem Switches

CLECs considered Qwest's refusal to allow interconnection only at local tandem or end office switches to be impermissible. After an administrative law judge considering the Section 271 checklist in Washington ordered Qwest to allow interconnection at access tandems, Qwest agreed here to allow it in accord with the Washington order. However, that order allowed Qwest two overly broad exceptions to the requirement. The exception allowed Qwest to require interconnection at local tandems or end office switches when: (a) traffic volumes reached specified levels or (b) Qwest agreed not to charge a CLEC more than it would cost to interconnect at access tandems. These exceptions require narrowing to make them more consistent with FCC requirements.

Therefore, the SGAT should be changed to allow interconnection at access tandems and the exceptions allowed in Washington should be narrowed as set forth later in this report. The SGAT should also be amended to limit Qwest's exemption from providing transport between local and access tandems and between access tandems to cases where there is a substantial risk of tandem exhaust and to cases where Qwest itself does not use inter-tandem connections to transport the calls of its own end users.

10. Inclusion of IP Telephony as Switched Access in the SGAT

AT&T objected to the inclusion of IP Telephony in the "switched access" definition language in the SGAT, arguing that the FCC has specifically exempted such traffic from access charges. Qwest has removed the disputed portions of the SGAT directly addressing IP telephony. Several other SGAT sections disputed by AT&T concern Internet-bound traffic generally; those disputes are addressed in the ***Reciprocal Compensation*** section of this report.

11. Charges for Providing Billing Records

SGAT Sections 7.5.4 and 7.6.3 allow Qwest to charge CLECs for providing billing records. WCOM objected to the Qwest charges for providing these records, because each party must provide these records to the other and neither has charged the other for providing these records in the past. The charges in question apply equally to Qwest and CLECs and they are for services intended to enable the other to secure revenues from end users. Charges are appropriate and there is not a basis for questioning the SGAT provision requiring payment of them.

12. Combining Traffic Types on the Same Trunk Group

Sprint objected to the separate trunk group requirements of SGAT Section 7.2.2.9.3.2, which it contended would require inefficient overlay networks to mirror "old" incumbent networks. Sprint expressed particular concern about the refusal to permit CLECs to take advantage of capacity on existing long-distance networks to carry local/EAS traffic. This issue is resolved in the *Commingling of InterLATA and Local Traffic on the Same Trunk Groups* issue in the ***Reciprocal Compensation*** portion of this report.

Checklist Item 1 – Collocation

For the Collocation portion of Checklist Item 1, the parties were able to resolve 54 issues before the briefs were filed. Four issues should be addressed in other contexts. First, an issue regarding the inclusion of collocation costs incurred in prices for interconnection is addressed in the ***Reciprocal Compensation*** section of this report, under the issue heading of *Including Collocation Costs in Reciprocal Compensation*. Second, a NEXTLINK argument that Utah collocation charges are excessive should be considered in Utah-specific cost proceedings. Third, a NEXTLINK issue about collocation delays was addressed in the ***Common Issues*** section of this report, under the issue heading of *Lack of Available Facilities*. Fourth, Qwest appeared willing to respond to a Rhythms issue about APOTS-CFA information, but it is not clear that the necessary language has been added to the SGAT. This issue can be revisited in the upcoming general SGAT terms and conditions workshop, should added language continue to be needed. Fifteen issues remained to be resolved under the Collocation topic. Of these fifteen issues, seven require SGAT language changes (issues 1, 3, 5, 6, 10, 11 and 14 below), and five require no change (issues 2, 4, 7, 9 and 13). Issue 11 requires Qwest to demonstrate during the 10-day comment period that the SGAT will not preclude ordering collocation prior to SGAT execution. Finally, issue 15, involving maximum order numbers, invites the participants to propose SGAT language during the comment period. Qwest should not be deemed to be in compliance with this checklist item before it makes the changes necessary to deal with the seven issues. However, upon making those changes, and upon Commission resolution of issues 11 and 15, Qwest can be deemed to have met its burden of proof, subject to the completion and commission consideration of the results of any OSS testing that may relate to the item. The fifteen issues and the proposed resolutions are summarized below.

1. "Product" Approach to Collocation

This issue has two distinct aspects:

- Whether it was reasonable for Qwest to require application of the BFR process before making new forms of collocation (i.e., those not detailed in the SGAT) available

- How to address inconsistency between SGAT provisions and underlying technical and administrative documents that provide equipment specifications, administrative or procedural requirements for ordering, and the like.

AT&T objected to the BFR process, which it considered cumbersome, but failed to offer a suitable alternative. The fact that Qwest agreed to make new collocation "products" available as it developed them began to address the issue of minimizing delay in availability. However, the SGAT should be changed to assure that new products still awaiting the process of negotiation with CLECs and possible state commission resolution of disputes would be offered under terms and conditions consistent with existing SGAT provisions where possible. The SGAT also should be changed to assure that the early agreement of a CLEC to Qwest proposed offerings does not preclude a CLEC from gaining the benefit of changes that a state commission later orders. Resolving the consistency issue in a fashion that is practical requires a recognition that it is not realistic to think that there can ever be perfect consistency between numerous and complex underlying technical and administrative documents and the SGAT. The upcoming workshop on general SGAT terms and conditions should explore ways to establish a clear hierarchy of authorities in cases where they conflict. Pending that consideration, there has been no evidence to support a conclusion that discrepancies or disagreements in documentation are so profound as to suggest that a determination of Section 271 compliance must await the rationalization of any documents that provide contradictory requirements or guidance on matters of central importance.

2. Adjacent Collocation Availability

McLeodUSA argued that the adjacent collocation option should not be limited to situations where space has been exhausted. However, McLeodUSA did not provide any support for this argument and in the absence of any showing at all of the need for requiring adjacent collocation where space is available, there should be no requirement to include such availability in the SGAT.

3. Precluding Virtual Collocation at Remote and Adjacent Premises

AT&T objected to virtual collocation restrictions in the SGAT and argued that virtual collocation may be necessary in remote locations where space limitations preclude physical collocation. Qwest countered that if there is no room for physical collocation absent a separation of its equipment, then there cannot be "by definition" any space for virtual collocation. Qwest's evidence did not establish any such level of certainty; therefore, there is no basis for precluding virtual collocation. Qwest should change its SGAT in order to assure that virtual collocation in remote locations is not precluded or conditioned to any greater extent in remote premises than it is at wire centers. This resolution will preclude virtual collocation where it is not possible.

4. Cross Connections at Multi-Tenant Environments

AT&T argued that SGAT Section 8.1.1.8.1 placed inappropriate restrictions on access to the Network Interface Device (NID) in multi-tenant locations (MTEs). Qwest's brief noted that it considered the issue to be resolved on the basis of its agreement not to require collocation "in MTE terminals located in or attached to customer-owned buildings where no electronic equipment, power or heat dissipation is required." Qwest's proposal provides a sound solution to the general question of the non-application of collocation requirements to MTE terminals.

5. *Listing of Space-Exhausted Facilities*

Qwest objected to having to inventory space at its wire centers as part of efforts to keep current its required web site for reporting space availability information to CLECs. Qwest wanted only to have to report information that it learned from CLEC requests associated with collocation. AT&T agreed to allow Qwest to limit its efforts to these sources for all premises other than wire centers. However, AT&T believed that the FCC required Qwest at least to have to independently maintain the current status of space availability at wire centers. The FCC requirements clearly contemplate a Qwest obligation to report within 10 days the filling of space at "premises." Qwest cannot report within 10 days unless it is obliged to maintain current knowledge of such status. The FCC generally uses the term "premises" to mean much more than wire centers when collocation is the issue. However, it is reasonable to construe the term as meaning wire centers in this context, lest Qwest be put under a burden that grossly outweighs the benefits that will come from undertaking it. Therefore, Qwest should add SGAT language requiring it to report on wire center space, whether or not CLECs have inquired about collocation or collocation space there.

6. *ICB Pricing for Adjacent and Remote Collocation*

Qwest proposed that adjacent and remote collocation be priced on an individual case basis under the SGAT. AT&T argued that Qwest should be required to develop a standard list of adjacent and remote collocation offerings, which should, where possible, incorporate rate elements. The evidence here does not support the identification of any collocation offerings for which standard prices can be established, let alone what those prices should be. However, it may be that such offerings and their costs can at some point be identified sufficiently to support fixed pricing elements. Therefore, the SGAT should leave open the possibility for the development of standard prices, but it should not be criticized, in terms of Section 271 compliance, for failing to do so at present.

7. *Conversion of Collocation Type – Payment of Costs*

Jato asked for the elimination of ICB pricing for conversions among collocation types and it specifically objected to having to pay for the elimination of SPOT frames, which it said constituted an inefficient and anticompetitive Qwest policy in the first place. Qwest objected to eliminating provisions for recovering its costs. There is not a record basis for concluding that the circumstances involved in converting among collocations will be so similar as to support standard pricing. Moreover, Jato provided no evidence to support its claim about SPOT frames. Therefore, neither of its pricing recommendation should be adopted.

8. *Recovery of Qwest Training Costs*

For virtually collocated equipment, WCOM argued that CLECs should be able to provide the training themselves or contract with Qwest for it at "reduced rates." Qwest responded by saying that it is proper for Qwest to recover the cost of training related to equipment that a CLEC collocates and that may be unfamiliar to Qwest personnel. Because Qwest must maintain and repair virtually collocated equipment, it should have the ability to identify and provide the training reasonably required to perform those duties. Moreover, as Qwest's recovery of training costs is limited to what is reasonable, what WCOM meant by arguing for reduced rates is not clear.

9. Removal of Equipment Causing Safety Hazards

SGAT Section 8.2.3.10 allows Qwest to remove or correct non-compliant equipment problems at CLEC expense, provided that it has given the CLEC a 15-day notice of Qwest's determination that such problems exist. Jato, McLeodUSA, AT&T all commented on this provision. Qwest did agree to change the section to meet many of the concerns. The CLEC-proposed conditions beyond those that Qwest has agreed to incorporate are not appropriate for inclusion in the SGAT.

10. Channel Regeneration Charges

Depending upon where a CLEC collocates, channel regeneration may be required for it to operate effectively. Distance is the important criterion. CLECS generally objected to paying for channel regeneration. Qwest agreed that CLECs should pay for regeneration where it is unavoidable, but the SGAT did not limit charges to such situations." Therefore, the SGAT should be changed to remove the power to charge where there exists another available collocation location where regeneration would not be required, or where there would have been such a location, had Qwest not reserved space for its future use in the affected premises.

11. Qwest Training Costs for Virtually Collocated Equipment

Qwest must install and maintain virtually collocated equipment; therefore, it should recover its costs for training associated with that equipment, which it may not use for its own purposes. The SGAT provided for the prorating of Qwest training charge if a second CLEC began to use the same equipment type, but did not provide for continued proration for use by additional CLECs. The SGAT should allow for continued proration, but it should not be changed to make the training charges for each CLEC, as McLeodUSA suggested, depend upon the relative number of pieces of equipment used by that CLEC.

12. Requiring SGAT Execution Before Collocation May Be Ordered

It is not clear whether the SGAT requires a CLEC to execute it before it may begin the process of collocation ordering. While it is appropriate for Qwest to get basic information about the CLEC and to secure financial protection, it is not appropriate to delay collocation ordering pending SGAT execution. The reason is that the ordering times for collocation are long. CLECs could face significant delays if they must first choose among the SGAT, opting into another interconnection agreement, or negotiating a separate interconnection agreement. Therefore, Qwest should demonstrate that the SGAT will allow collocation ordering before SGAT execution, provided that Qwest has the same financial protections that would exist had the SGAT been executed.

13. Forfeiture of Collocation Space Reservation Fees

AT&T objected to the SGAT provision that would require CLECs to forfeit the nonrecurring collocation space reservation fee upon cancellation of the reservation. Qwest responded partially by reducing the costs of forfeiture and by adding a new SGAT provision that would provide a lower cost way to provide some of the benefits of space reservation. The Qwest proposal is supported by both the recovery of actual costs and the prevention of wasteful or inappropriate use of space reservation.

14. Collocation Intervals

Qwest argued that a waiver it had secured from the FCC justified an extension of the normal collocation intervals required by the FCC. AT&T responded that the FCC allowed for state consideration of shorter intervals and that it also had underscored the importance of keeping extensions of the intervals to a minimum in all cases. The major dispute focused upon what impact to a collocation interval should result if the collocation was not forecasted by the CLEC involved. AT&T's approach of tying interval extensions to space, power, and HVAC needs establishes a better connection between need for and interval extension and its granting and length. It addresses three of the principal reasons why Qwest might need added provisioning time, and its inclusion of another reason, basic infrastructure modifications, allows for consideration of other reasons. The SGAT should reflect the AT&T approach, rather than Qwest's more liberal approach, which more loosely connects the causes and effects of interval affecting circumstances.

However, because forecasts do not commit CLECs to an order, Qwest is at financial risk in proceeding on the work it takes to accommodate them. Therefore, Qwest should be protected in the case of collocations requiring major infrastructure modifications. Qwest should be able to request interval relief from the state commission.

15. Maximum Order Numbers

Qwest had proposed to limit it obligation to meet collocation intervals to five orders per state. The FCC allows limits, but focuses not strictly on the number of orders, but their complexity. Qwest defended the SGAT section imposing the limit, but deleted it from the SGAT filing. Qwest said that a substitute provision was included in another SGAT section, which was not included in Qwest's frozen SGAT filing. The five orders per state limit is not an appropriate way to measure the need for relief form interval requirements. The participants should present and defend proposed SGAT language in their 10-day responses to this report, which responses will be filed with each participating commission.

Checklist Item 11 – Local Number Portability

For Checklist Item 11: Local Number Portability, a total of 11 issues were resolved by the parties prior to the briefs, leaving only one issue at impasse. This issue does require an SGAT language change. Qwest should not be deemed to be in compliance with this checklist item before it makes the changes necessary to deal with this issue. However, upon making the changes, Qwest can be deemed to have met its burden of proof, subject to the completion and commission consideration of the results of any OSS testing that may relate to this item.

1. Coordinating LNP and Loop Cutovers

When a customer selects a CLEC as its carrier (and wishes to retain the same phone number) and the CLEC provisions its own loop, if the CLEC fails to have the customer transfer work done by the hour set by Qwest for a disconnect, the customer will suffer a loss of service. AT&T argued that exposing customers to unnecessary service disruptions creates a barrier to competition. It proposed to solve the problem in various ways; e.g., requiring Qwest not to disconnect until after confirmation of a successful disconnect, or performing automated queries to verify number

porting before disconnecting. Qwest argued that none of the reasons for the CLECs failure to get the work done in time were within its control and thus it should not have to bear the burdens of special manual efforts. The evidence did not support a finding that Qwest can provide the coordination that AT&T wants through simple, inexpensive changes in its service-order system or automated querying. However, it is reasonable to expect Qwest to halt the disconnect if it receives notice from the CLEC by 8:00 p.m. of the need to do so. Qwest should also commit to a study of the feasibility and costs of instituting automated means to provide the level of coordination that AT&T seeks.

Checklist Item 13 – Reciprocal Compensation

For Reciprocal Compensation, Checklist Item 13, the parties agreed not to have witnesses at the workshop but rather to introduce the transcripts from the Washington and Colorado workshops. Most of the reciprocal compensation issues were resolved outside of this workshop, although two of the resolved issues are discussed in this report. Five issues remained to be resolved by the facilitator. The following is a summary of the remaining unresolved issues and a discussion of their resolution:

1. *Excluding ISP Traffic from Reciprocal Compensation*

After the briefs were filed in this case, the FCC issued an order that held that Section 251(g) serves to exclude Internet service provider traffic from the reciprocal compensation provisions of Section 251(c). The treatment of ISP traffic as a condition for approval of checklist 13 requirements is inappropriate. However, the FCC's decision does not eliminate the need to review SGAT language to identify those sections that may still have continuing effect after the FCC's decision. The parties were asked to provide as part of their 10-day comments proposals for changing all those sections of the SGAT affected by the April 27, 2001 FCC order.

2. *Qwest's Host-Remote Transport Charge*

AT&T argued that reciprocal compensation is not due to Qwest for transport between its host switch and a Qwest remote office. Qwest countered that the connection between its host and remote switches is not part of the loop because in the event of calls outside the local area, Qwest must transport such calls along dedicated paths between host and remote switches. Qwest was concerned that the CLECs would secure the use of the umbilical (between the hose and the remote) for free. It is proper for Qwest to include the costs of the umbilicals in transport prices, assuming that it can demonstrate in any later cost proceeding that the underlying costs are not already captured at other places.

3. *Commingling of InterLATA and Local Traffic on the Same Trunk Groups*

AT&T and WCOM proposed an SGAT language change to allow CLECs to use spare special access circuits in trunks they have secured under interstate tariffs and to pay TELRIC prices for these circuits, rather than to continue to pay the rates called for in the federal tariffs under which CLECs have secured them. The language would permit such price "ratcheting" and allow the commingling of InterLATA and local traffic on the same trunk groups. Qwest argued that the FCC had considered and specifically rejected the configuration sought by the CLECs. While the proposed commingling and ratcheting would result in more efficient CLEC network use, this

must be balanced against the FCC's and state commissions' goal of universal service. Access charges have been and continue to be an important mechanism for commissions in achieving the goal of universal service. Accordingly, the AT&T's and WCOM's proposed language should not be adopted at this time. Qwest's proposed language, which would permit the use of spare access circuits for interconnection with the requirement that all circuits used are to be priced at special access rates, should be adopted.

4. Exchange Service Definition

AT&T proposed to alter the definition of "Exchange Service" to remove the words "as defined by Qwest's then-current EAS/local serving areas" in Section 4.22.[4] AT&T contended that the Commissions determine the boundaries of the local calling areas and that permitting Qwest to unilaterally modify this definition is inappropriate. In order to make it clear to all parties that the commissions will continue to define the boundaries of EAS/local service area boundaries, it is appropriate that Qwest should delete the phrase.

5. Including Collocation Costs in Reciprocal Compensation

AT&T argued that CLECs should be compensated for collocation costs where Qwest traffic traverses CLEC equipment collocated at the Qwest central office. In general, AT&T maintained that several aspects of Qwest's interconnection requirements, e.g., its SPOP proposal, its 50-mile trunk limit, and its restrictions on interconnection at tandems, served improperly to increase AT&T's reciprocal compensation obligations. XO Utah made similar claims. The AT&T and XO Utah argument violates the notion that transport and termination prices should be based on Qwest's costs, except where CLECs, which they have not done here, present studies showing that their own costs are different.

Checklist Item 14 – Resale

In Checklist Item 14: Resale a total of 29 issues were resolved before the parties filed briefs, leaving only three issues at impasse.

1. Indemnification

The argument here centered around AT&T's request for an indemnity provision that would provide for parity of treatment between Qwest retail customers and those served by CLECs who resell Qwest retail services. AT&T proposed SGAT language; Qwest countered with SGAT language that assumed limited liability. The form of "parity" being sought by AT&T is inapt; parity should be between the Qwest's retail customers and the wholesale customer (the CLEC itself, not the CLEC's customer). Therefore, the SGAT should include Qwest's language for Section 6.2.3.1, except that subsections (c) and (d) thereof should be eliminated.

2. Marketing During Misdirected Calls

AT&T requested SGAT language that would limit Qwest's ability to market to CLEC customers who mistakenly contacted Qwest with a billing or repair problem. Qwest responded that such a prohibition limits commercial free speech and should not be allowed. The limitation is

[4] AT&T's brief at 58.

appropriate in the context of a commercial relationship in which Qwest serves CLECs. Qwest is not prohibited from discussing its products and services to any customer who asks, merely those who have contacted Qwest by error. Therefore, the language that AT&T proposes is generally appropriate for inclusion in the SGAT.

3. Special Contract Termination Charges

InTTec and McLeodUSA both raised a concern about termination penalties that Qwest could waive for its own customers who upgrade service but they were not able to waive for their customers. Both asked that Qwest be required to provide relief of termination cost liability and waive termination charges for CLECs as resellers. This remedy is too broad; it would prohibit Qwest from imposing charges even where it applies them to its own end users. However, it is appropriate for the SGAT tc require Qwest to waive termination charges to the same extent that it does for its own customers.

4. Electronic Interface for Centrex Resale

A concern was raised about the lack of electronic OSS interfaces for Centrex resale. The testimony addressed efforts in Iowa related to this issue. The parties failed to provide the promised follow-up on the Iowa situation or to address a number of questions pertinent to the resolution of this issue. The issue cannot be resolved without further input from the participants.

5. Inaccurate Billing of Resellers

Essen raised concerns about billing accuracy; these issues are better deferred until the completion of ROC OSS testing.

6. Ordering and Other OSS Issues

Essen raised general concerns, but did not provide the specific information needed to respond to this issue. If the issue remains of concern, it can be addressed subsequent to the completion of ROC OSS testing.

7. Other Pricing Issues

Essen raised concerns about the Montana wholesale discount and nonrecurring charges. The record here does not contain any substantial evidence about the costs underlying these pricing elements. They can only be addressed in later proceedings that focus upon costs.

8. Qwest Centrex Contracts

Essen raised concerns about Qwest's use of long-term contracts and the application of termination charges under them. There is no evidence of record to support a conclusion that such contracts or charges are inappropriate, or that Qwest has used them to disadvantage competitors.

9. Merger Related PIC Changes

Essen stated that the Qwest request for resellers to move all of their accounts from one PIC code to another during the Qwest/US West merger demonstrated how Qwest interferes with the ability of CLECs to operate efficiently. The evidence showed this to be a one-time problem, for which Qwest compensated CLECs for the efforts required to accommodate Qwest system limitations.

10. Breach of Confidentiality Agreements

Essen cited several instances of billing problems in the past. Qwest presented evidence of efforts to address them. There was no evidence presented to show that the corrections have been ineffective.

11. Superior Service to Qwest's Internal Sales Force

Essen complained that short-term promotions were not being offered to CLECs at a discount. There was no evidence that Qwest failed to conform to the applicable requirements for availability of and application of discounts during short- and long-term promotions.

IV. Common Issues

Several parties raised issues that addressed a number of the checklist items within the scope of this report.

1. Lack of Available Facilities

NEXTLINK testified that it has often experienced collocation delays because of a lack of facilities, particularly access to DC power. NEXTLINK said that it has had to pay for other collocation facilities while it awaits power augmentation.[5] The Wyoming Consumer Advocacy Staff (WCAS) conducted a survey of in-state CLECs and it offered the results of that survey into evidence. The survey indicated a CLEC concern about lack of facilities and a fear that Qwest would favor its own end-users in responding to CLEC requests for service.[6]

Proposed Issue Resolution: The issue of delays in service, for whatever reason, are addressed in the performance measures that are set forth in the *Service Performance Indicator Definitions* (PID), which has been developed as part of a collaborative effort involving the state commissions that form the Regional Oversight Committee, Qwest, and the CLEC community. For measures in which the PID performance standard is established as parity with retail operations, then the lack of facilities is an issue that affects Qwest and CLECs equally, presuming that Qwest meets the performance standard. Where Qwest does not meet that standard, or a benchmark standard if that is what the relevant performance measure provides, the issue of financial consequence is being addressed in the PEPP. Performance of OSS testing by the ROC and the results of current workshops addressing the PEPP are proceeding in parallel with these workshops. The issue of delays should be addressed when those efforts reach or at least near completion. At that time, it will be more practical to address the extent to which facility delay may impose discriminatory burdens on CLECs.

2. The Need for A "Real World" Test of Qwest's Performance

Based in significant part upon the results of its survey of CLECs in Wyoming, WCAS argues that Qwest cannot be deemed to have met the 271 checklist requirements absent some period of operation henceforth, during which tangible evidence of its commitments to open its local market will accumulate.

Proposed Issue Resolution: There is no firm requirement that such a test period take place prior to a checklist compliance determination. Rather, the FCC appears to have recognized, through its reliance upon OSS tests and post-entry assurance plans, that there are other means of providing the assurances that are a pre-condition to RBOC entry into in-region long distance markets. There has not been substantial evidence to support the notion that Qwest's performance is so profoundly inadequate as to make these means inappropriate here. In fact, despite repeated efforts to induce CLECs to bring evidence about the nature of their relationship with Qwest to the workshops, not much information in that regard has been forthcoming.

Where CLECs have, for the most part, declined to present such evidence, it would be particularly inappropriate to rely upon a survey that not all participated in and in which the information

[5] Response Testimony of David LaFrance on Behalf of NEXTLINK Utah, Inc., September 5, 2000 (hereafter LaFrance Direct), at page 12.

[6] Exhibit WS1-Wyoming CAS-1 (Walker Direct) at page 5.

reported is of a fairly general nature. Had the CLECs involved chosen to present such evidence directly in these workshops, there would have been ample opportunity to examine its foundations and to assess its credibility and weight. Moreover, some of the concerns expressed in the survey do not go to the standard that is relevant here. Where parity with retail operations is the applicable standard, absolute, as opposed to relative, observations about delays and lack of facilities are not persuasive.

Even if there is an argument to be made that there is a minimum baseline of performance that should be provided to CLECs, even if Qwest's own customers do not get that level of service, the nature of the Wyoming CAS survey, combined with the lack of supporting evidence from those CLECs who have participated in the workshops, does not allow for a determination of what that standard should be, let alone whether Qwest has met or can be expected to meet it. WCAS witness Walker moreover observed the "finger pointing" that appears to take place between Qwest and CLECs in matters of disagreement; what is missing is enough detailed information to allow a reasoned determination here of where blame lies, if blame there be at all.

The survey presented by the Wyoming CAS is not without benefit in these proceedings. It can be taken as evidence that Qwest has had historical performance problems in serving CLECs. What the survey does not do, however, is to lay a sufficient foundation for overcoming the belief that OSS testing and post entry performance plans may serve adequately to provide a basis for determining whether Qwest should secure Section 271 approval. It is not certain how this conclusion might have been different, had CLECs complied better with the repeated requests of the participating state commissions to make these workshops more focused on "real world" experience. That is speculative; what is not is that CLECs have stood largely silent on the question of supporting general complaints and concerns with detailed information relating to the kind of issues that at least some of them were willing to provide responses to in the Wyoming CAS survey.

Where that leaves us in these workshops is with the conclusion that we must look largely to the OSS test and the post entry assurance plan to guide final judgments on the kinds of performance issues that the WCAS survey raised. That opportunity will come; the commissions have already stated in their procedural orders that they will create a means for doing so.

V. Checklist Item 1 -Interconnection

Background - Interconnection

Section 271(c)(2)(B)(i) of the Telecommunications Act addresses the competitive checklist item involving interconnection: [An ILEC must provide] "...interconnection in accordance with the requirements of §§ 251(c)(2) and 252(d)(1)..." Section 251(c)(2) imposes upon Qwest:

> *[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;*
> *(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and*
> *(D) 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*
>
> ...

The FCC has defined the term interconnection as "...the linking of two networks for the mutual exchange of traffic."[4] Section 7.0 of the Qwest SGAT generally addresses interconnection issues.

Issues Resolved During This Workshop – Interconnection

1. Interconnection Service Quality

AT&T sought to add language to SGAT Section 7.1.1.1, for the purposes of: (a) assuring that the sections addressing interconnection are subject to this section's quality requirements and (b) applying state wholesale and retail service-quality requirements to Qwest's interconnection obligations.[5] AT&T's recommended changes to the SGAT language are set forth below:

> *7.1.1.1 U S WEST will provide to CLEC interconnection at least equal in quality to that provided to itself, to any subsidiary, affiliate, or any other party to which it provides interconnection. Notwithstanding specific language in other sections of this SGAT, all provisions of this SGAT regarding interconnection are subject to this requirement. In addition, U S WEST shall comply with all state wholesale and retail service quality requirements.*

[3] 47 U.S.C. § 251(c)(2)

[4] 47 C.F.R. 51.5

[5] Wilson Direct at ¶ 43.

At the workshop in Denver on December 18, 2000, the parties agreed to approve the section as contained in the SGAT 'Lite' marked WS1-QWE-TRF-1-4[13], and now included as follows in the "Frozen SGAT":

> *7.1.1 This Section describes the Interconnection of Qwest's network and CLEC's network for the purpose of exchanging Exchange Service (EAS/Local traffic), Exchange Access (IntraLATA Toll) and Jointly Provided Switched Access (InterLATA and IntraLATA) traffic. Qwest will provide Interconnection at any technically feasible point within its network, including but not limited to, (i) the line-side of a local switch (i.e., local switching); (ii) the trunk side of a local switch, (iii) the trunk connection points for a tandem switch, (iv) Central Office cross-connection points, (v) out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases, and (vi) points of access to unbundled network elements. Section 9 of this Agreement describes Interconnection at points (i), (iv), (v), and (vi), although some aspects of these Interconnection points are described in Section 7. "Interconnection" is as described in the Act and refers, in this Section of the SGAT, to the connection between networks for the purpose of transmission and routing of telephone exchange service traffic and exchange access traffic at points (ii) and (iii) described above. Interconnection, which Qwest currently names "Local Interconnection Service" (LIS) is provided for the purpose of connecting end office switches to end office switches or end office switches to local or access tandem switches for the exchange of Exchange Service (EAS/Local traffic); or end office switches to access tandem switches for the exchange of Exchange Access (IntraLATA Toll) or Jointly Provided Switched Access traffic. Qwest tandem to CLEC tandem switch connections will be provided where technically feasible. Qwest local tandem to Qwest access tandem and Qwest access tandem to Qwest access tandem switch connections are not provided.*

This issue can be considered closed.

3. Single Points of Interconnection in Each LATA

WCOM objected to SGAT Section 7.1.2 language requiring a CLEC to establish a point of interconnection (POI) in each local calling area where it does business. Specifically, WCOM wanted to replace the second sentence of the section with the following language:

> *At CLEC's option, CLEC shall determine the most efficient number of interconnection points and the location of those points, subject to technical feasibility.*

McLeodUSA argued that CLECs should not be required to interconnect at more than one POI per LATA.[14] AT&T made a similar argument in opposition to Qwest's SGAT language, which would require a POI within each local calling area.[15] AT&T also objected to limitations on the types of interconnection methods available. AT&T sought to make the SGAT's list of

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[13] Transcript of 12/18/00 at pages 32-33.

[14] Exhibit WS1-MCL-SAJ-3, at page 1.

[15] Wilson Direct at ¶ 45.

interconnection method illustrative, rather than exhaustive.[16] In rebuttal testimony, Qwest proposed modifications to the language offered by AT&T.[17]
In Qwest's SGAT Matrix of December 8, 2000, this section is marked as a consensus section. The language in the SGAT filed that that time[18] (and now found in the Frozen SGAT) is as follows:

> *The Parties will negotiate the facilities arrangement used to interconnect their respective networks. CLEC shall establish at least one Physical Point of Interconnection in Qwest territory in each LATA the CLEC has local customers. The Parties shall establish, through negotiations, at least one of the following Interconnection arrangements : (1) a DS1 or DS3 Qwest provided entrance facility; (2) Collocation; (3) negotiated Mid-Span Meet POI facilities; (4) other technically feasible methods of Interconnection.*

This issue can be considered closed.

4. Hub Interconnection Arrangements

SGAT Section 7.1.2.4 describes hub interconnection arrangements, which Qwest agreed to provide through what it called a "LIS Inter Local Calling Area (LIS) Facility."[19] AT&T objected to these arrangements, which it said required it to establish a trunk from AT&T's POI to every Qwest end office in Qwest's local calling area, before it could serve a single customer. AT&T called this requirement identical to requiring a POI in every wire center, rather than merely in every LATA. AT&T raised related problems, such as the added cost resulting from the requirement in some cases to purchase transport from the Qwest private line tariff as a finished service, and the restriction of the use of these facilities by CLECs to interconnection only. AT&T recommended that the entire section be replaced by the following language:

> *7.1.2.4 Hub Location. The CLEC may establish a POI via a hub location by either providing its own facilities to the hub or by utilizing unbundled dedicated transport provided by U S WEST. Spare facilities at the hub locations may be used for the transport of unbundled elements.*

WCOM sought clarification of this section, arguing that a CLEC should only have to provide physical interconnection where the CLEC both has NXXs and originates traffic. Therefore, it sought to add to SGAT Section 7.1.2.4.1 the term "originating NPA NXX" to modify the term "customers."
Ultimately, Qwest deleted all of this section[20] and it is marked as consensus on the SGAT Matrix of December 8, 2000. This issue can be considered closed.

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[16] Wilson Direct at ¶ 48.

[17] Rebuttal Testimony of Thomas R. Freeberg (hereafter Freeberg Rebuttal) at page 15.

[18] WS1-QWE-TRF-1-4.

[19] Wilson Direct at ¶¶ 62-67.

[20] See WS1-QWE-TRF-1-4.

5. Charges for Interconnection Trunking

A number of parties raised questions about charges under SGAT Sections 7.1.2.4.3 through 7.1.2.4.6. WCOM argued that Section 7.4.2.4.3 could be argued to require CLECs to pay for the facilities even if they were 2-way trunks (i.e., carrying calls from Qwest customers as well).[21] McLeodUSA asked what charges there would be for Direct Transport Trunks of over 20 miles in length under SGAT Section 7.1.2.4.3.[22] WCOM noted that, under Section 7.1.2.4.5, Qwest was only agreeing to reduce the costs for Qwest's traffic portion across the first 20 miles. WCOM argued that this provision would subsidize traffic originated by Qwest customers in cases where it traveled on trunks in excess of 20 miles in length. WCOM also objected to the application of private line tariff rates under SGAT Sections 7.1.2.4.4 and 7.1.2.6, arguing that prices should be based on TELRIC, not on the basis of access-tariff rates.
These sections were all deleted in the SGAT filed by Qwest for the December 18, 2000[23] workshop and are marked as "consensus" in the SGAT matrix of December 8, 2000. Therefore, this issue can be considered closed.

6. Limits on LIS Trunk Traffic Types

McLeodUSA also objected to the SGAT Section 7.1.2.4.7 limitation that LIS trunks may be used only to transport local exchange traffic between Qwest and CLEC customers located within Qwest local calling area.[24] McLeodUSA argued that CLECs, like Qwest, should be free to use the trunks for other purposes. This section was also deleted by Qwest.[25] Therefore, this issue can be considered closed.

7. Reciprocal Compensation for Toll Traffic Exchanged

WCOM objected to the second sentence of SGAT Section 7.2.1.1, under which Qwest would apply its tariffed switched access rates to toll traffic exchanged in both directions between itself and CLECs.[26] WCOM proposed that each party apply its own individual tariffed intraLATA toll rates. Qwest resolved this issue by deleting the sentence that caused the objection. Therefore, this issue can be considered closed.

8. Defining Jointly Provided Switched Access Traffic

Qwest offered at workshops to change the way that SGAT Section 7.2.1.2.3 defines "Jointly Provided Switched Access" traffic. No other participant registered an objection to this technical

[21] Friday Direct at page 10.

[22] Exhibit WS1-MCL-SAJ-3.

[23] WS1-QWE-TRF-1-4.

[24] Exhibit WS1-MCL-SAJ-3.

[25] WS1-QWE-TRF-1-4.

[26] Friday Direct at page 11.

change, to which the participants appear to have agreed in similar workshops in Arizona.[27] At the workshop held in Denver on December 18, the parties agreed that this issue was closed.[28]

9. One-Way Trunk Groups

AT&T sought a change in SGAT Section 7.2.2.1.2.1 to eliminate a preference for two-way trunk groups. Qwest made changes in the section to accommodate this request, which closes this issue, with one exception. AT&T continued to have a concern about routing of Qwest one-way trunks back to AT&T. This aspect of the issue, on which the parties could not agree, is addressed below with the other unresolved issues.

10. Obliging CLECs to Provide Transport to Qwest

AT&T objected to the requirement of SGAT Section 7.2.2.1.2.2 that CLECs provide transport to Qwest, which AT&T says is required neither by the Telecommunications Act of 1996 nor FCC rules implementing it.[29] Qwest resolved the issue by eliminating the reciprocal nature of the obligation to sell transport services. The section, after this change, only addresses CLEC purchases of transport services from Qwest. The Qwest change also responded to a question that McLeodUSA raised about leases from a third party.[30]
Qwest made a change to eliminate a similar problem in SGAT Section 7.2.2.1.3 and to address AT&T, WCOM, and McLeodUSA concerns about allowing Qwest to direct how a CLEC uses its collocation space.[31]
Therefore, this issue can be considered closed.

11. Interconnection Over Direct Trunks Where Available

The parties discussed a new SGAT section that was proposed at Exhibit WS1-ATT-KLW-5q to address how interconnection will occur in cases where there are and alternatively where there are not established direct trunks:

> *7.2.2.1.6 Regardless of the number of location routing numbers (LRNs) used by a CLEC in a LATA, Qwest will route traffic destined for CLEC customers via direct trunking where direct trunking has been established. In the event that direct trunking has not been established, such traffic shall be routed via a Qwest tandem.*

The language was incorporated into Qwest's frozen SGAT filing. Therefore, this issue can be considered closed.

13. Acceptance of Transit Traffic

WCOM expressed concern about Qwest's removal from SGAT Section 7.2.2.3.1 of interexchange carrier traffic from the definition of the "Transit Traffic" that Qwest agrees to

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[27] See Issue Log Matrix in 7-State, 2/20/2001.

[28] Transcript of 12/18/00 at page 79.

[29] Wilson Direct at ¶ 69.

[30] Exhibit WS1-MCL-SAJ-3.

[31] Wilson Direct at ¶ 71, Friday Direct at page 11, and Exhibit WS1-MCL-SAJ-3.

accept. Transit traffic, from Qwest's perspective, is traffic that its customers neither originate nor terminate, but which Qwest's facilities carry between the customers of other entities. In response to this concern, Qwest changed the section to define traffic carried by interexchange carriers as "Jointly Provided Switched Access." After discussion of the issue on December 18, 2001, WCOM undertook the obligation to consider this issue further. There was no further mention of the issue and WCOM did not file a brief in this workshop. Therefore, the issue can be considered closed.

14. Applying Tariff Prices to Signaling for LIS Trunks

SGAT Section 7.2.2.6.1 required CLECs with their own signaling network to secure Out-of-Band Signaling from Qwest's FCC Tariff #5. AT&T objected, arguing that it should have connectivity through dedicated transport, that such transport should be provided at cost-based prices, and that reciprocal compensation should apply.[32] Qwest made changes to this section; it said that they were sufficient to resolve this issue in Arizona workshops. The lack of briefing on this issue indicates that it can be considered closed.

15. 64 CCC Availability

AT&T was concerned that the terms of SGAT Section 7.2.2.6.2 limited CLECs more than Qwest is itself limited in the ability to route high-speed ISDN traffic over switch and transport facilities. AT&T noted Qwest's ability to use alternate routing and overlay network capabilities to avoid the ISDN-unfriendly capacity limits of older transmission facilities.[33] AT&T asked that the section be changed to require Qwest to provide CLECs with the same alternatives as are available to Qwest to provide 64CCC. Qwest agreed to change the section to provide such parity to CLECs. Therefore, this issue can be considered closed.

16. MF Signaling

AT&T recommended language that would allow access to MF signaling where SS7 is not available.[34] The language provided as follows:

> *7.2.2.6.3 MF Signaling. Interconnection trunks with MF signaling may be ordered by CLEC if the Qwest Central Office Switch does not have SS7 capability or if the Qwest Central Office Switch does not have SS7 diverse routing.*

The language contained in the "frozen" SGAT was similar; it provides as follows:

> *7.2.2.6.3 MF Signaling. Interconnection trunks with MF signaling may be ordered by CLEC if the Qwest Central Office Switch does not have SS7 capability.*

This language change resolved this AT&T issue, but there remains an unresolved issue concerning the case where there is SS7 capability, but not diverse routes for providing it. That issue is addressed below.

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[32] Wilson Direct at ¶¶ 72-74.

[33] Wilson Direct at ¶¶ 75-77.

[34] Exhibit WS1-ATT-KLW-5-R.

17. LIS Trunk Forecasting

SGAT Section 7.2.2.8.1 requires good faith efforts to produce an agreed-upon forecast of LIS trunk requirements. McLeodUSA observed that such information is very sensitive and that it was unclear why Qwest needed some of it. McLeodUSA also observed that there was no discussion of reciprocal forecasts.[35] The section requires good faith efforts by the parties, which of necessity includes consideration of these kinds of issues during the joint efforts that it will take to develop the forecasts. At the workshop in Denver, Qwest witness Freeberg described the reasons for the forecasts.[36] McLeodUSA made no additional comments, raised no remaining concerns, and did not brief this issue (McLeodUSA filed no brief at all). Therefore, this issue can be considered closed.

18. Commission Monitoring of LIS Trunk Provisioning

WCOM asked that there be public service commission monitoring of Qwest performance in provisioning LIS trunks. This issue is better addressed in the context of the post entry performance program (PEPP) or through requests made directly to the state commissions. The participants at the workshop agreed to close the issue without an SGAT language change.

19 Switch Growth Time Intervals

AT&T raised a concern about SGAT Section 7.2.2.8.3 language stating that CLEC jobs requiring switch growth necessarily involved minimum durations of six months. AT&T agreed with this limit only in cases where Qwest would require new switching modules or frames, as opposed, for example, to merely needing to add a new circuit card.[37] AT&T proposed a language change to broaden the interval language and to require Qwest to use CLEC forecasts to assure the availability of switch capacity. Qwest made changes to address AT&T's concerns. McLeodUSA questioned whether Qwest could unilaterally change the timelines established by the section. McLeodUSA also observed that CLECs need the ability to amend forecasts to meet unexpected growth.[38] The Qwest language change that addressed AT&T's concern about intervals also addressed the McLeodUSA timelines question. In addition, nothing in this SGAT section precludes changes in forecasts, whose preparation, as noted above, is subject to good faith requirements by the terms of the SGAT language.
Therefore, this issue can be considered closed.

20. Responsibility to Build to Forecasts

AT&T objected to the reciprocal nature of the SGAT Section 7.2.2.8.4 obligation to build and it recommended a language change that would require Qwest to ensure the installation of sufficient capacity to meet CLEC forecasts.[39] Qwest did not remove the reciprocity requirement, but did

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[35] Exhibit WS1-MCL-SAJ-3.

[36] Transcript of 12/18/00 at page 140.

[37] Wilson Direct at ¶ 79.

[38] Exhibit WS1-MCL-SAJ-3.

[39] Wilson Direct at ¶¶ 81-83.

propose a modified version of the language offered by AT&T.[40] At the workshop, Qwest noted that it had adopted this language. While there was general discussion on this section and other related sections, no objections were raised and no briefs addressed this issue,[41] which, therefore can be considered closed.

21. Information Exchange for Joint Planning Meetings

SGAT Section 7.2.2.8.7 addressed the information that should be exchanged to support joint planning meetings.[42] AT&T asked that the section be expanded to include a provision obligating Qwest to provide a detailed list of: (a) all its spare capacity on switches and in the state involved, and (b) capacity on all inter-office routes that could affect interconnection traffic. AT&T asserted that this disclosure was warranted by existing capacity problems in the Qwest network. Qwest revised the section in a manner that addressed AT&T's concerns.
McLeodUSA sought protection for this confidential information.[43] Qwest added a provision recognizing the confidentiality of the information and limiting its use to network planning activities.
Therefore, this issue can be considered closed.

22. Other Planning Information

McLeod raised several questions about the application of SGAT Section 7.2.2.8.8, including control over changes to the form used to provide information and the need for information about other tandem providers.[44] After discussion of this issue at the workshop, the parties agreed that it could be closed without further changes to the SGAT.

23. Updates to Information Qwest Makes Available Through Databases

SGAT Section 7.2.2.8.9 discusses information that Qwest makes available through its Interconnections (ICONN) Database and the Local Exchange Routing Guide (LERG). AT&T wanted to provide for regular updates of these databases.[45] The participants agreed that this issue could be closed without requiring any change to the SGAT.

24. Protection of Sensitive Forecast Information

AT&T wanted to strengthen the SGAT Section 7.2.2.8.12 provisions that deem CLEC forecast information to be confidential, by precluding Qwest from making it available to marketing, sales or strategic planning personnel.[46] McLeodUSA made a similar request.[47] Qwest changed the section to respond to these requests.[48] Therefore, this issue can be considered closed.

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[40] Freeberg Rebuttal at page 24.

[41] Transcript of 12/18/00 at pages 149-158.

[42] Wilson Direct at ¶¶ 87-88.

[43] Exhibit WS1-MCL-SAJ-3.

[44] Exhibit WS1-MCL-SAJ-3.

[45] Wilson Direct at ¶¶ 89-91.

[46] Wilson Direct at ¶¶ 92-94.

25. *Resizing Underutilized Trunk Groups*

SGAT Sections 7.2.2.8.13 and 7.2.2.8.14 allowed Qwest to resize CLEC trunk groups used at less than 60 percent and it allowed Qwest to refuse to augment trunk groups used at less than this level. AT&T was concerned about harm to CLECs where there were valid reasons for under utilization (e.g., erratic growth patterns or the banking of capacity to avoid held-order problems).[49] AT&T proposed to change the first section to avoid resizing where a CLEC provides its reasons for underutilization to Qwest and to assure that resizing left a CLEC with at least 25 percent spare capacity. It proposed to amend the second section by changing Qwest's right to refuse augments to a right to dispute a CLEC request for augments when existing trunk groups are being used at less than the required 60 percent level. McLeodUSA raised similar concerns.[50] Qwest changed the language to drop the 60 percent factor to 50 percent, and to eliminate the augment provision entirely. These changes were satisfactory to the participants. WCOM recommended that the three-month measurement period for underutilization be extended to six months, in order to account for typical usage fluctuations.[51] In light of the changes already made by Qwest, and the fact that WCOM did not raise this issue again, suggests that the six-month recommendation no longer needs to be considered.
Therefore, this issue can be considered closed.

26. *Assessment of Construction Charges*

AT&T expressed concern about a unilateral right of Qwest to assess construction charges in "extraordinary circumstances."[52] AT&T wanted to require Qwest to secure Commission approval before it could impose such charges. McLeodUSA and WCOM raised a similar concern.[53] Qwest changed the language to require such approval, to expedite consideration of the issue by the commission, and to provide for a sharing of the construction costs involved. Therefore, this issue can be considered closed.

27. *Trunking Service Standards*

AT&T considered the service-standards language of SGAT Section 7.2.2.9.1 to be too general.[54] It proposed incorporating state requirements, ROC standards, and a maximum of 1 percent blocking. It also proposed to require weekly reports on trunk usage. Qwest made changes to incorporate state and ROC standards and to provide monthly reports. This change satisfied AT&T. Therefore, this issue can be considered closed.

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[49] Exhibit WS1-MCL-SAJ-3.

[48] Freeberg Rebuttal at page 25.

[49] Wilson Direct at ¶¶ 95-97.

[50] Exhibit WS1-MCL-SAJ-3.

[51] Priday Direct at page 13.

[52] Wilson Direct at ¶¶ 98-100.

[53] Exhibit WS1-MCL-SAJ-3 and Priday Direct at page 13.

[54] Wilson Direct at ¶¶ 102-103.

28. Preference for Two-Way Trunking

WCOM felt that the SGAT Section 7.2.2.9.2 requirement to use two-way trunking "wherever possible" was too inflexible to accommodate new CLECs with smaller traffic volumes.[55] Qwest agreed to remove the section from the SGAT. Therefore, this issue can be considered closed.

29. Exchange of Traffic Only in Qwest Local Calling Areas

AT&T argued that the SGAT Section 7.2.2.9.7 requirement to exchange traffic only in Qwest local calling areas violated the FCC requirement allowing CLECs to choose their point of interconnection.[56] Qwest agreed to remove this section. Therefore, this issue can be considered closed.

30. Alternate Traffic Routing

Qwest proposed to change the language of SGAT Section 7.2.2.9.8 to eliminate the term "local" when describing the trunk groups that can be used to address overflows on direct trunk groups. There was no opposition to this change. The frozen SGAT filed by Qwest reflects the deletion of the term. Therefore, this issue can be considered closed.

31. Delivery of CLEC Traffic to Qwest Remote Switches

AT&T objected to the SGAT Section 7.2.2.9.9 prohibition on delivering CLEC traffic to Qwest's remote switches.[57] Qwest resolved the issue by allowing delivery to these switches in those cases where it may have arranged similar trunking for itself or others. Therefore, this issue can be considered closed.

32. LIS Acceptance Testing

Qwest agreed to expand available testing to include other testing needed to ensure operability or satisfaction of technical parameters, and accepted language proposed by AT&T.[58] Therefore, this issue can be considered closed.

33. Sharing the Costs of Testing

AT&T argued that Qwest should share in the costs of acceptance testing under SGAT Section 7.2.2.10.2.2, because interconnection trunks operate for the mutual benefit of the parties.[59] Qwest resolved the issue by changing the section to make CLECs solely responsible for testing costs in the event that they request tests beyond those required for acceptance purposes.

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[55] Friday Direct at pages 13 and 14.

[56] Wilson Direct at ¶ 111.

[57] Wilson Direct at ¶ 113.

[58] Freeberg Rebuttal at page 26.

[59] Wilson Direct at ¶ 115.

34. Repair Testing

Qwest agreed to add an SGAT Section (7.2.2.10.3), which provides that testing after repairs for operability and technical parameter verification will be at no additional CLEC expense.[60] Therefore, this issue can be considered closed.

35. LIS Trunk Ordering Information

AT&T observed that the provisions of SGAT Section 7.4.1 needed to be reconciled with the Qwest "Interexchange Carrier Resource Guide" (IRRG), in order to assure that the required information for ordering would be supplied.[61] Qwest made several detail changes in the section to address this issue.

36. Using the LERG to Obtain Ordering Information

AT&T argued that the information required from CLECs under SGAT Section 7.4.2 is identical to the information that Qwest tells CLECs to get from the LERG, as opposed to asking Qwest for it. Therefore, AT&T continued, Qwest should get that information from the LERG as well, rather than requiring CLECs to supply it.[62] McLeodUSA raised a similar issue.[63] Qwest changed the section to reflect the availability of information from the LERG. Therefore, this issue can be considered closed.

37. Channel Information For Entrance Facilities

Qwest proposed to add to SGAT Section 7.4.3 an obligation on parties ordering entrance DS1 or DS3 entrance facilities to identify the channels to be used to provide circuits. No participant expressed any objection or reservation about this change. Therefore, this issue can be considered closed.

38. Joint Planning Meetings

AT&T wanted to amend SGAT Section 7.4.4 in order to require that planning meetings produce commitments to implementing the resulting trunk plans.[64] Qwest changed the SGAT section to provide for such commitment language. Therefore, this issue can be considered closed.

39. Provisioning Intervals for Interconnection Trunks

AT&T objected to the SGAT Section 7.4.6 individual-case-basis intervals for initial trunking arrangements at any interconnection location, arguing that this approach was inconsistent with ROC standards and other provisions of the SGAT.[65] Qwest changed this section to make the ICB approach applicable only to new switch locations. It also changed Section 7.4.7 to: provide (a)

[60] Freeberg Rebuttal, at page 27.

[61] Wilson Direct at ¶ 118.

[62] Wilson Direct at ¶¶ 11119-122.

[63] Exhibit WS1-MCL-SAJ-3.

[64] Wilson Direct at ¶ 124.

[65] Wilson Direct at ¶ 127.

that Interconnect Resale and Resource Guide (IRRG) would address provisioning intervals, (b) that the IRRG's intervals would be consistent with ROC requirements, and (c) that Qwest would notify CLECs of IRRG changes. These changes resolve AT&T's issue about provisioning intervals for interconnection trunks. The last of these changes also addressed the question of McLeodUSA about whether Qwest could unilaterally change the intervals.[66] Therefore, this issue can be considered closed.

40. Defining the Service Date For LIS Charges

SGAT Section 7.4.8 allowed Qwest to apply cancellation charges or to startcharging for LIS service if the CLEC could not begin to accept the service 30 days after the original service date. AT&T wanted that date defined, in order to provide clarity about the issue of charging.[67] Qwest resolved this issue by clarifying that the trigger date is the date when Qwest advises the CLEC that the requested service is available. Therefore, this issue can be considered closed.

Issues Remaining in Dispute - Interconnection Checklist Item 1

1. Indemnification For Failure to Meet Performance Standards

AT&T wanted to add to the SGAT a new section (7.1.1.1.2) that would hold CLECs harmless in the event that Qwest failed to meet the service quality standards of Section 7.1.1.1, as AT&T proposed to amend them.[68] The new AT&T SGAT language would provide the following:

> *7.1.1.1.2 In the event that U S WEST fails to meet the requirements of Section 7.1.1.1, U S WEST shall release, indemnify, defend and hold harmless CLEC and each of its officers, directors, employees and agents (each an "Indemnitee") from and against and in respect of any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any nature or kind, known or unknown, liquidated or unliquidated including, but not limited to, costs and attorneys' fees*

AT&T's brief[69] defended this provision as creating an "incentive" for Qwest to perform adequately for "competitors it would like to put out of business." Qwest objected to the provision on a number of grounds:[70]

- Duplication with the Post-Entry Performance Plan
- Lack of FCC requirements to provide indemnification for untimely interconnection trunk installation
- Failure of any prior 271 proceeding to consider indemnification as a checklist compliance issue

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[66] Exhibit WS1-MCL-SAJ-3.

[67] Wilson Direct at ¶ 129.

[68] Wilson Direct at ¶ 43.

[69] AT&T Brief at page 6.

[70] Qwest Brief at pages 11 and 12.

- Existence of adequate damage and indemnification provisions generally applicable and set forth elsewhere in the SGAT

Proposed Issue Resolution: It is certainly correct to observe that the relationship between ILECs and CLECs is not typical of the circumstances that bring vendors or suppliers, on the one hand, together with buyers or customers, on the other hand, in the business world. A material portion of the advantage that each stands to gain under the Telecommunications Act of 1996 clearly must come in part at the expense of the other. Thus, the degree of mutuality (or, more precisely, its lack) in the relationship does raise legitimate questions about the need for special incentives to encourage performance.

However, it must also be recognized that there presently exists another, parallel effort to address the matter of providing such incentives. It is the ROC effort to develop a Post Entry Performance Plan (PEPP). The PEPP workshops are specifically addressing what form of financial incentives and penalties are appropriate to deal with the particular circumstances of Qwest's relationship with CLECs on an ongoing basis. These workshops recognize the treatment that the FCC has given to this issue in Section 271 proceedings involving other RBOCs. Therefore, the need to address the question of incentives already has been recognized, and it has been assigned to a distinct set of processes for disposition. It is, at the least, untimely to address the question of the need for incentives here, while those other processes remain underway.

There exists the question of damages, which is somewhat different from the question of instituting particular incentives to assure adequate Qwest performance.[71] Indemnity as a means for apportioning responsibility for damages is a legitimate tool of commercial contracting. In particular, it has value in protecting one party from liability where the harm results solely from the conduct of the other. However, there are several problems with AT&T's proposed application of the tool in this context.

First, interconnection by definition involves the mutual exchange of traffic. The customers not only of a CLEC, but also of Qwest, must depend upon the successful performance of both parties. Each party has facilities that support such performance. Yet AT&T's clause would not allow for a reasoned determination of responsibility in the event that harm occurs. Whether a CLEC's own conduct contributed to the harm appears to be irrelevant under the proposed standard. Moreover, AT&T's clause does not subject it to a corresponding indemnification obligation. The obligations of CLECs and ILECs may differ under the Telecommunications Act of 1996, but those of CLECs are still substantial, in particular as they concern the exchange of traffic. The AT&T proposal does not reflect any degree of mutuality, even accounting for the differing nature of the parties' legal and regulatory obligations.

Second, the question of liability for damages is of general relevance to the SGAT, not just to interconnection. AT&T has not demonstrated why there are unique considerations here, in the context of interconnection.[72] Thus, this matter is better addressed in the context of the SGAT's general terms and conditions, which will happen later in these workshops.

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[71] The PEPP is presumably also addressing the issue of the impact of substandard performance on the competitive marketplace as a whole, which typically represents another, distinct "tier" of compensation.

[72] For example, see the treatment of the indemnity question under the Resale topic, where distinguishing circumstances are present, given the nature of pricing and service delivery in that case.

Third, the acceptance of AT&T's proposed language would raise a distinct problem in the particular context of state commission performance standards. Adopting that language would be tantamount to deciding, on behalf of the participating state commissions, that, as between Qwest and CLECs, the responsibility for failure to meet applicable state standards should in all cases fall upon Qwest. It is to be expected that states will adopt differing types of standards applicable to wholesale and retail service, according to the particular types of behavior that they wish to induce. The same is true for penalties and rewards for meeting those standards. The adoption of an indemnification clause will transfer the burden of those penalties, without considering the objectives and policies that motivated a particular state to adopt them. Such a transfer may be appropriate in some circumstances; however, it should happen in cases of shared performance responsibilities only after the state involved has decided, on the basis of facts and arguments brought before it, that such a transfer is consistent with its particular objectives and policies.
Fourth, while the AT&T proposal would transfer the penalties involved in failing to meet state standards; it does not address any of the rewards that states may provide for particularly good performance. In this respect, AT&T effectively transfers the pain of poor performance but not any gain from strong performance.
Therefore, there is not a sound basis for concluding that Qwest fails to meet the Section 271 checklist on the grounds that its SGAT fails to include a provision indemnifying CLECs in the event of a failure to meet the standards applicable to interconnection.

2. Entrance Facilities as Interconnection Points

Entrance facilities are common aspects of the interface between local carriers and interexchange carriers, whose networks must be interconnected in order to allow long distance calls to be completed. Entrance facilities in this context have been secured through interstate tariffs for a long time. Much of this issue depends on whether and how CLECs should be able to use and pay for facilities that they have secured for interstate purposes when they want to use a portion of those facilities for interconnection under the Telecommunications Act of 1996.
Citing the FCC's First Report and Order at paragraph 191, AT&T expressed concern that Qwest was improperly transferring DS1 and DS 3 entrance facilities, which are an access world concept, to the realm of local exchange interconnection.[73] AT&T considered Dedicated Transport to be the correct and only element that should be required for interconnection trunks. AT&T construed Qwest's language as requiring both an Entrance Facility and Direct Trunked Transport where a CLEC needs to get to the Qwest switch in situations where the CLEC has no switch within the boundary of the Qwest serving wire center. In short, AT&T argued that Qwest would require it in such cases to pay the higher costs associated with securing two components where Dedicated Transport should alone suffice. Therefore, AT&T sought to change SGAT Section 7.1.2.1 as follows:

> *7.1.2.1 ~~Entrance Facility~~Leased Facilities. ~~Interconnection may be accomplished through the provision of a DS1 or DS3 entrance facility~~dedicated transport facilities. ~~An entrance facility extends from the U S WEST Serving Wire Center to CLEC's switch location or POI. Entrance facilities may not extend beyond the area served by the U S WEST Serving Wire Center. The rates for entrance facilities are provided in Exhibit A. U S WEST's Private Line Transport service is~~*

[73] Wilson Direct at ¶ 52.

~~*available as an alternative to entrance facilities, when CLEC uses such Private Line Transport service for multiple services. Entrance Facilities may not be used for interconnection with unbundled network elements.*~~ *Such transport extends from the US WEST switch to the CLEC's switch location or the CLEC's POI of choice.*

Qwest's brief[74] divided this issue into three parts:

- Whether entrance facilities can be used to access unbundled network elements
- If so, whether CLECs can commingle local and all types of toll calls on the same trunk group
- If so, whether CLECs should be allowed to secure lower (i.e., TELRIC) rates for the portion of such facilities used for interconnection.

As to the first part, Qwest agreed to allow access to UNEs, but opposed commingling (outside of the 9th Circuit) and the ratcheting of rates.

Proposed Issue Resolution: Qwest has agreed to allow access to UNEs. This agreement is to adopt the Washington resolution of the first part of this issue. The Washington order held that:[75]

> *Qwest must modify its SGAT to permit interconnection using entrance facilities at any technically feasible POI chosen by the CLEC, including interconnection for access to UNEs, and must revise SGAT section 7.1.2 as agreed at the workshop. See Tr. at 1250.*

Qwest should change the SGAT here to reflect this same commitment. The remaining two parts of the issue are resolved in the *Commingling of InterLATA and Local Traffic on the Same Trunk Groups* issue in the ***Reciprocal Compensation*** portion of this report.

3. EICT Charges for Interconnection Through Collocation

AT&T originally objected to the SGAT Section 7.1.2.2 requirement for CLECs to pay for the facilities; i.e., Interconnection Tie Pairs (ITP), which connect Qwest and CLEC facilities at interconnection points.[76] AT&T later noted that Qwest's intent was actually to charge for what Qwest calls Expanded Interconnection Channel Termination (EICT). AT&T argued that the POI in collocation situations is the CLEC's collocated equipment; therefore, Qwest should either: (a) pay for the facilities needed between the Qwest switch and the collocated CLEC equipment or (b) require Qwest to provide for the connection under a "reciprocal compensation obligation." AT&T noted also that CLECs do not charge Qwest in similar situations for connection at their central offices. AT&T recommended the following change to the SGAT section:

> *7.1.2.2 Collocation. Interconnection may be accomplished through the Collocation arrangements offered by U S WEST. The terms and conditions under which Collocation will be available are described in Section 8 of this Agreement.* ~~*When interconnection is provided through the Collocation provisions of Section 8 of this Agreement, the Interconnection Tie Pair (ITP) rate elements, as described*~~

[74] Qwest Brief at pages 17 and 18.

[75] Washington Utilities And Transportation Commission Administrative Law Judge's *Initial Order Finding Noncompliance In The Areas Of Interconnection, Number Portability And Resale*, Docket Nos. UT-003022 and UT-003040.

[76] Wilson Direct at ¶ 56.

~~*in Section 9 will apply in accordance with Exhibit A. The rates are defined at a DS0, DS1 and DS3 level.*~~

AT&T also requested that the EICT charge references be removed from SGAT Section 7.3.1.2.[79] Qwest agreed in its brief to accept the resolution of this issue as proposed in the Draft Washington Order addressing this issue.[78] That order provided as follows:

> *Qwest is responsible for constructing and paying for facilities on its side of the POI. Therefore, Qwest must remove restrictions in SGAT section 7.3.1.2.1 associating ITPs with UNE provisioning and not interconnection, and remove the application of EICT rate elements in Sections 7.1.2.2 and 7.3.1.2.1.*

The Draft Washington Order, which Qwest accepts, is consistent with AT&T's request.

Proposed Issue Resolution: The Draft Washington Order reflects a resolution of this issue that is in accord with FCC requirements and it comports with AT&T's request. Therefore, this issue can be considered to be resolved upon Qwest's making of the SGAT changes required by that order.

4. Mid-Span Meet POIs

AT&T objected to the requirement that mid-span meet POIs be required to be within Qwest wire center boundaries, because such a provision would require CLECs to deploy trunks to every Qwest wire center, which is unnecessary and economically burdensome.[80] AT&T sought the right to interconnect in this fashion at any technically feasible point, and to lease dedicated transport from Qwest in the event that it chose not to construct its own facilities to the meet point. AT&T also objected to precluding the use of mid-span meet points to gain access to unbundled network elements. AT&T recommended the following change in SGAT Section 7.1.2.3:

> *7.1.2.3 Mid-Span Meet POI. A Mid-Span Meet POI is a negotiated Point of Interface, ~~limited to~~for the interconnection of facilities between one Party's switch and the other Party's switch. The actual physical Point of Interface and facilities used will be subject to negotiations between the Parties. The Mid-Span Meet POI shall be located within the ~~Wire Center~~LATA boundary of the U S WEST switch. Each Party will be responsible for its portion of the build to the Mid-Span Meet POI. Spare facilities used for a~~A~~ Mid-Span Meet POI ~~shall not~~may be used by CLEC to access unbundled network elements.*

AT&T argued that Qwest's prohibition on access to UNES would promote an inefficient use of facilities and it would be contrary to an FCC holding that supported such use.[81] Qwest agreed to eliminate the wire center boundary requirement.[82] Qwest cited the FCC's First Report and

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[77] AT&T Brief at page 13.

[78] Qwest Brief at page 17.

[79] *Draft Order*, Washington Utilities and Transportation Commission, Docket Nos. UT-003022 & 003040, February 22, 2001 at ¶ 156.

[80] Wilson Direct at ¶¶ 58-60.

[81] AT&T Brief at page 13, citing UNE Remand Order ¶¶ 321 and 322.

[82] Frozen SGAT language for Section 7.1.2.3.

Order[83] as allowing the prohibition, but nevertheless, it also agreed to allow this form of interconnection to be used for access to UNEs, provided that the CLEC pay the UNE rate for the entire facility.[84] AT&T's brief suggested that the UNE rate should apply only to the portion of the facilities being used to gain access to UNEs.[85]

Proposed Issue Resolution: Qwest urges an overly broad interpretation of ¶553 of the First Report and Order. That paragraph explicitly says no more than that shared-cost meet-point arrangements make sense only in the context of interconnection, not in the context of UNE access. The language quoted in Qwest's brief does not at all address the question of whether, having established interconnection through meet points, some portion of the capability that is created can be used for UNE access. The portion of the paragraph that AT&T cites addresses UNE pricing in "a section 251(c)(3) access situation." Overall, paragraph 553 establishes the proposition of shared cost responsibility for interconnection meet points and CLEC cost responsibility for UNE access. What the paragraph does not directly address is responsibility for costs where trunks are used for both purposes. Such joint use should be supported from an economic point of view, otherwise economic waste and unwarranted competitive barriers would result from the need to install two sets of facilities where one is sufficient.

As to cost sharing, the overall intent of the FCC is reasonably clear from paragraph 553 and it is very sound as well. Costs should be shared where use is joint; they should be borne solely where the facility will form a link between two other portions of a CLEC's network. There has been no argument that cost apportionment would be particularly difficult in the circumstances at issue here. The best way to preserve the sound construct that the FCC has prescribed is to require that the SGAT apportion cost responsibility according the portion of the facilities being used for UNE access and the portion being used for interconnection. Therefore, SGAT Section 7.1.2.3 should be amended by eliminating the following language:

> *A Mid-Span Meet POI shall not be used by CLEC to access unbundled network elements.*

The following language should replace it:

> *A CLEC may use remaining capability in an existing Mid-Span Meet POI to gain access to unbundled network facilities; provided that the CLEC shall be obliged to compensate Qwest under the terms and conditions applicable to UNEs for the portion of the facility so used. In determining such portion, the decision shall be based to the extent practicable on the guideline that the portion so determined should correspond to the nature and extent of facilities that would be required to provide access to elements in the absence of a concurrent use for interconnection. Qwest may seek appropriate relief from the Commission if it can demonstrate that this provision has been used to occasion the installation of new facilities that, while claimed necessary for interconnection, were actually intended for UNE access.*

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[83] Qwest Brief at footnote 47, citing ¶ 553 of the First Report and Order

[84] Qwest Brief at page 20.

[85] AT&T Brief at page 14

5. Routing of Qwest One-Way Trunks

As noted in the earlier report section addressing resolved issues, Qwest did eliminate the SGAT Section 7.2.2.1.2.1 preference for two-way trunks. AT&T remained unsatisfied with a particular issue, however. Where a CLEC chooses one-way trunks, Qwest must install its own one-way trunks to terminate its traffic to that interconnecting CLEC. In particular, AT&T wanted CLEC, rather than Qwest, control over the routing of Qwest's one-way trunks back to the CLEC. AT&T's reasoning was that a CLEC should have the right to control Qwest's routing, while the CLEC controls its routing to Qwest, because Qwest retaliates against CLEC one-way routing decisions by routing from each of Qwest's end offices, which causes facility exhaust.[86]
Proposed Issue Resolution: AT&T proposes a solution to the problem of "retaliation" that is far too broad. In essence, its solution gives it the right to determine key variables in the cost and configuration of Qwest facilities that would bring to it the same kind of traffic that AT&T delivers to Qwest. Where AT&T chooses one-way trunks, it demands the right to choose its own interconnection points and routes, considering it appropriate for others, particularly Qwest, to rely upon AT&T's incentive to act rationally and economically. However, when Qwest must as a result install its own one-way trunks back, AT&T asks that AT&T control interconnection points and routing, now arguing that Qwest will be motivated by different kinds of motives. Implicit in AT&T's request is also the assumption that it will not have any motive to require Qwest to incur unnecessary or uneconomic costs, or at least a presumption that Qwest's economic loss is not an issue. Having questioned Qwest's motives, AT&T can hardly argue that it is immune to some of the same kinds of influences in corresponding circumstances. Qwest should have a reasonable degree of control over the interconnection points and routing for the one-way trunks that they have to build because CLEC's themselves have chosen to interconnect with Qwest through one-way trunks. If one-way trunking from Qwest generally causes inefficient use of CLEC networks, then CLEC's must consider it in exercising their unilateral rights about where and how to interconnect with Qwest's network. The Act does not anywhere state or even imply that CLEC's may choose Qwest's POIs. Moreover, if one-way trunking can be used in a retaliatory manner, then it should be dealt with in the SGAT's general terms and conditions, which is the preferable place to provide for relief from such actions, which surely cannot be limited either to interconnection trunking or to bad faith actions only by Qwest against CLECs.

6. Direct Trunked Transport in Excess of 50 Miles in Length

Qwest proposed a new SGAT section to address transport trunks in excess of 50 miles in length. It considered this section necessary in light of the fact that dropping its opposition to interconnection at access tandems could necessitate direct trunk transport lengths of several hundred miles.[87] Qwest's proposed language was:

> *7.2.2.1.5 If Direct Trunked Transport is greater than fifty (50) miles in length, and existing facilities are not available in either Party's network, and the Parties cannot agree as to which Party will provide the facility, the Parties will construct facilities to a mid-point of the span*

[86] AT&T Brief at page 18.

[87] Qwest Brief at page 6.

Qwest justified the 50-mile limit by citing a number of court and FCC decisions limiting ILEC responsibility to "adapt" their facilities for use by CLECs.[88] AT&T argued that this distance limit violated CLEC rights to choose the most efficient points of interconnection under 47 U.S.C. § 251(c)(2)(A) and under paragraph 209 of the FCC's First Report and Order.[89] Qwest pointed out that the FCC clearly contemplated distance limitations on ILEC build-outs, by stating that its belief that:[90]

> *state commissions are in a better position than the Commission [FCC] to determine the appropriate distance that would constitute the required reasonable accommodation of interconnection.*

Qwest noted that, in the same paragraph, the FCC described as being "limited" the build-out of facilities from the local exchange carrier's network. Qwest argued that the same reasoning applicable to meet-points applies to the provision of direct-trunk transport.

Proposed Issue Resolution: The issue here is not one of obliging Qwest to create a superior network or to adapt the nature or capability of its network to meet CLEC needs. There is nothing unique about the nature of the facilities involved; they are the same ones that all participants envision as the means to provide interconnection. The installation of trunks in excess of 50 miles would not make Qwest's network superior or operationally different; it would only mean that it would have some number of longer-length facilities in it.

As AT&T points out, Qwest has not presented evidence that it would fail to recover its costs of installing the very long interconnection trunks needed to provide direct trunk transport in the circumstances at issue. It is conceivable that increasing distance alone may alter the risks of cost recovery; however, no evidence to that effect has been presented here. It might also be true that cost recovery for two 30-mile interconnection trunks is not materially different from cost recovery for one 60-mile trunk. Clearly, it would be rational to consider in the setting of prices any differences that length causes in total costs to be incurred or in the risks of recovering them. Moreover, there may be factual support for a conclusion that there is some distance beyond which it may be presumed that cost recovery is so doubtful as to support a maximum limit. The issue as framed is essentially an economic one, and more particularly a costing one. It should be made with the benefit of the kinds of data and analysis that one finds in costing dockets, but which has not been presented here. Without such evidence, there is not a sound basis for deciding whether the proposed 50-mile limit is appropriate. This SGAT provision should be eliminated.

7. *Multi-Frequency Trunking*

As was discussed previously in the resolved issues portion of this report, the parties agreed to a resolution of the SGAT Section 7.2.2.6.3 issue involving the provision of MF trunking in the case of Qwest switches without SS7 capability. Qwest agreed to provide it. AT&T also sought such trunking where there is SS7 capability, but where it cannot be provided over multiple routes. The concern is for the case where capability will be lost by a link failure for which there

[88] Qwest Brief at pages 6 and 7.

[89] AT&T Brief at pages 19 and 20.

[90] First Report and Order at ¶ 553.

is not alternate path.[91] Qwest argued that it does not provide such redundant capability for itself when it must rely on that single link routing and that the FCC has not ever addressed the issue. Qwest also said that it should not be required to provide such redundancy on a generally available basis, because it falls outside reasonably foreseeable CLEC demand.[92]
Qwest does concede the accuracy of the central element of AT&T's concern, which is that its customers will have greater problems in making calls than Qwest's customers will. Qwest said that the differences could be minimized.[93] AT&T said that it has already lost the competition for customers who know enough about the network to realize that there is a differential service impact in the case of signal loss, depending on whether they take service from Qwest or from AT&T.[94]

Proposed Issue Resolution: These facts raise a legitimate parity of service question that has tangible competitiveness repercussions. Qwest noted that the draft order from Washington found Qwest's BFR solution appropriate,[95] but that draft order was clearly founded on evidence that every central office in Washington had diverse SS7 routing.[96] There is no such evidence here for any of the participating states. Where a CLEC is competing for customers, particularly those who understand the consequences of issues of this type, the time involved makes the BFR process an unsatisfactory solution. Low foreseeable demand should not prevent the obligation to make an offering for which the BFR process is likely to be commercially ineffective. Therefore, the SGAT should be changed to add the following at the end of Section 7.2.2.6.3:

or if the Qwest Central Office Switch does not have SS7 diverse routing

8. Obligation to Build To Forecast Levels

AT&T objected to the provision of SGAT Section 7.2.2.8.6 allowing Qwest to build to the lower forecast pending resolutions of disagreements between a Qwest and a CLEC forecast.[97] It recommended the following change in the language:

7.2.2.8.6 In the event of a dispute regarding forecast quantities, ~~the Parties~~ U S WEST will make capacity available in accordance with the ~~lower~~ higher forecast, if U S WEST has held any CLEC or IXC orders for lack of capacity during the previous six month period while attempting to resolve the matter informally. In the event U S WEST has no held orders for that period, the lower of the two forecasts will be used while attempting to resolve the matter informally. If the

[91] Exhibit WS1-ATT-KLW-5R; December 18, 2000 transcript at pages 134 and 135; December 19, 2000 transcript at page 103.

[92] Qwest Brief at page 16.

[93] Qwest Brief at page 17.

[94] AT&T Brief at page 21.

[95] Qwest Brief at page 17.

[96] *Draft Order*, Washington Utilities and Transportation Commission, Docket No. UT-003022 & 003040, February 22, 2001 at ¶ 117.

[97] Wilson Direct at ¶¶ 84-86.

Parties fail to reach resolution, the Dispute Resolution provision of this Agreement shall apply.

McLeodUSA argued that this provision required clarification.[98]

Qwest made a substantial change in this provision. It agreed to build to higher forecasts, requiring deposits in cases where historical trunk usage by the CLEC involved failed to reach a threshold level. The changed language also provideds for a deposit amount refunds in the event that future use approached forecast levels.

AT&T, however, continued to express concerns about some aspects of the revised language. First, it noted that Qwest's own trunk utilization is, like CLEC's only at a roughly 50 percent level, thus calling into question the validity of setting that usage factor as a deposit trigger. AT&T also observed that the ratio used by Qwest to trigger deposits also measures utilization against forecasts rather than against currently installed trunks, making it an even more inappropriate measure. In particular, according to AT&T, CLECs in Qwest's territory have an inducement to be generous in forecasting, in light of Qwest's problems in providing sufficient network facilities. AT&T also argued that Qwest does not "penalize itself for underutilization." AT&T also observed that there is no reservation of the trunks for a particular CLEC even after it has advanced costs for their installation; Qwest may find other uses for them even before a CLEC orders them. AT&T construed the Qwest language as potentially requiring a deposit even before Qwest will build to the lower forecast, which presumably will be its own.[99]

The Qwest brief argued that Qwest has accepted a central aspect of the AT&T request, which is to agree to assure that capacity is available as forecasted by CLECs. However, Qwest argued that undertaking this obligation has material risk, because building forecasted interconnection trunks does not ensure that CLECs will order them, or, if they do, that usage of them will be sufficient to generate adequate cost recovery. Therefore, Qwest continued, its commitment to build should be accompanied by a generally corresponding CLEC commitment to assure reasonable levels of compensation.[100]

Proposed Issue Resolution: AT&T's argument contains a number of assertions that are not correct. First, Qwest does in fact suffer a penalty in the event that it installs trunks that it does not use sufficiently. Whether it builds for CLECs or for itself, Qwest must make the investment to install trunks. Thereafter, whether its own usage or CLEC usage does not generate sufficient revenue to carry the investment, Qwest faces the same overall economic result. Second, AT&T incorrectly interpreted the SGAT as requiring deposits before Qwest will build even to the lower forecast. Section 7.2.2.8.6.1 of Qwest's "Frozen SGAT" for this workshop applies deposit requirements only to the portion of the higher forecast that is in excess of the lower forecast. In other words, Qwest will build up to the limit of the lower forecast without requiring a deposit. Qwest is correct in arguing that its obligation to make investments at CLEC request without assurance of recovery should be balanced by an obligation to assure that it does not bear disproportionate risk for that investment. The difficulty lies in determining where that balance should be struck. In deciding that question, two particular portions of AT&T's arguments have substantial weight:

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[98] Exhibit WS1-MCL-SAJ-3.

[99] AT&T Brief at pages 22 and 23.

[100] Qwest Brief at page 13.

- Using forecasts as a base for measuring utilization
- Holding CLECs responsible for underutilization even if the trunks are otherwise used

Qwest's language considers usage only over a six-month period for deposit refund purposes. While the record does not disclose what kind of cost recovery periods are typical of such facilities, it is clear that they are intended to serve over lives much longer than half a year. Given the inability to match usage growth (which takes place in small increments that occur continuously) perfectly with augmentation of facilities to serve that usage (which come less frequently and in larger increments) it is natural to expect measurements of usage against forecasted capacity installations to produce numbers significantly smaller than would measurements of usage against installed capacity.

The evidence of record supports a conclusion that a 50 percent usage, measured against installed capacity, would not be considered by Qwest or CLECs to be atypical or problematical from an operational point of view.[101] The SGAT should not impose economic consequences under a utilization standard that exceeds current experience in the Qwest network. Therefore, the SGAT should be changed to require deposits (and to return deposits) on the basis of utilization of installed facilities, not forecasted facilities.

Even if use of forecasted trunks were the appropriate measure, there would remain two material implementation issues.

First is the considerable problem of deciding which forecast to use for taking the measurement. Changes by CLECs in their forecasts would raise the question of which to use for purposes of determining initial deposit requirements and later returns of deposit amounts. For example, SGAT Section 7.2.2.8.4 contemplates quarterly forecasts, each of which will cover periods of two future years. The deposit language requires an 18 month look-back and a 6-month look-ahead, which means that there will be overlapping and presumably differing forecasts to consider. Qwest's language does not address the problem of which to use, nor is it self-evident which forecast should be used for which purpose.

The second implementation problem is the impact that Qwest problems can have on a CLEC's satisfaction of the standard. If Qwest is unable to install facilities that CLECs would have used heavily, then their actual usage versus forecasts will be lowered. This result is worse even than fortuitous; it will have occurred for reasons that have everything to do with the quality of Qwest performance and nothing to do with CLEC performance. Qwest's SGAT language would return deposits already made in such a case, but it does nothing to exclude these circumstances from the determination of whether to take a deposit in the first place. In other words, if usage versus forecasts in the prior measurement period were lower because of failure of Qwest to install facilities, that lower usage would count in deciding whether a deposit was to be required. Again, there is no evident drafting solution to this problem.

Having decided that forecasts are not a proper measurement base, there arises next the question of whether a usage factor of 50 percent of installed capacity is appropriate for the SGAT. The SGAT provides that a CLEC must fail to meet the 50 percent standard at all times during the preceding 18 months. Clearly, a CLEC can, by meeting the standard in any of those 18 months, avoid a deposit requirement, even where its average utilization for the entire 18-month period is

[101] February 26, 2001 transcript at pages 75, 84 and 85

substantially below 50 percent. It can be safely assumed that, in practice, deposits will not be required unless a CLEC's usage falls considerably below an average of 50 percent. Thus, the use of a 50 percent-usage factor for installed facilities cannot be considered excessive.

AT&T has raised a valid concern about CLEC responsibility for the costs of facilities that it may not use, but that Qwest otherwise does eventually find useful in filling other needs. The issue here is striking a balance that considers Qwest's risk of cost recovery. As AT&T and Qwest have observed, CLEC forecasts contribute to Qwest construction plans, but Qwest is not building them for the account even of a CLEC that has advanced the costs of installing them. No CLEC has the right to control the use of those trunks in the event that it cannot make sufficient use of them. Yet, under Qwest's language there will be cases where CLEC's have in essence paid in advance for those trunks. If nobody uses them, Qwest has a legitimate concern about investment recovery. If anybody uses them, however, the circumstances change significantly. In such a case, the Qwest investment does produce benefits and it does eliminate cost recovery risk. Under Qwest's language, those benefits are doubled if it gets the deposit from a CLEC, but the use is by another party, which could be Qwest itself.

There should thus be a mechanism that allows a CLEC to recover deposit amounts for facilities that are used by others, including but not limited to Qwest itself. Otherwise, this SGAT provision loses the risk-balancing character that justified it, becoming instead a penalty to discourage generous CLEC forecasting. The need for a penalty has not been established, and, as Qwest has successfully argued in other contexts, penalties should not be liberally incorporated into the SGAT. Therefore, the SGAT should contain a provision that allows deposit refunds where other use of facilities puts Qwest in the same position it would have been in had the CLEC met the use levels warranting a return of deposit amounts. The following addition to the SGAT will accomplish this purpose:

> *7.2.2.8.6.2 Where there is a reasonably reliable basis for doing so, Qwest shall include in the trunks-required calculation any usage by others, including but not limited to Qwest itself, of facilities for which that CLEC has made deposit payments. Qwest shall not be required to credit such usage more than once in all the trunks-required calculations it must make for all CLEC's in the relevant period.*

9. *Interconnection at Qwest Access Tandem Switches*

Qwest divides its networks in a fashion that produce what it calls "local" tandem switches and "access" tandem switches. SGAT Section 7.2.2.9.6 precluded interconnection at access-tandem switches, allowing interconnection only at local-tandem and end-office switches. AT&T argued that this provision violates a requirement of 47 U.S.C. § 251(c)(2)(B) that interconnection permitted at any technically feasible point. AT&T further argued that Qwest's refusal to allow interconnection at these access tandems would require AT&T to bear the unnecessary expense of trunking to Qwest end-office switches, merely to serve a single customer.[102] McLeodUSA[103] and WCOM[104] also took this position. AT&T argued that Section 7.4.5, like others in the SGAT to

[102] Wilson Direct at ¶¶ 105-109.

[103] Exhibit WS1-MCL-SAJ-3

[104] Priday Direct at page 14

which it objected earlier, improperly precluded interconnection at Qwest access tandems.[105] AT&T also argued that the last two sentences of Section 4.11.2 also serve to reinforce improper restrictions on interconnection at access tandems.

Sprint objected to the provisions of SGAT Section 7.2.2.9.6, because they denied CLECs a statutory right, confirmed by FCC regulations, to interconnect in any technically feasible manner and at no more than a single point for each LATA.[106] Sprint cited paragraphs from the FCC's First Report and Order:

> *The interconnection obligation of section 251(c)(2) allows competing carriers to chose the most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers' cost of, among other things, transport and termination of traffic.*
>
> * * *
>
> *Of course, requesting carriers have the right to select points of interconnection at which to exchange traffic with an incumbent LEC under Section 251(c)(2).*[107]

Qwest opposed the use of its access tandem for routing local traffic, because it had constructed what it called two separate networks: one to move local traffic, and one for switched access transport. Qwest argued that it did not route local traffic on its toll/switched access network, nor did it route toll or switched access traffic on its local transport network. Qwest raised the concern that the proposal to interconnect for the exchange of local traffic on its switched access network would strand capacity on its local network, and create capacity shortfalls on its switched access network.[108] Qwest did agree earlier to some easing of the restrictions on interconnection at its access tandem switches, but kept them in place in a number of cases. Then, in its brief, Qwest agreed to a significant additional change, by accepting the resolution of this issue as set forth in the *Draft Washington Order*,which came in a context similar to this one.[109] Paragraph 147 of that order provides:

> *Qwest's must revise the SGAT to permit interconnection for the exchange of local traffic at the point determined by the CLEC, in conformance with the language proposed by AT&T. Qwest must not require interconnection at the local tandem, at least in those circumstances when traffic volumes do not justify direct connections to the local tandem. Qwest must do so regardless of whether capacity at the access tandem is exhausted or forecasted to exhaust unless Qwest agrees to provide interconnection facilities to the local tandems or end offices served by the access tandem at the same cost to the CLEC as interconnection at the access tandem.*

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[105] Wilson Direct at ¶ 125.

[106] Sprint Brief at pages 12 and 13.

[107] First Report and Order at ¶¶ 172, 220, fn. 464.

[108] Freeberg Rebuttalat page 6.

[109] Qwest Brief at page 3, citing the *Draft Order*, Washington Utilities and Transportation Commission, Docket No. UT-003022 & 003040, February 22, 2001 at ¶ 146 and 147.

It became clear from the briefs that another issue arose from the resolution of the issue in Washington. Specifically, Qwest asserted that it was not willing to amend the last sentence of SGAT Section 7.1.1. as had been requested by CLECs.[110] The sentence precluded connections between Qwest local and access tandems and between Qwest access tandems. Qwest opposed the elimination of the last sentence. Qwest stated that the only material consequence of retaining this sentence is that it would require, for areas served by more than one Qwest access tandem, that a CLEC provide for trunking to each tandem in whose seving area the CLEC had customers. The purpose, Qwest said, was to avoid overloading tandem switches by routing all calls through a single switch. [111] Qwest said that this limitation would not discriminate against CLECs because Qwest did not route its own local calls between its tandem switches.

AT&T argued that this sentence would also impose inefficient interconnection by precluding inter-tandem trunking even where ti would not create a risk of tandem switch exhaust. AT&T also expressed concern that it raised the potential for discrimination against CLECs, since Qwest did have trunks between its access tandems.[112]

Proposed Issue Resolution: Qwest conceded the technical feasibility of interconnection at its access tandems,[113] focusing instead on impacts to its network, should CLECs be able to exchange local traffic at Qwest's access tandems. As AT&T demonstrated, technical feasibility is the correct standard, citing paragraph 78 of the SWBT Texas 271 Order:

> [The] *Incumbent LEC is relieved of its obligation to provide interconnection at a particular point in its network only if it proves to the sate public utility commission that interconnection at that point is technically infeasible*

However, having recited that standard, the Washington order imposed two potential qualifications on its decision to eliminate requirements to interconnect at local tandems or end offices. Because Qwest agreed only to an SGAT change that applies such qualifications, we must address them. The two qualifications are:

- Leaving open the door for requiring interconnection at local tandems or end offices where justified by traffic volumes
- Allowing Qwest to require interconnection at local tandems or end offices, provided that Qwest makes such interconnection available at a cost no greater than would be the case if interconnection had occurred at the access tandem.

Neither of these limitations strictly comports with the breadth of the FCC requirement that CLECs be permitted to choose their POIs.[114] They allow Qwest to limit interconnection at access tandems even in the absence of a showing that such interconnection is technically infeasible. However, narrowing them can make their application consistent with the concept of technical feasibility. It has not been demonstrated that higher levels of traffic interchange either will not or

[110] Qwest Brief at page 3. The amendment Qwest opposed was actually the recommended deletion of the sentence as proposed in the Wilson Direct at pages 15 and 16.

[111] Qwest's Response To Facilitator's Request For Supplemental Information, April 20, 2001

[112] AT&T's Response to SGAT Section 7.1.1. Inquiry, served by e-mail on April 20, 2001.

[113] December 19, 2000 transcript, at page 5.

[114] FCC First Report and Order at ¶ 172.

cannot affect the operation of Qwest's network as designed and implemented. There is an evidentiary basis for concluding that Qwest's network configuration as it concerns the division of tandem switches can cause problems at higher usage levels. The focus of the discussion on network impacts in this workshop has certainly been at low levels of traffic interchange. The following language represents an appropriate means for allowing consideration of limits on interconnection at access tandems. Such language should replace Section 7.2.2.9.6 of the SGAT, because it balances the need to allow CLECs to choose their POI, while allowing Qwest to have network impacts considered:

> *The parties shall terminate Exchange Access Service (EAS/Local) traffic on tandem or end office switches. When there is a DS1 level of traffic (512 BHCCS) between CLEC's switch and a Qwest End Office Switch, Qwest may request CLEC to order a direct trunk group to the Qwest End Office Switch. CLEC shall comply with that request unless it can demonstrate that such compliance will impose upon it a material adverse economic or operations impact. Furthermore, Qwest may propose to provide interconnection facilities to the local tandems or end offices served by the access tandem at the same cost to the CLEC as interconnection at the access tandem. If the CLEC provides a written statement of its objections to a Qwest cost-equivalency proposal, Qwest may require it only (a) upon demonstrating that a failure to do so will have a material adverse effect on the operation of its network and (b) upon a finding that doing so will have no material adverse impact*
>
> *on the operation of the CLEC, as compared with interconnection at such access tandem.*

Qwest defended the last sentence of SGAT Section 7.1.1 on the grounds that it would avoid the tandem exhaust in areas served by multiple Qwest access tandems. Qwest said that such exhaust might occur if CLECs could route all traffic through only one of the multiple access tandems. Qwest also said that its proposal would not discriminate against CLECs because Qwest itself did not use its tandems in a fashion similar to that proposed by CLECS (i.e., routing local calls over trunk groups between access tandems). However, Qwest's language is not limited to cases where such trunk groups would threaten exhaust, nor would it allow comparable treatment for CLECs should Qwest alter its policy generally or in specific cases. To address these concerns, the last sentence of Section 7.1.1 should be changed to read as follows:

> *New or continued Qwest local tandem to Qwest access tandem and Qwest access tandem to Qwest access tandem switch connections are not required where Qwest can demonstrate that such connections present a risk of switch exhaust and that Qwest does not make similar use of its network to transport the local calls of its own or any affiliate's end users.*

SGAT Section 7.4.5 also limits traffic exchange at access tandems. No reason for including the section, other than to provide such a limit, has been offered. As this reason is not valid, the section, appearing otherwise to be unnecessary, should be deleted. The last two sentences of SGAT Section 4.11.2 also reinforce the limits on traffic exchange at access tandems. There having been offered no other reason for their inclusion, they too should be removed from the SGAT.

10. Inclusion of IP Telephony as Switched Access in the SGAT

Qwest sought to include Internet Protocol (IP) telephony as "switched access" traffic in the SGAT. AT&T objected, on the basis that the FCC has specifically exempted such traffic from access charges.[115] AT&T specifically objected to the inclusion of jointly provided switched access language in the SGAT in Sections 7.5.1 and 4.57.[116] Qwest's frozen SGAT removes the last portion of Section 7.5.1. In its brief, AT&T continued to object to certain provisions of SGAT Sections 4.39 and 4.57, along with unspecified portions of SGAT Sections 7.3.1.1.3.1 and 7.3.2.2 and along with other sections that were not at all identified.[117] Qwest agreed to remove the IP telephony language from SGAT Sections 4.39 and 4.57.[118]

Proposed Issue Resolution: Qwest has removed the disputed portions of the SGAT directly addressing IP telephony. Sections 7.3.1.1.3.1 and 7.3.2.2 address Internet-bound traffic generally, not IP telephony particularly. That issue is addressed later, in the ***Reciprocal Compensation*** section of this report. Moreover, AT&T has not made clear what other provisions raise similar problems; therefore, a foundation has not been laid for striking any additional language from the SGAT to bring it into compliance with this checklist item.

11. Charges for Providing Billing Records

SGAT Sections 7.5.4 and 7.6.3 allow Qwest to charge CLECs for providing billing records. WCOM objected to the Qwest charges for providing these records. WCOM argued that each party must provide these records to the other; historically neither has charged the other for doing so.[119] Section 7.5.4 applies when local carriers must exchange records where necessary to bill an interexchange carrier for jointly provided switched access and database inquiries. Section 7.6.3 applies to transit traffic, requiring payment when a carrier seeks information necessary to bill the originating carrier.

Qwest agreed to make these charges applicable to each party, but rejected the WCOM request to waive them entirely. Qwest argued that if a carrier wants to be paid by the interexchange carrier or the originator of transit traffic, it should pay the costs of other carriers who must provide information related to the securing of such payment. Qwest disputed WCOM's claim that it had provided such services in the past without charge; furthermore, Qwest did not consider past custom determinative in deciding whether such charges are appropriate now.[120]

Proposed Issue Resolution: WCOM raised this issue in its original comment, but did not file a brief. Its argument about past practice is not dispositive. The issue to be resolved is whether it is appropriate to charge a CLEC for a service that the CLEC desires in order to allow it to secure revenue. In addition, the charge here is reciprocal: Qwest pays the same if it takes a similar

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[115] AT&T Brief at pages 34 and 35.

[116] Wilson Direct at ¶¶ 130-133.

[117] AT&T Brief at page 35.

[118] Qwest Brief at footnote 50.

[119] Friday Direct at page 15.

[120] Qwest Brief at pages 20 and 21.

service from CLECs. The need for this service is a clear incident of interconnection; the service benefits the requesting carrier; the requesting carrier is not obliged to take the service; and the charges apply as well to similar Qwest requests of CLECs. There can be no question that a carrier asked to provide service to another in the course of the requesting carrier's efforts to secure revenues should receive fair compensation for the service rendered. Moreover, there being no claim that the charges have been determined improperly. There is no basis for questioning these provisions of Qwest's SGAT.

12. Combining Traffic Types on the Same Trunk Group

Sprint objected to the separate trunk group requirements of SGAT Section 7.2.2.9.3.2, which it contended would require inefficient overlay networks to mirror "old" incumbent networks. Sprint expressed particular concern about the refusal to permit CLECs to take advantage of capacity on existing long-distance networks to carry local/EAS traffic. Sprint responded to Qwest's reliance on a Bell South decision,[121] in which the FCC did not compel combined routing of local, intraLATA, and access traffic. Sprint observed that this ruling was based on a finding that combination was then not technically feasible. Sprint said that Qwest did not make any showing of infeasibility here, that the Washington and Oregon Commissions have issued rulings demonstrating feasibility, and that a later Bell South interconnection agreement with Sprint demonstrates a change of position by that ILEC on the matter of feasibility.[122]
Sprint further argued that the application of factors such as "percentage of local use" (PLU) in other states show that there are means for addressing the identification of the amount of toll traffic that qualifies for access charges.
Proposed Issue Resolution: This issue is resolved in the *Commingling of InterLATA and Local Traffic on the Same Trunk Groups* issue in the ***Reciprocal Compensation*** section of this report.

[121] *Application of BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, CC Dkt. No. 98-121 (FCC 98-271, Oct. 13, 1998)

[122] Sprint Brief at pages 7 through 12.

CONTINUATION

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VI. Checklist Item 1 - Collocation

Background - Collocation

Pursuant to 47 U.S.C §251(c)(6), Qwest must:

> *...provide, on rates, terms and conditions that are just, reasonable, and nondiscriminatory, for the physical collocation of equipment necessary for interconnection or access to unbundled network elements ate the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.*

47 CFR § 51.323(a) specifies that, "an incumbent LEC shall provide physical collocation and virtual collocation to requesting telecommunications carriers." Physical collocation is essentially an offering that enables a requesting carrier to place its own equipment in the premises of the incumbent for interconnection and access to UNEs. Virtual collocation occurswhen the incumbent provides the equipment for CLEC use.In order to satisfy this checklist item, Qwest must demonstrate compliance with the collocation provisions of the Act and the FCC regulations.[123]

Issues Resolved During This Workshop – Collocation

1. Limiting Collocation to Wire Centers

AT&T objected to the SGAT Section 4.12 definition of collocation as being unduly limited to wire centers, arguing that technical feasibility should be the only criterion for limiting locations where Qwest should allow collocation.[124] AT&T recommended the following change to the definition:

> *4.12 "Collocation" is an arrangement where ~~space is provided in a U S WEST Wire Center for the placement of~~ U S WEST provides space in any technically feasible premises for the placement of CLEC's equipment to be used for the purpose of Interconnection or access to U S WEST unbundled network elements.*

AT&T also objected to SGAT Section 8.1.1 language that would limit collocation to wire centers. It recommended the following language changes to reflect the FCC's broader definition of the "premises" at which collocation should be made available: [125]

> *8.1.1 Collocation allows for the placing of equipment ~~owned~~ by CLEC within U S WEST's premises, including central offices, serving wire centers and tandem offices, as well as all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities and adjacent facilities, where*

[123] See generally 47 CFR §§51.323, 51.5

[124] Wilson Direct at ¶ 169, citing the FCC First Report and Order at ¶ 574.

[125] Wilson Direct at ¶ 172.

technically feasible, ~~Wire Center~~ that is necessary for accessing unbundled network elements (UNEs), ancillary services, or~~and~~ Interconnection. Collocation includes the leasing to CLEC of physical space in a U S WEST premises~~Wire Center~~, as well as the resources necessary for the operation and economical use of collocated equipment, such as the use by CLEC of power; heating, ventilation and air conditioning (HVAC); and cabling in U S WEST's premises~~Wire Center~~. Collocation also allows CLECs to access Interconnection Distribution Frames (ICDF) for the purpose of accessing and combining unbundled network elements and accessing ancillary services. There are six types of Collocation available pursuant to this Agreement – Virtual, Caged Physical, Shared Caged Physical (including sublease collocation), Cageless Physical, Interconnection Distribution Frame, and Adjacent Collocation.

AT&T generally sought to replace the SGAT terms "wire center" and "central office" with the term "premises" where collocation locations are being addressed:

8.1.1.5	8.1.1.5.1	8.2.1.10	8.2.1.11	8.2.1.19
8.2.1.23	8.2.2.2	8.2.2.3	8.2.3.2	8.2.3.4
8.2.4.2	8.2.4.3.2	8.2.4.7	8.2.4.8	8.2.5.1
8.3.2.6	8.3.3.2	8.3.3.4	8.4.3.1	8.6.1.3

WCOM made a similar argument, seeking generally to use the term "premises" rather than "wire centers" to describe locations where collocation may take place.[126] NEXTLINK also testified to the importance of allowing collocation at remote terminals.[127] Rhythms also objected to limiting collocation to "wire centers."[128]

After having generally agreed to the CLEC-recommended approach in workshops in other states, Qwest offered a different approach here. Under this revised approach, Qwest offered what it called "Remote Collocation" to address collocation at outside-plant type structures. Qwest defined remote collocation in SGAT Section 8.1.1.8.

Thus, rather than generally extending the SGAT's collocation provisions to all "premises," Qwest decided to limit caged, cageless physical, virtual, and shared collocation to central offices, while making remote collocation available at other Qwest premises. Qwest generally agreed with the changes to SGAT Section 4 and to Section 8.1.1. However, it offered its remote collocation approach, which would obviate the need to deal with the use of the term "wire centers" in the other cited sections. Qwest did offer that, should its remote collocation approach not be accepted, it would be willing to revert to its agreement in other states to adopt the CLEC-recommended approach in those other sections.[129]

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[126] Priday Direct at page 19.

[127] LaFrance Direct at page 16.

[128] *Issues List of Rhythms Links, Inc. Regarding Checklist Items 1, 11, and 14*, September 22, 2000 (Rhythms Comments) at page 9.

[129] Rebuttal Testimony of Margaret S. Bumgarner for Qwest Corporation on Checklist Item No. 1 – Collocation & Checklist Item No. 11 – Number Portability (Bumgarner Rebuttal), September 18, 2000, at page 11 through 13.

No participants expressed disagreement with this approach or with the way it was reflected in changes that Qwest made to the SGAT. Therefore, this issue can be considered closed, except for the questions of whether (a) virtual collocation is available at remote premises and (b) whether new forms of collocation require the use of the BFR process. Those issues are discussed below.

2. ICDF Collocation

WCOM argued that ICDF Collocation was not a collocation type, but rather a method for obtaining UNE combinations. Therefore, WCOM wanted to remove the ICDF language from the Collocation section of the SGAT. Qwest agreed to remove the language from Section 8.1.1 and throughout Section 8.0, and to limit it to Section 9.0, which addresses UNE combinations. WCOM agreed that cross-references in Section 9 would address its concerns over the ICDF language.[130] Therefore, this issue can be considered closed.

3. Virtual Collocation Repair

McLeodUSA wanted to amend SGAT Section 8.1.1.1 to cite specifically Qwest's obligations not just to install and maintain, but also to repair, in cases of virtual collocation.[131] Qwest's frozen SGAT filing reflects this change; therefore this issue can be considered closed.

4. Maximum Caged Physical Collocation Space

McLeodUSA objected to the SGAT Section 8.1.1.2 limit of 400 square feet for caged physical collocation.[132] Qwest agreed to remove the limitation, which has been eliminated in Qwest's frozen SGAT filing.[133] Therefore, this issue can be considered closed.

5. Minimum Square Footage Requirements

WCOM argued that the 9-foot minimum requirement of SGAT Section 8.1.1.3 was inappropriate, because the only minimum space standard allowed by the FCC is that required for a single bay, which in the future could be less than 9 feet.[134] Qwest agreed to remove the 9-foot limit.[135] Therefore, this issue can be considered closed.

6. Subleasing Collocation Space Among CLECs

AT&T wanted to change SGAT Section 8.1.1.4 to make it clear that a CLEC could sublease to another CLEC physical collocation space that the first CLEC had obtained from Qwest (whether or not caged), in as small as single-bay increments. AT&T would make each CLEC responsible

[130] Priday Direct at page 19.

[131] Exhibit WS1-MCL-SAJ-4.

[132] Exhibit WS1-MCL-SAJ-4.

[133] Bumgarner Rebuttal at page 14.

[134] Priday Direct at page 20.

[135] Bumgarner Rebuttal at page 15.

to Qwest only for payment of its share of the space involved.[136] Qwest agreed to make the requested change.[137]

McLeodUSA questioned why Qwest should be involved in prorating costs among CLECs in the case where the application that covered installation came from a single CLEC.[138] The language of this SGAT section, particularly as reflected in Qwest's frozen SGAT filing, makes it clear that Qwest cannot limit CLEC rights to sublease to other CLECs.

Therefore, this issue can be considered closed.

7. Adjacent Collocation Definition

AT&T wanted to change SGAT Section 8.1.1.6, in order to make the definition of adjacent collocation consistent with FCC requirements.[139] Qwest agreed to the recommended changes, but objected to establishing a set interval for adjacent collocation, because of the wide range of circumstances that might exist, such as CLEC construction of a new building.[140] This issue can be considered closed, subject to the general discussion of intervals, which follows in this report's following discussion of collocation issues that remain unresolved.

8. Adjacent Collocation Terms and Conditions

AT&T objected to the use of an individual-case-basis (ICB) and largely undefined approach for setting terms and conditions for all collocation, urging instead the adoption of SGAT language (in Sections 8.2.6 and 8.4.5) that would provide details about securing building permits, allowing CLEC construction, providing power and other services, performing post-construction inspections, precluding CLEC moves if space should become available after adjacent collocation was provided, providing ordering details, and setting firm intervals for the delivery of requested space.[141]

Qwest agreed to the Section 8.2.6 changes with some clarification. It also agreed to the Section 8.4.5 changes, with the exception that Qwest would not agree to standard intervals for adjacent collocation, citing the wide variety of circumstances and construction needs that can be involved.[142] This issue can be considered closed; however, AT&T did raise an objection in its brief to the SGAT's failure to provide standard prices for predictable forms of adjacent collocation. AT&T noted, however, that the identification of standard adjacent collocation types and prices for them were better handled in dockets at which detailed cost information can be presented.[143]

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[136] Wilson Direct at ¶ 166.

[137] Bumgarner Rebuttal at page 15.

[138] Exhibit WS1-MCL-SAJ-4.

[139] Wilson Direct at ¶ 178, citing 47 CFR § 51.323(k)(3).

[140] Bumgarner Rebuttal at page 16.

[141] Wilson Direct at ¶ 179.

[142] Bumgarner Rebuttal at pages 44 and 57 .

[143] AT&T Brief at page 63, objecting to ICB pricing, but not mentioning the question of intervals.

Therefore, this issue can be considered closed, without limiting the opportunity to raise such cost issues in subsequent proceedings.

9. Limiting Obligations to Feasibility and Technical Standards

AT&T wanted to strike from SGAT Section 8.2.1.1 a provision limiting Qwest's general collocation obligations to technical and requirements and performance standards. AT&T wanted to replace it with one obliging Qwest to comply generally with applicable state and federal law.[144] WCOM also objected to the limiting provision of this section.[145] Qwest agreed to change the section to address these concerns.[146] Therefore, this issue can be considered closed.

10. Collocation of Switching-Capable Equipment

SGAT Section 8.2.1.1 substantially restricted the collocation of remote switching units (RSUs) and other equipment with switching capability by:

- Prohibiting their collocation where intended by the CLEC solely for switching or enhanced services
- Allowing Qwest to prohibit collocation where Qwest satisfied the state commission that the equipment would not be used for interconnection or access to UNEs
- Requiring CLECs to provide in advance an inventory of switching equipment and a description of how it would be used for interconnection or UNE access
- Requiring CLECs to remove RSUsat their expense, should Qwest be successful in appeals challenging the legal right to collocate them at Qwest premises.

AT&T objected to this section, arguing that the refusal to allow the collocation of RSUs would unduly delay the development of competition in rural states, citing Idaho, Iowa, Montana, North Dakota, Utah, and Wyoming specifically. AT&T argued that the inability to collocate and to use the switching capability of RSUs would cause the unnecessary use of direct circuits and the creation of "wasteful" CLEC interconnections.[147] Therefore. AT&T recommended changing Section 8.2.1.1 to: (a) explicitly allow interconnection of RSUs and the use of their switching capabilities, and (b) eliminate the conditions and restrictions of Qwest's section.
WCOM wanted to change the definition of equipment in SGAT Section 8.1.1, in order to allow the collocation of equipment with switching capability.[148] McLeodUSA questioned the definition of "switching," and wanted to allow CLECs to self-certify their compliance with the equipment

[144] Wilson Direct at ¶ 180.

[145] Friday Direct at page 20.

[146] Bumgarner Rebuttal at page 18.

[147] Wilson Direct at ¶¶ 183 and 184.

[148] Friday Direct at page 19.

limitations of SGAT Section 8.2.1.2.[149] Jato also raised several questions about the equipment limitations of SGAT Section 8.2.1.2.[150]

Qwest's testimony opposed the collocation of RSUs, but did agree to allow CLECs to collocate DSLAMs, ATM, and packet switches.[151] However, Qwest later agreed to allow the collocation of RSUs, as shown in its frozen SGAT filing:

> *8.2.1.2.3 Remote Switching Units (RSUs) also meet this legal standard when used for Interconnection or access to unbundled network elements for purposes of providing Local Exchange Service.*

Therefore, this issue can be considered closed.

11. UNE Demarcation Points in Collocation Situations

WCOM testified that the placement of the demarcation point for UNEs inside the CLEC collocation space would cause problems, due to the fact that each party is responsible for maintenance on its side up to the demarcation point. If some of the equipment for which Qwest has maintenance responsibility is within the CLEC collocation space, then CLECs will be required to undertake the inefficient act of dispatching their personnel to allow Qwest access to the equipment that Qwest must maintain. Therefore, WCOM wanted to change the demarcation point to a location outside the CLEC collocation space.[152] Qwest agreed to modify the SGAT to respond to this concern.[153] Therefore, this issue can be considered closed.

12. Direct Connection of CLEC and Qwest Equipment

AT&T sought a change in SGAT Sections 8.2.1.4 and 8.2.1.5 to remove any requirement for intermediate frames, in order to allow CLECs to make the same kinds of connections to Qwest that Qwest uses for its own cross connections.[154] AT&T also argued that Section 8.3.1.11 should be modified to make it clear that intervening ICDFs are not required.[155] WCOM made a similar argument.[156] Jato made a similar argument about Section 8.3.1.11.[157]

Qwest made an addition to Section 8.2.1.5, which allows direct connection, and which Qwest said proved satisfactory in workshops in other states.[158] No participant expressed objections to

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[149] Exhibit WS1-MCL-SAJ-4.

[150] Initial Testimony of Andrew Newell on behalf of Jato Communications, Inc. (Newell Direct), at page 2.

[151] Bumgarner Rebuttal at page 19.

[152] Priday Direct at page 21.

[153] Bumgarner Rebuttal at page 19.

[154] Wilson Direct at ¶ 186.

[155] Wilson Direct at ¶ 224.

[156] Priday Direct at page 21.

[157] Newell Direct at page 11.

[158] Bumgarner Rebuttal at page 20.

this language, which is included in Qwest's frozen SGAT filing, nor did any brief this issue. The issue can therefore be considered closed.

13. Incorporating Technical Publications By Reference

SGAT Section 8.2.1.8 refers to a number of technical documents that AT&T said it had not seen. AT&T objected to indirectly including in the SGAT documents that might be inconsistent with SGAT provisions, arguing that any relevant portions should be placed directly into the SGAT.[159] Qwest removed the references.[160] Therefore, this issue can be considered closed.

14. Safety Standards

AT&T wanted to change the provisions of SGAT Section 8.2.1.8 in several ways:

- Making only the Level 1 safety requirements of the Network Equipment Building System (NEBS) applicable, and explicitly excluding the NEBS performance standards
- Making only the safety requirements of the cited technical publications applicable
- Limiting all other Qwest safety requirements to those that Qwest applies to itself.[161]

AT&T also sought to make the last of these three changes in the SGAT Section 8.2.1.17 requirements regarding earthquake ratings.[162] AT&T made a similar request with respect to limiting the technical standards referred to in SGAT Section 8.2.2.5.[163] AT&T made a similar request with respect to the NEBS reference in SGAT Section 8.2.3.9, asking as well in that case for the explicit right to challenge before a state Commission or a court any decision by Qwest to halt construction for non-compliance.[164] AT&T also raised its NEBS non-safety standards concern and its problem with mere references to technical publications under SGAT Section 8.2.3.12, which deals with caged physical collocation standards.[165]
WCOM testified that the use of NEBS must also be limited to Level 1 safety requirements, in order to comply with FCC requirements. WCOM also asserted that the incorporation by reference of technical publications should not be permitted, because it would give Qwest the opportunity to unilaterally change applicable requirements.[166] Jato also testified in support of

[159] Wilson Direct at ¶ 187.

[160] Bumgarner Rebuttal at page 21.

[161] Wilson Direct at ¶ 189.

[162] Wilson Direct at ¶ 196.

[163] Wilson Direct at ¶ 207.

[164] Wilson Direct at ¶ 212.

[165] Wilson Direct at ¶ 215.

[166] Priday Direct at page 22.

limiting the application of NEBS to Level 1 safety standards and against the incorporation of technical documents by reference into the SGAT.[167]
Rhythms also requested a similar limitation on the application of NEBS, and asked that safety standards be specified in the SGAT.[168]
Qwest agreed to change SGAT Section 8.2.1.8 to address the NEBS Level 1 safety standards issue, to provide parity between Qwest and CLECs with respect to imposing safety and engineering standards, and to eliminate references to technical publications (except for the Qwest technical publication addressing central office alarming).[169] Qwest agreed to change the earthquake ratings language of Section 8.2.1.17 to apply a specific standard, NEBS –BR GR-63-CORE, and to post each wire center's earthquake rating on its IRRG website. Qwest changed the 8.2.2.5 reference to address the NEBs and parity issues.[170] Qwest also changed Section 8.2.3.9 to address the NEBS issue.[171] Qwest made similar changes in Section 8.2.3.12.[172] Therefore, this issue can be considered closed.

15. Deadline for Providing CLECs Certain Collocation Information

AT&T wanted to add to SGAT Section 8.2.1.9 a 10 calendar-day time limit for Qwest responses to CLEC requests for information about collocation space.[173] Qwest agreed to this change.[174] Therefore, this issue can be considered closed.

16. Including Power Availability Information in Space Availability Reports

Jato asked that power availability information be included in the Space Availability reports, in order to allow CLECs to avoid delays by having to submit applications before learning that power constraints exist.[175] Qwest objected to the provision of such information, because changing power demands would make the information unreliable essentially immediately upon its issuance. Qwest also cited its space forecasting and reservation provisions as a better means for assuring the power availability.[176] However, Qwest's frozen SGAT filing does provide for the provision of power availability in Section 8.2.1.9:

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[167] Newell Direct at page 3 and various other places.

[168] Rhythms Comments at page 8.

[169] Bumgarner Rebuttal at page 21.

[170] Bumgarner Rebuttal at page 33.

[171] Bumgarner Rebuttal at page 37.

[172] Bumgarner Rebuttal at page 39.

[173] Wilson Direct at ¶ 190.

[174] Bumgarner Rebuttal at page 21.

[175] Christopher Murphy Testimony for the First Workshop in Utah PSC Docket No. 00-049-08 (Murphy Direct), at page 6.

[176] Bumgarner Rebuttal at page 21.

e) whether sufficient power is available to meet the specific CLEC request;

The participants did not brief this issue; Qwest's SGAT change appears to provide what Jato sought. Therefore, this issue can be considered closed.

17. Expansions of Space Available for Collocation

AT&T wanted to incorporate into SGAT Section 8.2.1.10 a provision requiring Qwest to: (a) provide CLECs with expansion space that is contiguous to existing space where possible, and (b) consider CLEC needs in Qwest's facility-expansion planning. AT&T cited 47 CFR §§ 51.323(f)(2) and 51.323(f)(3) as supporting the inclusion of these provisions.[177] McLeodUSA argued that Qwest should not merely have to take into account projected needs, but also to "take steps to accommodate" them.[178]

Jato offered a clarifying amendment to this SGAT section; it would change the phrase "bay at a time" to "single bay increments." The amendment would make it clear that CLECs need to submit a separate order for each bay.[179]

Qwest agreed to these modifications, with the exception of the McLeodUSA comment about accommodation of CLEC expansion needs. Qwest said that its phrasing was taken directly from the FCC rules and that its forecasting and space reservation provisions would provide for adequate CLEC input into planning for future space requirements.[180]

McLeodUSA filed no brief in this workshop. Qwest's language reflects FCC requirements and it provides in essence for all the level of "accommodation" that is realistic, given that the issue to be taken account of is forecasted demand, not assured demand. Therefore, this issue can be considered closed.

18. Tours of Space-Limited Collocation Premises

AT&T sought a change to SGAT Section 8.2.1.11, which would clarify that the 10-day limit on scheduling premise visits should run from CLEC receipt of a Qwest denial of collocation for space reasons.[181] Qwest agreed to a change that would provide such clarification.[182] Therefore, this issue can be considered closed.

19. Providing Floor Plans for Space-Limited Premises

AT&T sought a clarifying, technical change to the language of Section 8.2.1.12.[183] Qwest agreed to make it.[184] Therefore, this issue can be considered closed.

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[177] Wilson Direct at ¶ 191.

[178] Exhibit WS1-MCL-SAJ-4.

[179] Newell Direct at page 4.

[180] Bumgarner Rebuttal at page 22.

[181] Wilson Direct at ¶ 192.

[182] Bumgarner Rebuttal at page 23.

[183] Wilson Direct at ¶ 193.

20. Listing of Space-Limited Premises

McLeodUSA asked that Qwest also be required to make notification when added collocation space becomes available.[185] Qwest agreed.[186] Therefore, this issue can be considered closed.

21. Reclamation of Space to Use for Collocation

As it relates to making space available in premises that are full, AT&T asserted that SGAT Section 8.2.1.14 needed to be changed to bring it into conformity with 47 CFR §§ 51.321(i) and 51.323(f)(5) by:[187]

- Reducing from 60 to 30 days the time within which Qwest must provide space reclamation price quotes
- Requiring Qwest on request to remove obsolete, unused equipment
- Requiring Qwest to relinquish space held for future use before denying virtual collocation, where such collocation is feasible.

McLeodUSA argued that Qwest should pay for space renovation; otherwise CLECs would be obliged to bear the consequences of Qwest's failure to manage space effectively.[188] Jato argued that CLECs should not have to pay for the reclamation of collocation space that must be made available to CLECs for collocation in cases where that space is being occupied by unused, obsolete equipment, or is otherwise not being legitimately used by Qwest. Jato also said the removal of unused, obsolete equipment is good business practice, and should be paid for by Qwest in the pursuit of such practice. Relying upon an analogy with TELRIC principles, Jato argued that an efficient operator would not have such equipment taking up space in the first place.[189] Jato asked for the establishment of flat rates to replace Qwest's ICB pricing, and requested the elimination of the separate interval for providing a price quote for reclamation.[190] Qwest agreed to bear the cost of removing obsolete, unused equipment, provided that CLECs would be required to bear any additional costs that would arise in cases where CLECs seek to expedite such removal. Qwest also agreed to the provision addressing relinquishment of space held for future use. However, Qwest objected to the 30-day interval for providing price quotes for space reclamation. It disputed AT&T's claim that the FCC had adopted any required interval, and cited many factors and conditions that could require substantial time to examine, particularly where multiple contractors were likely to be involved in the reclamation work.[191]

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[184] Bumgarner Rebuttal at page 24.

[185] Exhibit WS1-MCL-SAJ-4.

[186] Bumgarner Rebuttal at page 25.

[187] Wilson Direct at ¶ 195.

[188] Exhibit WS1-MCL-SAJ-4.

[189] Newell Direct at pages 4 and 5.

[190] Newell Direct at page 6.

[191] Bumgarner Rebuttal at page 26.

Its objection to the AT&T request for a 30-day period for price quotes notwithstanding, Qwest later revised the language of Section 8, which addresses collocation, as shown in its frozen SGAT filing, in a manner that removes all reference to reclamation price quotes and thatdefines reclamation only in terms of the removal of Qwest equipment, which Qwest agreed to bear itself. This change and the lack of any mention of this provision in the briefs of any participant means that this issue can be considered closed.

22. Unauthorized Access

AT&T objected to the vagueness and the lack of reciprocity in SGAT Section 8.2.1.18, which makes CLEC presence outside designated areas a trespass. AT&T also wanted Qwest to be permitted to apply to CLECs security procedures no more stringent than those applicable to Qwest's own personnel.[192]
Qwest disagreed. It considered the terms "trespass" and "designated and approved areas" to be well understood. It also stated that reciprocity was unnecessary, because Qwest already was applying proper limits to the conduct of its own employees and agents, who, in addition, should have greater rights to access to Qwest premises than do CLEC personnel.[193] Nevertheless, Qwest's frozen SGAT filing reflects a change that makes Qwest personnel subject to trespass for wrongful entry into caged collocation areas. This compromise and the lack of objection to it by AT&T at the workshops or in briefs indicate that this issue can be considered closed.

23. Facility Access

AT&T wanted SGAT Section 8.2.1.19 to be modified to make it clear that CLECs are entitled to unescorted access to basic facilities, which should include parking.[194] Jato also requested that parking be provided.[195] Qwest changed the section to address this issue.[196] Therefore, this issue can be considered closed.

24. CLEC to CLEC Interconnection

WCOM's requested that direct connection be allowed among collocated CLECs, as did Rhythms.[197] NEXTLINK testified that recent Qwest pronouncements have created uncertainty as to whether Qwest would permit CLECs collocated at the same Qwest premises in Utah to directly connect equipment between them. NEXTLINK said that such connections were important in allowing CLECs to avoid more expensive ways of interconnecting their networks and to permit a CLEC collocated in a number of Qwest premises to provide transport service for other CLECs in a more efficient manner.[198] Qwest agreed, but was not willing to provide

[192] Wilson Direct at ¶ ¶198 and 199, citing the FCC Collocation Order at ¶ 47.

[193] Bumgarner Rebuttal at page 28.

[194] Wilson Direct at ¶ 200.

[195] Newell Direct at page 7.

[196] Bumgarner Rebuttal at page 28.

[197] Rhythms Comments at page 9.

[198] LaFrance Direct at page 15.

interconnection, absent the use of the BFR process, except by the use of fiber, coaxial, or copper cable. The changes are reflected in SGAT Section 8.2.1.23.[199] The lack of objection to or briefing on this change indicates that the issue can be considered closed.

25. Direct Connections

AT&T objected to and sought the elimination of the SGAT Section 8.2.1.25 and Section 8.2.1.26 "without direct access to the COSMIC or MDF" clause. AT&T also believed that the reference to the BFR process should be removed, because Qwest has agreed to standard methods for direct connection to most types of Qwest cross connect frames and other equipment.[200] Jato also sought the ability to make direct connections without first having to use the BFR process.[201] Qwest agreed to make changes that were successful in resolving the issue in workshops in another state.[202] The lack of objection to or briefing on the language here indicates that the issue can be considered closed.

26. Converting from Virtual to Cageless Collocation

AT&T argued for a modification to SGAT Section 8.2.1.27 to allow simple conversions from virtual collocation to cageless collocation, which AT&T argued could be accomplished in fewer than thirty days, without requiring use of the BFR process.[203] Qwest agreed to an SGAT change that would limit simple conversions to 30 days.[204] Therefore, this issue can be considered closed.

27. Subcontracting Construction

AT&T proposed adding a new SGAT Section 8.2.1.28, which would: (a) permit CLECs to subcontract collocation work, and (b) limit QWEST approval of CLEC contractors to standards that QWEST applies to its own contractors.[205] Qwest agreed to make a change to address this issue, while preserving the right, for security purposes, to standard processing of access cards and devices.[206] Qwest also agreed to an AT&T and WCOM change that would limit its review of CLEC-chosen contractors for cage construction.[207] Therefore, this issue can be considered closed.

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[199] Bumgarner Rebuttal at page 29.

[200] Wilson Direct at ¶ 202

[201] Newell Direct at page 7

[202] Bumgarner Rebuttal at page 30

[203] Wilson Direct at ¶ 203

[204] Bumgarner Rebuttal at page 31

[205] Wilson Direct at ¶ 204

[206] Bumgarner Rebuttal at page 31

[207] Bumgarner Rebuttal at page 34

28. Power Outages

AT&T proposed adding a new SGAT Section 8.2.1.29, which would (a) provide for advance notification of non-emergency power work, and (b) provide prompt notice of those power outage, emergency power, or alarm conditions that could affect CLEC equipment.[208] Qwest agreed to provide notice, limited in the first of the two cases to any work that might affect power supply.[209] Therefore, this issue can be considered closed.

29. Performance Standards for Qwest Virtual Collocation Installations

AT&T proposed to modify SGAT Section 8.2.2.1 to provide for installation, maintenance, and repair time periods and failure rates comparable to those that Qwest provides in the case of work for itself, citing 47 C.F.R. § 51.323(e) as supporting this standard.[210] McLeodUSA questioned whether Qwest could change these standards at will.[211] Qwest made a change that would provide for interval and failure-rate parity, which addressed the concerns of both AT&T and McLeodUSA.[212] Therefore, this issue can be considered closed.

30. Providing Software Options and Plug-In Information to Qwest

McLeodUSA questioned whether Qwest had a legitimate need for the software options and plug-ins for virtually collocated equipment, which SGAT Section 8.2.2.6 requires CLEC to provide.[213] Qwest responded that it needed the information in order to carry out its obligations to maintain the equipment associated with those software options and plug-ins.[214] McLeodUSA did not follow up on this answer to its question, which was responsive, nor did it file a brief on this issue. Therefore, it can be considered closed.

31. Costs for Virtual Collocation Maintenance and Repair

WCOM requested a change to limit Qwest's maintenance and repair costs to what was "reasonable" and to preclude charges resulting from Qwest's fault or negligence. McLeodUSA questioned whether SGAT Section 8.2.2.8 was written broadly enough to include the fault not just of Qwest itself, but of those acting on its behalf.[215] Qwest agreed to make changes that responded to the WCOM request.[216] The language as written is already broad enough to

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[208] Wilson Direct at ¶ 204.

[209] Bumgarner Rebuttal at page 32.

[210] Wilson Direct at ¶ 205.

[211] Exhibit WS1-MCL-SAJ-4

[212] Bumgarner Rebuttal at page 32.

[213] Exhibit WS1-MCL-SAJ-4.

[214] Bumgarner Rebuttal at page 33.

[215] Exhibit WS1-MCL-SAJ-4.

[216] Bumgarner Rebuttal at page 34.

encompass those for whose errors or omissions Qwest is responsible at law. McLeodUSA offered no evidence or argument to support a conclusion that there are in this case any special circumstances that require this particular SGAT section to amplify what the term "Qwest" means. Therefore, this issue can be considered closed.

32. Efficient Space Use

AT&T wanted to eliminate the SGAT Section 8.2.3.3 quantified limits on ancillary CLEC use of space, and to make the obligation to use space efficiently applicable also to Qwest.[217] McLeodUSA questioned why the provisions of this section were not reciprocal.[218] Jato found this section (requiring efficient use within 12 months) and Section 8.2.3.7 (requiring installation to commence within 60 days) to be contradictory. It recommended that the sections be reconciled and that CLECs be given "at least 90-120 days to install their equipment."[219] Qwest agreed to remove the section entirely, which responded to the concerns raised by all three of these participants.[220] Therefore, this issue can be considered closed.

33. Efficient Space Design

Jato testified that Qwest's right under SGAT Section 8.2.3.4 to design a CLEC's collocation space should be limited by the requirement that Qwest design the space "in the most efficient manner possible." Qwest agreed to make this change.[221] Therefore, this issue can be considered closed.

34. Leasing of Collocated Equipment

SGAT Section 8.2.3.6 cites CLEC ownership, but not leasing, of collocated equipment; AT&T wanted this section of the SGAT to acknowledge the power to lease.[222] Qwest changed the SGAT to respond to this request.[223] Therefore, this issue can be considered closed.

35. Early Access to Collocation Space

AT&T wanted to change SGAT Section 8.2.3.7 to acknowledge that collocators can install their equipment before Qwest's installation work is done, where early access will not interfere with work completion.[224] Qwest agreed to change the SGAT to allow early access.[225] Therefore, this issue can be considered closed.

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[217] Wilson Direct at ¶ 208.

[218] Exhibit WSI-MCL-SAJ-4.

[219] Newell Direct at page 8.

[220] Baumgarner Rebuttal at page 35.

[221] Baumgarner Rebuttal at page 35.

[222] Wilson Direct at ¶ 210.

[223] Baumgarner Rebuttal at page 36.

[224] Wilson Direct at ¶ 211.

[225] Baumgarner Rebuttal at page 36.

36. Halting Non-Compliant CLEC Work

McLeodUSA argued that Qwest should be held liable if it improperly halted work, and questioned whether Qwest would take similar action when it discovereds that its own work was not compliant with safety requirements.[226] Jato asked for the elimination of the term "non-standard," which it considered too subjective, and for the elimination of the term "unsafe," which it viewed as redundant in light of the application of NEBS standards.[227] Qwest removed the two terms to which Jato objected and it incorporated a clause acknowledging CLEC rights to pursue objections to the state Commission or a court.[228] These changes are responsive and neither participant objected to the adequacy of the Qwest changes. Therefore, this issue can be considered closed.

37. Space Reclamation

AT&T asserted that SGAT Section 8.2.3.13 did not adequately define what the "U S WEST Space Reclamation Policy" meant. AT&T also argued that the 9-foot minimum space limitation is not appropriate and should be deleted.[229] Qwest provided the policy and it changed the minimum square footage language to address AT&T's concern.[230] Therefore, this issue can be considered closed.

38. Use of Other Technologies

AT&T said that SGAT Section 8.2.4.1 should be expanded to allow wireless, microwave, and as yet undefined technology to accomplish collocation.[231] Qwest changed the SGAT to address this concern.[232] Therefore, this issue can be considered closed.

39. Fiber Entrance Facilities

AT&T asked that SGAT Section 8.2.4.3 be changed to allow for the new "express connect" option, by exempting that option from the language.[233] Qwest changed the SGAT to address this request and to provide a minor clarification about cross-connect fiber in Section 8.2.4.3.2.[234] Therefore, this issue can be considered closed.

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[226] Exhibit WS1-MCL-SAJ-4.

[227] Newell Direct at page 9.

[228] Bumgarner Rebuttal at page 37.

[229] Wilson Direct at ¶ 216, citing the FCC Order on Reconsideration at ¶ 47 and the second NOPR on collocations in half bays and racks in the Order on Reconsideration.

[230] Bumgarner Rebuttal at page 40.

[231] Wilson Direct at ¶ 217.

[232] Bumgarner Rebuttal at page 41.

[233] Wilson Direct at ¶ 219.

[234] Bumgarner Rebuttal at page 41.

40 *Dual Entrance Facilities*

Citing 47 C.F.R. §§ 51.323(d)(1) and (2), AT&T said that SGAT Section 8.2.4.6 should be amended to provide for interconnection points accessible by both parties, and as close as reasonably possible to Qwest premises. AT&T also wanted to change this section to require Qwest to provide at least two interconnection points in all cases where there are at least two entry points for Qwest cable facilities.[235] WCOM also testified that such dual entry should be allowed.[236] Qwest agreed, subject to space availability, as 47 C.F.R. § 51.323(d)(2) permits.[237] Therefore, this issue can be considered closed.

41 *Dedicated Interoffice Transport*

Jato said that the SGAT Section 8.2.4.8. language should be broadened to reflect FCC requirements.[238] Jato asked that dedicated transport should be defined and made available as:

> [Qwest] *transmission facilities dedicated to* [CLEC] *that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.*

Qwest committed to a broader change, based on discussions in the Arizona workshop, which addressed this request.[239] Therefore, this issue can be considered closed.

42. *ICDF Construction Charges*

Jato asked for clarification of the circumstances where Qwest could charge for new construction in connection with CLEC ICDF use.[240] Qwest's agreement to delete the sectionaddressed this request.[241] Therefore, this issue can be considered closed.

43 *Express Fiber Entrance Facilities*

AT&T said that Section 8.3.1.4 should be changed to provide that the "Express Fiber Entrance Facility" does not include fiber cable, splice case, splice frame, fiber distribution panel or relay rack equipment. AT&T also believes that the reasonableness of charges per fiber pair should be considered in SGAT cost dockets.[242] Qwest agreed except for relay racks, which Qwest considered to be necessary, noting that this exception was acceptable to AT&T in the Arizona

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[235] Wilson Direct at ¶ 221

[236] Pinkey Direct at page 30

[237] Hemphill Direct at page 43

[238] Jarrell Direct at page 10, citing CC Docket No. 96-98, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd at 15718 (1996), ¶ 440

[239] Hemphill Rebuttal at page 44

[240] Jarrell Direct at page 11

[241] Hemphill Rebuttal at page 44

[242] Wilson Direct at ¶ 223

workshops.[243] The lack of further pursuit of this issue by AT&T indicates that it can be considered closed.

43 Minimum Inspector Labor Charge

WCOM objected to the 3-hour minimum set forth in SGAT Section 8.3.1.8 and 8.3.2.1, unless Qwest could justify it as applicable to work Qwest performs for itself as well. WCOM agreed that Qwest had made a satisfactory showing in this regard.[244] Therefore, this issue can be considered closed.

45 Security Charges

WCOM objected to the SGAT Section 8.3.1.12 provision allowing Qwest to charge for security cameras and other security "infrastructure."[245] Jato argued that the FCC requirement that security charges be prorated acts as a bar to Qwest's approach of using ICB pricing.[246] McLeodUSA questioned why charges for entry devices should be monthly.[247] Qwest dropped the section's last sentence, which contained the charges to which WCOM and Jato objected.[248] The issue of whether access charges should be recurring or not should be addressed in a proceeding in which there is evidence about the nature and amount of the costs involved. Therefore, this issue can be considered closed.

46 Prorating Preparation and Installation Charges; Contractor Selection

WCOM testified that the FCC requires the prorating of charges, so that CLECs pay on the basis of the space that each occupies. It wanted to change SGAT Section 8.3.3.1 to provide for TELRIC-based prices and for prorating. WCOM also wanted to add a clause allowing CLECs to choose a contractor other than a Qwest pre-approved one, subject to reasonably exercised Qwest review and approval.[249] Qwest agreed to address these concerns with changes that WCOM found acceptable in workshops in other states.[250] Therefore, this issue can be considered closed.

47 Housekeeping Charges

Jato testified that SGAT Section 8.3.3.2 appeared to oblige CLECs to pay for housekeeping services outside CLEC-leased space. Jato objected to paying for any more than a pro rata share of services related to common areas.[251] Qwest language changes during the course of workshops

[243] Thompson Rebuttal at page 46

[244] Finke Direct at page 31

[245] Finke Direct at page 31.

[246] Newell Direct at page 12.

[247] Exhibit WCOM-MCL-SAI-4

[248] Thompson Rebuttal at page 51

[249] Finke Direct at page 32.

[250] Thompson Rebuttal at page 51

[251] Newell Direct at page 12

in other states' workshops make it clear (as shown in Qwest's frozen SGAT filing) that the charges in question are for a pro rata share of common area costs. Therefore, this issue can be considered closed.

48 CLEC Order Changes; Impact on Intervals

AT&T argued that SGAT Section 8.4.1.2 improperly applied charges to all changes. AT&T said that minor changes in collocation orders (e.g., changing the number of standard electrical outlets) should not cause added fees and delays under Section 8.4.1.2.[252] Qwest testified that it would not accept the requested change, but its frozen SGAT filing reflects a change of position. The section now limits the changes that require a new application to "material" ones. The section provides a definition of "material" and it provides a mechanism for dealing with changes that do fit the definition.[253] Therefore, this issue can be considered closed.

49 Space Reservation After Quote Delivery

AT&T would add to SGAT Section 8.4.3.1 a provision reserving space while a CLEC decides what to do after Qwest delivers a quote.[254] Qwest changed the SGAT to provide for such reservation.[255] Therefore, this issue can be considered closed.

50 Timing Between Collocation Completion and Transport Orders

Jato objected to the SGAT Section 8.5.1.1 ban on CLEC initiation of transport and ancillary service orders until after collocation construction completion and payment of outstanding non-recurring charge balances. Jato requested a provision requiring Qwest to provide to CLECs the information needed to order transport not later than 30 days before the completion of collocation construction.[256] NEXTLINK said that Qwest has refused to allow it to submit orders for transport and other facilities accessed via collocation until the collocation has been completed, thus delaying NEXTLINK's ability to make use of collocation space for which it has to pay Qwest. NEXTLINK asked that the Utah Commission require Qwest to permit orders for such facilities prior to the completion of collocation construction and to coordinate the provisioning of those facilities and the collocation space. NEXTLINK also asked that Qwest be required to inform CLECs immediately of any anticipated delay in provisioning the collocation space or related facilities.[257]

Qwest testified that it was unwilling to provide such other services before receiving full payment for collocation.[258] This response did not address the precise concern, which was not the initiation

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[252] Wilson Direct at ¶ 228.

[253] Ramgarmer Rebuttal at page 53.

[254] Wilson Direct at ¶ 230, citing the FCC's Order on Reconsideration at ¶¶ 28 and 36 and 47 CFR § 51323.

[255] Ramgarmer Rebuttal at page 54.

[256] Newell Direct at page 15.

[257] LaFrenier Direct at page 13.

[258] Ramgarmer Rebuttal at page 58.

of actual service but the ability to submit orders for them. Qwest subsequently changed this section, as reflected in its frozen SGAT filing, in a manner that would allow for transport to be activated at the same time that collocation is completed. This change was responsive to the [illegible] and Jato request. Neither CLEC briefed this issue. Therefore, this issue can be considered closed.

31 Determining When Virtual Collocation Is Complete

Jato said that connectivity and technical-parameters testing should be finished before virtual collocation can be considered complete under SGAT Section 8.5.2.1. Jato also argued that testing should not require a separate charge.[259] Qwest's frozen SGAT does reflect a redefinition of collocation completeness, requiring the premises to be ready for service. Qwest also noted that the testing it does in virtual collocation is the same kind of testing that CLECs would do for themselves and at their own expense in physical collocation; therefore, Qwest should get payment for such service provided.[260] This issue can be considered closed.

32 Virtual Collocation Failure Notices and Repairs

AT&T sought to change SGAT Section 8.6.1.3 in order to provide for prompt Qwest notification of failure of virtually collocated CLEC equipment, and to require Qwest to make repairs at intervals and with failure rates not greater than those applicable to Qwest's own equipment.[261] Qwest changed the SGAT to address this request.[262] Therefore, this issue can be considered closed.

33 ICDF Repair

AT&T asserted that SGAT Section 8.6.3.1 should not put all ICDF maintenance responsibility on CLECs. Qwest should have the responsibility on the "horizontal" side.[263] Qwest changed the SGAT to respond to this concern.[264] Therefore, this issue can be considered closed.

34 Minimum Blocks for Termination Orders

Jato testified that Qwest required it to order DS1 terminations in blocks of 28, while other ILECs permit the ordering of individual DS1 terminations. Jato asked for the addition of an SGAT provision allowing orders for individual terminations.[265] Qwest testified that the SGAT does

[259] Second Brent at page 14

[260] Bumgarner Rebuttal at page 19

[261] Wilson Direct at ¶ 234

[262] Bumgarner Rebuttal at page 39

[263] Wilson Direct at ¶ 234

[264] Bumgarner Rebuttal at page 39

[265] Second Brent at page 13

allow DS1 services to be ordered and activated one-at-a-time.[266] Therefore, this issue can be considered closed.

Issues Deferred or Addressed Elsewhere - Collocation

1. Reciprocal Compensation for Collocation Facilities Used for Interconnection

NEXTLINK argued that Qwest unduly limited the nature of the facilities that it would subject to reciprocal compensation for the transport and termination of the traffic of interconnected carriers.[267] NEXTLINK said that, where it uses collocation in part to provide for interconnection, the portion of the collocated facilities that are used for interconnection should be subject to reciprocal compensation. This issue is addressed in the report section addressing Reciprocal Compensation, under the issue heading of *Including Collocation Costs in Reciprocal Compensation*.

2. Collocation Costs

NEXTLINK objected to the high cost of collocation in Utah, arguing that it pays Qwest on average over $175,000 per office, or over twice what Qwest says are its average costs.[268] These amounts have been paid under charges that are subject to true up, after the Utah Commission sets permanent prices. NEXTLINK argued that Qwest should not be deemed to be in compliance with the collocation checklist item until the commission sets those permanent prices. The Utah Commission should address this in cost proceedings.

3. Lack of Available Facilities

NEXTLINK testified that it has often experienced collocation delays because of a lack of facilities, particularly access to DC power. NEXTLINK said that it has had to pay for other collocation facilities while it awaits power augmentation.[269] This issue was addressed in the **Common Issues** section of this report, under the issue heading of Lack of Available facilities.

4. APOTS-CFA Information

Rhythms requested the establishment of a firm interval for providing APOT-CFA information, which lets a CLEC know where on the Qwest frame its cable has been assigned. Rhythms concern was that this information be provided promptly, because it is necessary prior to order placement. There was a discussion of adding to SGAT Section 4 APOT-CFA information as a ready for service criterion. It was agreed, but the relevant section was not included in Qwest's frozen SGAT language for this workshop. Therefore, Rhythms may address this issue in the upcoming SGAT General Terms and Conditions workshop if it does not consider the issue closed.

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[266] Bumgarner Rebuttal at page 47.

[267] Response Testimony of David LaFrance on Behalf of NEXTLINK Utah, Inc., September 5, 2000 (LaFrance Direct), at page 9.

[268] LaFrance Direct at page 12.

[269] LaFrance Direct at page 12.

Issues Remaining in Dispute – Collocation

1. "Product" Approach to Collocation

AT&T noted that the SGAT provided for eight standard collocation types, and required the use of the BFR process before new collocation types would be available.[270] AT&T raised two concerns with this approach:

- Excessive delays in securing new or currently non-standard collocation through the BFR process
- Establishment of changing collocation conditions through application of Qwest documents external to the SGAT.

AT&T's brief cited a number of instances where it said that CLECs were forced to agree in advance (i.e., before they could secure collocation) to other requirements that were inconsistent with interconnection agreements or the SGAT, which requirements came from Qwest policy and other documents.[271] AT&T argued that the application of such collateral and inconsistent requirements reflected what it called an attempt by Qwest to "productize" the services that it provides to CLECs.

AT&T wanted to solve the first problem by obviating the need for the BFR process for any new type of collocation that Qwest makes available. It wanted to solve the second problem by withholding a certification of Qwest compliance with the Section 271 checklist until its collocation policies and performance requirements could be shown to be in compliance with its SGAT and interconnection requirements.[272]

Qwest argued (as to the first AT&T concern) that it should have the right, as a simple matter of contract law, to require CLEC consent to all the terms and conditions of any new product or service offering before being obliged to make that offering available. Qwest also said that it does permit CLECs to opt into any new product and service offerings without requiring the prior execution of the agreement under which the CLEC's relationship with Qwest is governed.[273]

Proposed Issue Resolution: The characterization of the issue as "productization" is not helpful in resolving the dispute that exists here. The dimensions of that term are hazy at best. The issue is not whether Qwest gives something the attributes of a product (assuming that there would even be agreement on what those are). The issues instead are:

- Whether Qwest has placed unreasonable terms, conditions, or limits on the availability of collocation
- If it has, what is to be done about it.

As to the concern about new a new form of collocation, it is clear that what it will be, of what it will consist, what its unique circumstances and requirements are, and whether it will impose

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[270] AT&T Brief at pages 45 and 46.

[271] AT&T Brief at pages 47 and 48.

[272] AT&T Brief at pages 47 and 50.

[273] Qwest Brief at pages 26 through 28.

costs that are unique cannot be determined now. Otherwise, either Qwest or the CLECs could make specific proposals for dealing with it at this time. Neither has; in fact, by definition, neither can. Therefore, there must be some method for establishing terms and conditions at such time as the circumstances underlying them are known and have been subject to negotiation among the carriers and, if necessary, to arbitration or other resolution by the state commissions.

There is no basis for declaring now that new forms of collocation must be available under the same terms and conditions as apply to known forms. The BFR process may take time to resolve any disagreements, but its usefulness in this context is no less than its usefulness to other, presently unknown circumstances. To the extent that the BFR process may require streamlining, the reasons therefore cannot be limited to collocation. The participants will have an opportunity to address any structural or procedural concerns about the BFR process in the upcoming workshop on general SGAT terms and conditions. That is the proper place to address whether the design of the process is appropriate to meeting all the needs for which it is intended, of which collocation is only one.

That Qwest agrees to make any new offerings available immediately does help to minimize delays. However, it must also be recognized that such offerings will be subjected to after-the-fact analysis by and negotiation with the CLECs. There may even ensue commission resolution of any disputes that survive such negotiation. It should be clear that CLEC agreement to the terms and conditions of any new offering does not foreclose appropriate retroactive changes to reflect the terms and conditions ultimately agreed to in negotiations or ordered by regulatory authorities. Otherwise, CLECs will be on the horns of a dilemma, which is to decline to take service until all disputes are ultimately resolved, or to commit now and perhaps for the long term to provisions that will change after regulatory intervention. There have been other cases where Qwest has asked for a continuation of existing arrangements even after public policy changes make such arrangements impermissible on a forward-looking basis. This should clearly not be such a case.

Therefore, Qwest should add the following sentence to the end of SGAT Section 8.1.1:

> *Other types of collocation may be requested through the BFR process. In addition, where Qwest may offer a new form of collocation, CLEC may order that form as soon as it becomes available and under the terms and conditions pursuant to which Qwest offers it. The terms and conditions of any such offering by Qwest shall conform as nearly as circumstances allow to the terms and conditions of this SGAT. Nothing in this SGAT shall be construed as limiting the ability to retroactively apply any changes to such terms and conditions as may be negotiated by the parties or ordered by the state commission or any other competent authority.*

The second aspect of this issue, applying to collocation the contents of external Qwest documents that are not consistent with the SGAT, also has implications not just, or even particularly, relevant in the case of collocation. Qwest conceded at the workshops the need for such documents to be consistent with the SGAT. It also conceded that the SGAT should control in the event of any disagreement. Thus, the major problem to resolve here is essentially one of how to apply this concept, on which there was no evident disagreement.

The solution of waiting until every Qwest technical and other parallel document affirmatively agree with every aspect of the SGAT is not functional. Nobody argued with the need for underlying standards and procedural documentation; nobody argued that the SGAT should itself be such a document. The workshop record is replete with references to many technical

documents. We also know that OSS interfaces will require an extensive knowledge of particulars and the use of forms or screens for activities such as pre-ordering, ordering, maintenance, repair, and billing.

Accepting the need for extensive documentation, which we must, it is wholly unrealistic to expect that documentation to be perfectly consistent with the contents of the SGAT. Even were it possible to remain current with every change in these parallel, but necessary documents, there would certainly be some provisions of them whose consistency with the SGAT would be a matter of honest dispute. Thus, to require perfect consistency as a condition of checklist compliance is tantamount to deciding that compliance will likely never happen. In addition to these concerns, it is also the case that this issue applies with equal force to the other obligations of Qwest under the SGAT; there is nothing that makes collocation unique or even particularly of concern in this regard.

Accordingly, a more practical way to address AT&T's concern about consistency, which is legitimate, must be found. Some progress in exploring the application of a general SGAT term or condition was made during the workshops. Essentially, this approach would provide explicitly for the precedence of the SGAT when any party establishes inconsistency with parallel documents. There may even be merit in addressing in a general way parallel documentation that, while consistent, imposes unnecessarily restrictive or burdensome conditions. The wisdom and the precise delineation of a general provision to address the questions of inconsistency and undue burden remain to be seen. However, the upcoming session on general SGAT terms and conditions will provide an adequate forum for addressing them. There is no reason to deal with them in the specific context of collocation.

2. Adjacent Collocation Availability

MeLeodUSA argued that the adjacent collocation option should not be limited to situations where space has been exhausted.[274] Qwest objected, on the grounds that the FCC has specifically declined to require adjacent collocation where there remains collocation space in an existing structure.[275]

Proposed Issue Resolution: MeLeodUSA made no response to the Qwest argument, provided no testimony in support of the need for adjacent collocation where existing space is available, and filed no brief on this (or any other) issue in this workshop. In the absence of any showing at all of the need for requiring adjacent collocation where space is available, there should be no requirement to include such availability in the SGAT.

3. Precluding Virtual Collocation at Remote and Adjacent Premises

AT&T's brief objected to virtual collocation restrictions under SGAT Section 8.1.1.8, 8.2.7, 8.2.7.2, 8.4.6.1, and 8.6.5.1. AT&T began by observing that the manner in which SGAT Section 4.50(a) defines remote premises for purposes of collocation allows only physical collocation at remote premises. AT&T went on to argue that the FCC does not distinguish between remote and other premises, for purposes of when virtual collocation is to be required, instead requiring at 47 C.F.R. 51.323(a) that physical and virtual collocation be required.[276] AT&T also cited the UNE

[274] Exhibit WSI-MCL-SAI-4.

[275] Bumgarner Rebuttal at page 17.

[276] AT&T Brief at pages 38 and 39.

Remand Order as specifically allowing virtual collocation at two locations that Qwest defines as "remote premises," i.e., cabinets and vaults.[277]

AT&T stated that virtual collocation is necessary in remote locations because those locations will often have space constraints that preclude physical collocation. Qwest's argument against allowing virtual collocation at remote premises springs from this very same factual observation. Qwest said that it would not require physical separation of its equipment in remote premises. In that case, according to Qwest, if there is no room for physical collocation, even absent such segregation, then there cannot "by definition" be any space for virtual collocation. Qwest said that its offer of adjacent remote collocation under SGAT Sections 8.4.6.1 and 8.4.6.2 adequately addressed situations where space limitations may preclude physical and virtual collocation at remote premises.[278] Qwest quoted a recent FCC order addressing space limitations at remote premises:[279]

> *We note that configuration of remote terminals may make it impossible for the incumbent to place collocators in separate space isolated from the incumbent's own equipment"*

Qwest described its view of the underlying motive for this dispute in a footnote in its brief.[280] That footnote stated that the objective underlying AT&T's argument was to shift responsibility to Qwest for equipment installation and maintenance of its equipment at remote terminals, given that these are ILEC responsibilities in the event of virtual collocation. Qwest argued that it would be "simply unfair and unrealistic" to expect it to staff, and train sufficient personnel to perform this role.

Proposed Issue Resolution: Section 251(c) of the Act sets forth an obligation to provide physical collocation. It goes on to state that virtual collocation is an option where technical reasons or space limitations make physical collocation "not practical."

Qwest has cited no evidence in the record to support a claim that a lack of space for physical collocation, even without physical separation of the Qwest and CLEC facilities, necessarily precludes every conceivable form of virtual collocation.[281] Moreover, the FCC language on which it relies only supports the conclusion that space for physical (not virtual) collocation may not be available at remote premises. If Qwest is right that virtual collocation is not possible in these circumstances, then it will not have to provide it, for the very reason that it is impossible. If Qwest is incorrect, then virtual collocation is not only possible, but the FCC requires it.

Qwest's claim that AT&T's real intent was to transfer massive installation and maintenance responsibilities to Qwest is curious, in light of Qwest's claim that virtual collocation is not

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[277] AT&T Brief at page 40, citing *UNE Remand Order* ¶ 221.

[278] Qwest Brief at page 36.

[279] *Order on Reconsideration* at ¶107 (*Second Further Notice of Proposed Rulemaking* in CC Docket No. 98-147).

[280] Qwest Brief at page 38, fn 95.

[281] Qwest did cite in its brief, at page 38, fn 94, to a transcript from workshops in another state, but neither the transcript nor any quotations from that transcript were included in its brief. This reference does not provide substantial evidence to support Qwest's claim, particularly where, as here, even if it did, it might make granting AT&T's a nullity, but in no case a harm in practical terms.

physically possible where physical collocation is not possible. It is difficult to imagine large resource requirements for something that will not be possible. Under Qwest's view of the physical circumstances involved, it is difficult to envision any amount of equipment being virtually located remotely, let alone enough of it to alter Qwest's resource needs substantially.[282] Moreover, should Qwest be required to install and maintain equipment here, it may recover under already existing SGAT terms and conditions its costs for doing so, including training. To the extent that they become material, they are not grounds for denying collocation in any event. At most, and this point is hypothetical at present, they may provide a basis for relief, should Qwest be able to demonstrate the need for it, from the collocation intervals otherwise required. Therefore, in order to satisfy its obligations to provide collocation, Qwest should change its SGAT in order to assure that virtual collocation in remote locations is not precluded or limited to any greater extent in remote premises than it is at wire centers. The absence of SGAT Section 4.50(a) from the record in this workshop precludes a specific language recommendation here. The participants should therefore include provisions that will accomplish this purpose in their comments on this report to the seven participating commissions.

4. Cross Connections at Multi-Tenant Environments

AT&T argued that SGAT Section 8.1.1.8.1 placed inappropriate restrictions on access to the Network Interface Device (NID) in multi-tenant locations (MTEs). AT&T's concern came in the context of making cross connections between its NID and Qwest's NID (as AT&T defined them) where they are commonly placed in locations that contain multiple end-users. AT&T believed that Qwest's SGAT, by imposing collocation obligations in such cases, would deprive it of the right that the FCC has given a CLEC to "connect its loops, via its own NID, to the incumbent LEC's NID."[283]

Qwest's brief noted that it considered the issue to be resolved on the basis of its agreement not to require collocation "in MTE terminals located in or attached to customer-owned buildings where no electronic equipment, power or heat dissipation is required."[284]

Proposed Issue Resolution: Much of the debate about this issue appeared to presume that resolution should depend on whether:

- Such cross connections were occurring at what was or was not properly definable as the "NID"
- Such cross connections did or did not require "collocation"
- Qwest did or did not own the wiring between the point of cross connection and customer end-use equipment.

To a large extent, these categorizations missed the real point involved, which is the identification of reasonable limits and protections on CLEC access to Qwest equipment that commonly serves more customers than the one(s) a CLEC will serve. On the one hand, deciding that such cross connections were defined as occurring at the NID would not, AT&T claims notwithstanding,

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[282] Parenthetically, it should also be noted that Qwest has not cited any evidence of record regarding even the existence of these burdens, let alone their magnitude.

[283] AT&T Brief at page 42, citing the *UNE Remand Order* at ¶¶ 230 and 233.

[284] Qwest Brief at page 29.

mean that Qwest could impose no constraints, however necessary they might be to assure no disruption of service to other customers. On the other hand, deciding that such cross connections must fall under the definition of collocation would not mean necessarily that the much longer standard intervals, which should be set with reference to much greater levels of required work, should necessarily apply. In other words, if the cross connection is at the NID, reasonable protections can apply; likewise, if the cross connection is collocation, intervals set with reference to the particular requirements of this case can be established under authority that the FCC clearly allows state commissions to exercise.

Ultimately, Qwest was making a distinction between enclosed versus non-enclosed equipment located within the structures in or on MTE buildings. Only in the former case was Qwest arguing that collocation requirements should apply. It later also became clear that, from safety, reliability, and operational perspectives, such a distinction had no practical foundation. At that point it became clear, as Qwest has confirmed in its brief, that no such requirements should apply in either case, provided that the locations in question were in or attached to customer-owned buildings. The workshop discussion also addressed remote terminals serving MTEs, but located remotely from customer-owned buildings. Nothing in the record contravenes Qwest's evidence that there are valid concerns about such "detached" terminals.

Therefore, Qwest's proposal, as set forth in its brief provides a sound solution to the general question of the non-application of collocation requirements to MTE terminals. It is not necessary to add AT&T's proposed amendment to Section 8.1.1.8.1. It is, however, appropriate to note that this SGAT section subjects to the provisions of Section 9.3 all CLEC connections at MTEs (which presumably means connection not only in or on customer-owned buildings, but in the free-standing remote terminals that Qwest distinguishes as well). The reasonableness of that section will be addressed in a subsequent report. Therefore, the recommended resolution here should not be read as implicitly deciding now that all of the conditions and limitations there are necessary and appropriate, as Qwest has proposed them.5. ' Listing of Space-Exhausted Facilities

AT&T cited two problems with the Qwest web site, mentioned in SGAT Section 8.2.1.13, by which Qwest notifies CLECs that certain premises do not have remaining collocation space:

- The list includes only wire centers; it should be expanded to include all other potential collocation premises
- The list typically includes only locations where CLECs have asked about space; it should include all premises where collocation is permitted, not only those about which Qwest has received CLEC inquiries.[285]

Qwest testified that a listing of all "premises" as AT&T wanted them to be defined would require Qwest to undertake an unreasonable burden of inventorying the "thousands and thousands" of places where a CLEC might request collocation, including cable vaults, pedestals, and any other "structure" located on public rights-of-way. Qwest asserted that the FCC's discussion of a publicly available report about space availability, which Qwest's web site provides, uses language that supports a more limited report, inasmuch as it uses the term "office" interchangeably with the term "premises." Qwest also cited the FCC requirement for an on-

[285] Wilson Direct at ¶ 194.

request space availability report as already giving a means for CLECs to ask about space at specific premises.[286]

AT&T's brief argued that Qwest may not limit the information only to wire centers, let alone further limit it to wire centers that Qwest discovers to be full only as a result of providing a CLEC-requested space availability report for a particular wire center. AT&T cited 47 C.F.R. § 51.321(h), the FCC rule that AT&T believes to require the broadly scoped report that it asked for in its testimony:[287]

> *The incumbent LEC must maintain a publicly available document, posted for viewing on the incumbent LEC's publicly available Internet site, indicating all premises that are full, and must update such a document within ten days of the date at which a premises runs out of physical collocation space.*

AT&T considered this language to be clear on its face, but offered a lesser standard for inclusion in the web site's list of premises, which would consist of:[288]

- All wire centers that are full
- A list of other premises where Qwest has prepared a space-availability report at the request of an individual CLEC.

Qwest's brief argued that it has no duty to inventory even wire centers, absent a specific CLEC request. Qwest said that 47 C.F.R. § 51.321(h), when read as an integrated whole, makes it clear that FCC intended the web site requirement to consist essentially of a compilation of information gleaned through Qwest responses to such CLEC requests. Qwest concluded by saying that its willingness to include in its web site those locations where it learns through three sources (a collocation application, a collocation reservation, or a space availability report) that space is limited meets the only logical construction of the FCC's requirements.[289]

Proposed Issue Resolution: Qwest's proposal contorts the clear intent of 47 C.F.R. § 51.321(h) in arguing that it must only report on premises that it discovers to be space constrained as a result of fulfilling CLEC space availability requests. It is obvious that Qwest has an independent duty to investigate; it could not possibly meet the burden to post notice within 10 days after premises become full if its only information for doing so came from CLEC requests, which will not generally coincide with the time when premises become full. Thus, Qwest's SGAT language unduly constricts the information that it is obliged to provide.

At the same time, however, the FCC's use of the term "premises," which has for other purposes the very broad definition that AT&T asserts, is unfortunate. It is not reasonable to impose on Qwest the obligation to investigate every single place in its network where collocation could take place, and, moreover, to do it at not greater than 10-day intervals, in order to keep its web site current. It can safely be assumed that many of the thousands of places that constitute "premises"

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[286] Bumgarner Rebuttal at pages 24 and 25, citing CC Docket no. 98-147, *Advanced Services Order*, released March 31, 1998, at ¶¶ 59 1nd 147 and fn 143..

[287] AT&T Brief at pages 59 and 60.

[288] AT&T Brief at page 61.

[289] Qwest Brief at pages 30 through 32.

for collocation purposes will never be of interest to CLECs. The FCC's language should be interpreted with reference to the goal it seeks to achieve in connection with the burden involved in achieving it.

When one considers the gross mismatch between resource expenditure and benefits to be obtained, it becomes clear that the FCC had in mind a different use of the term "premises" in the context that is relevant here. AT&T appears to recognize this in offering to limit the independent Qwest duty to investigate and report to wire centers. Its proposal embodies a definition of premises that, for the purposes of SGAT Section 8.2.1.13, will meet the goal sought by the FCC in a way that responds appropriately to the practical limits involved. Therefore, Qwest should be required to add the following sentence to the end of this SGAT Section:

> *Notwithstanding the foregoing, the Qwest web site will list and update within the 10-day period all wire centers that are full, whether or not there has been a CLEC requested Space Availability Report.*

6. ICB Pricing for Adjacent and Remote Collocation

Qwest proposed that adjacent and remote collocation be priced on an individual case basis under SGAT Section 8.3.5 and 8.3.6. Qwest reasoned that its complete lack of experience in offering such forms of collocation necessarily precluded the development of standard prices. Qwest noted that adjacent collocation could require new construction in widely varying and unpredictable circumstances.[290]

AT&T argued that Qwest should be required to develop a standard list of adjacent and remote collocation offerings, which should, where possible, incorporate rate elements. AT&T expressed concern that the increasing frequency it expected for such forms of collocation would produce opportunities for delay and unjust pricing. AT&T asked at a minimum that the issues of standard offerings be deferred to a cost proceeding, in which the participants could present proposals for standardizing prices.[291]

Qwest observed that, while CLECs had argued for at least some rate elements to be standardized, they did not specify which ones; moreover, some of the elements that Qwest considered in the context of standardization, such as power cables for example, were also subject to different considerations when run in locations outside of the more predictable central-office situations.[292]

Proposed Issue Resolution: Both sides presented credible defenses of their positions on this matter. The two material conclusions that the record before us supports are these:

- There is no evidence of record whatsoever about what identifiable forms of standard adjacent and remote collocation **will** cost
- There is a material possibility but not a certainty that there is no reliable way to determine what unprecedented (for Qwest) forms of collocation **may** cost.

Thus, this proceeding cannot identify and price any standard forms of adjacent and remote collocation. However, neither should it conclude that there is no way to price such standard

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[290] Qwest Brief at page 32.

[291] AT&T Brief at page 63.

[292] Qwest Brief at page 33.

forms except under the SGAT's ICB approach. Therefore, the SGAT should leave open the possibility for the development of standard prices, but it should not be criticized, in terms of Section 271 compliance, for failing to do so at present.
Therefore, to Sections 8.3.5.1 and 8.3.6 there should be added after the phrase "developed on an individual case basis" the phrase, "except where the commission finds that standard pricing elements can be reasonably identified and their costs determined".

7. Conversion of Collocation Type – Payment of Costs

Jato asked for the elimination of ICB pricing for collocation-type conversions and it specifically objected to having to pay for the elimination of SPOT frames, which it said came into existence only as a result of an inefficient and anticompetitive Qwest policy in the first place.[293] Qwest objected to eliminate provisions for recovering its costs.[294]
Proposed Issue Resolution: Neither Jato or Qwest briefed this issue. Jato also did not present evidence or argument to support a claim that prices are sufficiently predictable to be set in advance. In the absence of evidence, there is no basis for concluding that it is unreasonable to require individually determined prices. Moreover, to the extent that experience demonstrates that certain conversion types have predictable prices, the BFR process can be used to set them and to avoid the need for using them again in the same circumstances.
Jato also did not present evidence to support a claim that the prior use of SPOT frames was so wholly inappropriate as to justify the remedy of requiring Qwest to convert them at the unilateral request of CLECs and without cost. Therefore, its recommendation to eliminate provisions allowing Qwest to recover costs for the elimination of SPOT frames should not be accepted.

8. Recovery of Qwest Training Costs

WCOM testified that SGAT Section 8.2.2.7, which allows Qwest to recover the costs of training its employees responsible for installing, maintaining, and repairing virtually collocated equipment, is unreasonable and should be stricken. WCOM argued that CLECs should be able to provide the training themselves or contract with Qwest for it at "reduced rates."[295] Qwest responded by saying that it is proper for Qwest to recover the cost of training related to equipment that a CLEC collocates and that may be unfamiliar to Qwest personnel.[296] The parties did not brief this issue.
Proposed Issue Resolution: It is not reasonable for a CLEC, on the one hand, to expect Qwest to take full responsibility for installation, maintenance, and repair to the same standards that would apply if it were being used to serve Qwest end users, while, on the other hand, to deny Qwest the ability to reasonably identify and fulfill the training requirements necessary to exercise that responsibility. Qwest, not the CLEC, should have the initial responsibility to determine what training is necessary and by whom it is to be provided. Thus, obliging Qwest to accept CLEC-provided training is not reasonable. WCOM did not define what it means by

[293] Newell Direct at page 8.

[294] Bumgarner Rebuttal at page 31.

[295] Friday Direct at page 26.

[296] Bumgarner Rebuttal at page 33.

"reduced rates." If the term means rates below costs, then it is evidently unreasonable. What else it may mean is not clear. Similarly, denying the right to recover legitimate travel expenses is inappropriate.

Accordingly, a significant change to this training language is not warranted. However, it is noteworthy that Section 8.2.2.8, which addresses maintenance and repair costs, explicitly limits Qwest's recovery to costs that are "reasonable." It might well be argued that such a limitation is implied even where not stated. Moreover, its use may even be problematical in that section because it might give reason to infer that other unmodified uses of the term costs allow Qwest to recover costs that are not reasonable. Nevertheless, the addition of the modifier in the section following the one at issue here suggests at least a confirmation that Qwest has an obligation to limit its training, its direct costs, and its associated expenses to levels that it can demonstrate to be reasonable.

The issue of unintended consequences arising from a non-uniform use of modifiers such as "unreasonable" should be addressed in the upcoming session on general SGAT terms and conditions.

9. Removal of Equipment Causing Safety Hazards

SGAT Section 8.2.3.10 allows Qwest to remove or correct non-compliant equipment problems at CLEC expense, provided that it has given the CLEC a 15-day notice of Qwest's determination that such problems exist. AT&T wanted to change the section to allow no removal rights until after 30 days of negotiation, followed where necessary by state commission resolution at the request of either party. AT&T would also add a provision making Qwest liable for any equipment damage or service disruption caused by the audits pursuant to which Qwest identifies non-compliant conditions.[297]

Jato asked for the elimination of this section entirely, arguing that Qwest should not have the right to remove CLEC equipment before the state commission hears any CLEC objections.[298]

McLeodUSA raised several concerns about this section:[299]

- Lack of notice to CLECs of such audits
- Inability to correct within 15 days if applicable standards have changed
- Whether Qwest requires its own problems to be corrected within a similar time frame.

Qwest agreed to change the section to:

- Limit its scope to nonconformance with NEBS Level 1 safety standards
- Provide written notice detailing the requirement not met and the specific equipment involved
- Attest by affidavit that all Qwest equipment at the office complies with the standard at issue

[297] Wilson Direct at ¶ 213.

[298] Newell Direct at page 9.

[299] Exhibit WS1-MCL-SAJ-4.

- Acknowledge CLEC rights to pursue objections to the state Commission or a court
- Allow more than 15 days to correct unsafe conditions, where required.

Qwest did not agree to any other changes, but noted that there was agreement by the participants in the Arizona workshop as to the sufficiency of the changes, with one exception raised by WCOM.[300]

Proposed Issue Resolution: It is reasonable to conclude that the concerns of AT&T, which did file a brief on collocation but did not raise this issue, have been adequately addressed. However, it is not clear that the concerns of the others, who did not file briefs, and whose concerns were not fully addressed by Qwest changes, are resolved.

For safety violations, it would not be appropriate to preclude Qwest actions until after a state commission has reviewed them. After the fact or contemporaneous review, which Qwest's changes allow, is logical. However, requiring safety concerns to await formal disposition in an adjudicative environment is not consistent with sound business practice.

McLeodUSA's question about CLEC notice of the audits that identify such concerns is also misplaced. Qwest's ability to observe premises where its equipment is located and where its employees are present (along with the equipment and employees of other CLECs) should not be dependent upon whether it has provide notice to CLECs.

Qwest did agree to provide specificity about the noncompliant circumstances and to provide verification that it is not imposing on CLECs a requirement that its equipment at the same locations would fail to meet. Thus, CLECs will get a specificationof what problems exist and they will be entitled to assurances that Qwest is not expecting their equipment to meet higher standards than those that Qwest applies to its own equipment.

For these reasons, the CLEC-proposed conditions beyond those that Qwest has agreed to incorporate are not appropriate for inclusion in the SGAT.

10. Channel Regeneration Charges

Jato said that the FCC has ruled that charging CLECs for channel regeneration is not permitted, but must be provided at no charge when regeneration is necessary.[301] McLeodUSA questioned whether the charge applicable under SGAT Section 8.3.1.9 should be limited to cases where long distances are unavoidable, in order to preclude them when the resulting distance is merely a matter of Qwest's preference in determining locations for collocation.[302]

Qwest testified that it does provide through its EICT finished service all that the FCC requires, which is a physical collocation requirement that does not require repeaters. Qwest also provides as an option interconnection tie pairs, for which the signal level is not guaranteed. It is for this option that Qwest provides the opportunity to purchase regeneration. In response to McLeodUSA, Qwest said that, because CLECs have the right to request alternate collocation

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[300] Bumgarner Rebuttal at page 38.

[301] Newell Direct at page 11, citing CC Docket No. 93-162, *In the Matter of Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, Second Report and Order 12 FCC Rcd 18730 (1997) at ¶ 117

[302] Exhibit WS1-MCL-SAJ-4.

locations where available, the issue of location necessity/preference need not be separately addressed.[303]

AT&T argued that a forward-looking approach to collocation would have to assume no need for regeneration, which should therefore be excluded from collocation pricing. AT&T also argued that elimination of CLEC responsibility for such charges would give Qwest an incentive not to locate CLECs at inconvenient locations.[304]

Qwest noted in its brief that it has the obligation under SGAT Section 8.2.1.23 to "design and engineer the most efficient route and cable racking for the connection". Qwest also argued that, where regeneration is not avoidable, CLECs should pay its accrual costs.[305]

Proposed Issue Resolution: In the first instance, AT&T's reliance upon the forward-looking approach that the FCC takes to pricing is misplaced. It is one thing to conclude that Qwest should receive forward-looking costs for access to network elements that it has already installed. It is quite another to argue that it should expend costs for the specific purpose of allowing collocation, while expecting to recover only a portion of them. Acceptance of AT&T's forward-looking cost argument in the narrow context of channel regeneration raises vast concerns about what its limits might be. It could equally be argued that on a forward looking basis, consideration of CLEC collocation might make cage construction or power augmentation costs much less. The same argument could be made to support a claim that building new structures for adjacent collocation is not necessary.

There is no categorical difference between these examples and the instant case, which is channel regeneration. In any of them, the need for costs to be expended is that the physical configuration of the premises does not accommodate CLEC presence without the need to take steps that have costs. The FCC has correctly made actual, reasonable costs the basis for pricing collocation. Extending that concept by postulating what collocation premises would look like had all future possible CLEC needs been considered is not only highly speculative, it would also subject Qwest to a continuing and potentially vast liability to continue incurring future expenditures for which there will be less than full recovery, however reasonable the costs involved are. There should be no blanket presumption that all costs to be charged by ILECs should be based on a "least cost network configuration;" nor does a proper conception of a "forward looking environment" include the notion that an ILEC must bear responsibility for the actual and reasonable nonrecurring costs of accommodating CLEC collocation. AT&T's reliance upon these least cost and forward looking arguments is inapt in the context of collocation, where consistent practice has been to allow the actual and reasonable costs of allowing interconnection.

Nevertheless, there remains here a legitimate question about what costs are reasonable. Qwest conceded in its brief that CLECs should pay for regeneration where it is "unavoidable." The problem with the SGAT is that it does not limit payment to where regeneration is truly unavoidable. Qwest cited the right of CLECs to request alternate collocation locations, but did not explicitly provide the criteria for deciding whether to grant such a request. Qwest also cited the obligation to route connections reasonably, but did not address at least one relevant case; i.e.,

[303] Bumgarner Rebuttal at pages 46 and 47.

[304] AT&T Brief at page 62.

[305] Qwest Brief at pages 34 and 35.

if a particular collocation location requires regeneration even with efficient routing, but an alternate collocation would not, what cost responsibility for regeneration would exist. Qwest should not have the power to charge for regeneration where there exists another available collocation location where regeneration would not be required, unless the CLEC chooses to remain at the location where regeneration is required. Furthermore, where a CLEC wishes to make present use (without the need for regeneration) of space that Qwest has reserved for its future use, it similarly should not have to pay for regeneration because that particular location is not made available to it.

Therefore, the SGAT should incorporate the following sentence at the end of Section 8.3.1.9:

> *Channel Regeneration Charges shall not apply if Qwest fails to make available to CLEC: (a) a requested, available location at which regeneration would not be necessary or (b) collocation space that would have been available and sufficient but for its reservation for the future use of Qwest.*

11. Qwest Training Costs for Virtually Collocated Equipment

McLeodUSA questioned why the charges Qwest must incur for training under SGAT Section 8.3.2.2 should not continue to be prorated if more than one additional CLEC selects the same equipment type, and prorating should also not be on the basis of the number of equipment units of each CLEC involved.[306] Qwest responded by saying that it had agreed to reduction by half for a second CLEC, but did not address in its testimony or briefs why prorating should stop with the second CLEC.[307]

Proposed Issue Resolution: The logic of prorating extends not only to the second CLEC, which Qwest is willing to address, but also to subsequent CLECs. Qwest has cited no reasons (e.g., diminishing economic returns or administrative complexity) that would suggest otherwise. However, there is no evidence to support a conclusion that the number of equipment items that a CLEC uses makes a material difference in the Qwest training costs. The last sentence of Section 8.3.2.2 should be revised to read:

> *Where more than one CLEC in the same metropolitan area selects the same virtually collocated equipment, the training costs shall be prorated to each according to the number of CLECs so selecting.*

12. Requiring SGAT Execution Before Collocation May Be Ordered

Jato objected to the SGAT Section 8.4.1.1 requirement that it first execute the SGAT, because a CLEC should, provided it agrees to pay all collocation-related charges, have the option to save start-up time by examining what legal form its relationship with Qwest will take while it establishes collocation arrangements in parallel.[308] Qwest's responsive testimony did not discuss the execution of the SGAT, which was cited in the Jato testimony, but a questionnaire referred to in SGAT Section 3.1, which Qwest has not provided in its frozen SGAT language. Note that the Section 8.4.1.1 reference to Section 3.1 has changed to a reference to Qwest's "Implementation

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[306] Exhibit WS1-MCL-SAJ-4.

[307] Bumgarner Rebuttal at page 51.

[308] Newell Direct at page 12.

Schedule," which Qwest has also not provided in its frozen SGAT filing. Qwest testified that the questionnaire seeks only basic CLEC identification, credit, and billing information, and its completion should not be a source of material delay. [309]

Proposed Issue Resolution: The lack of access to the relevant SGAT sections makes it difficult to resolve this issue. However, certain general conclusions can be reached. First, the provision of the kinds of information that Qwest claims the questionnaire solicits are reasonably necessary to allow for the billing and collection that Jato agrees should take place without delay. Therefore, to the extent that the questionnaire seeks only such kinds of information, there appears to be no dispute about whether and when it must be provided.

Second, to the extent that a CLEC must execute the SGAT before ordering, Qwest has made no argument supporting such a requirement. Nor is the need for any evident as a precondition to the orders that Jato discusses. The execution of a simple background questionnaire is appropriate; however, the execution of the SGAT may, as Jato suggests, require a CLEC to examine options that may take considerably more time and judgment. Given the long lead times for collocation, that examination and the ordering of collocation should be permitted to proceed in parallel, provided that Qwest is exposed to no more cost risk than would apply had the CLEC already executed the SGAT. Therefore, Qwest should, within its 10-day comment period, make a demonstration that the SGAT will not preclude collocation ordering (with reasonable cost protections for Qwest) before the SGAT has been executed.

13. Forfeiture of Collocation Space Reservation Fees

AT&T objected to the SGAT Section 8.4.1.7.4 provision that would require CLECs to forfeit the nonrecurring collocation space reservation fee upon cancellation of the reservation. AT&T argued that the lack of a corresponding risk of loss by Qwest when it reserves space for itself violated the FCC requirement that space reservation policies apply equally as between Qwest and CLECs. AT&T also argued that the provision would provide a windfall to Qwest.[310]

Qwest responded partially to CLEC concerns about this provision. First, it reduced the deposit subject to forfeiture from 50 to 25 percent of the nonrecurring charges applicable to the space reserved. Qwest also added a new SGAT Section 8.4.1.8, which provides a lower cost way to provide some of the benefits of space reservation.[311] Qwest conceded that it does not bear the same costs when it abandons reserved space, but defended the 25 percent forfeiture on a number of grounds:[312]

- Qwest has to commit resources that involve costs to respond to reservation requests
- The forfeiture acts as an inducement for CLECs not to warehouse space inefficiently

[309] Bumgarner Rebuttal at page 52.

[310] AT&T Brief, citing the *First Report and Order* at ¶ 604 and 47 C.F.R. § 51.323(f)(4), at page 64.

[311] Qwest Brief at page 39.

[312] Qwest Brief at pages 38 through 42.

- The forfeiture will inhibit the development of a secondary market for reserved space.

Proposed Issue Resolution: AT&T attacked the forfeiture provision on the single ground that it does not apply equally to Qwest: i.e., it would accomplish little to require Qwest to forfeit a payment to itself. This argument is sound in part, but it ignores some aspects of cost and it does not address the other foundations on which this charge rests.

First, the AT&T argument does not account for the fact that space reserved by a carrier is unavailable for use by others for so long as it is reserved. Qwest must absorb the carrying costs of the unused space. The cost is real and equal to Qwest whether it or another carrier is reserving the space. It is not clear how Qwest's forfeiture amount of 25 percent of non-recurring charges relates to this carrying cost; however, neither the space reservation nor the billing portions of the Collocation section of the SGAT provide for its recovery in cases of space reservation.

Second, the basis of the forfeiture payment is the non-recurring charges for collocation. These charges include costs for a number of activities that Qwest must incur just to make the reservation, whether or not the reserving CLEC eventually uses that space. If a CLEC is entitled to a full refund upon abandonment of the reservation, then Qwest will not recover the costs it has incurred to create and manage the reservation.

Third, as the FCC recognizes in 47 C.F.R. § 51.323(f)(6), measures to prevent wasteful warehousing of collocation space are appropriate. Attaching a cost to such reservation is a means for limiting space reservation. The fact that nothing would prohibit a CLEC from relinquishing its reserved space to another CLEC for a fee, then recovering on top of that its deposit for making the reservation underscores the usefulness of measures to prevent the stockpiling of collocation space. Certainly the creation of a secondary market for collocation space in Qwest's premises has no material connection with the purposes of the Telecommunications Act of 1996.

In summary, the Qwest proposal is supported by both the need for recovery of actual costs and the prevention of wasteful or inappropriate use of space reservation. While it does not meet a test of perfect symmetry with costs, its design is reasonably related also to other objectives that have at least equal importance in promoting competition between Qwest and CLECs and equality of treatment among CLECs themselves. To the extent that CLECs find this provision unduly expensive, SGAT Section 8.4.1.8 provides for a less costly approach. Therefore, and given the fact that the proposal does bear some relationship to Qwest's costs for: (a) making reservations for CLECs and (b) carrying space that remains unoccupied for the duration of the reservation, this provision of the SGAT is appropriate.

14. Collocation Intervals

General Objection Testimony

WCOM testified in support of shorter intervals in some cases and it criticized the SGAT for failing to require Qwest to adhere to the intervals provided in Sections 8.4.2.2, 8.4.3.1, and 8.4.3.2.[313] McLeodUSA argued that the SGAT's collocation intervals were outside what the FCC requires.[314] Jato said that the Section 8.4.2.2 interval for virtual collocation should be 45 days. It also argued that the FCC requires the 90-day provisioning interval for physical collocation to run

[313] Priday Direct at page33.

[314] Exhibit WS1-MCL-SAJ-4.

from application receipt, not CLEC acceptance of a Qwest price quote and making of a down payment. Jato also sought the elimination of forecast language from the section, because forecasts are not required to obtain the FCC intervals.[315] Jato also asked that the ICDF collocation interval be reduced to 30 days from application date, because such collocation raises no power-supply or space issues. Jato also argued for a 15-day interval between Qwest's determination that ICDF space is available and making the ICDF available to a CLEC.[316] Qwest opposed a WCOM request to include SGAT fines and penalties for failing to meet intervals, citing the Post Entry Performance Plan as the proper forum for addressing them.[317]
Rhythms specifically objected to the SGAT Section 8.4.2.3 exemption from intervals in the event of "variables in equipment and scope of the work."[318] Qwest's frozen SGAT filing eliminated this provision. Rhythms also noted that Utah required a 45-day interval for collocation provisioning.

Virtual Collocation Testimony

AT&T considered the SGAT Section 8.4.2.2 intervals for virtual and cageless collocation to be too long, given that there would be no cage construction, DC-power cable runs, HVAC upgrades or other time consuming requirements. AT&T testified that 30 days would be sufficient for virtual collocation, and, further that this limit could be reduced to 10 days in the case where only a swap of line cards was required. AT&T testified that a similar time period should apply to cageless collocation as well.[319]
Qwest testified that the FCC did not choose to set virtual collocation intervals. Qwest proposed the existing intervals for physical collocation because it must perform more work [320]

Physical Collocation Testimony

AT&T sought a change to SGAT Section 8.4.3.1 that would require Qwest to conform to the FCC's recently released physical collocation intervals.[321] Qwest testified that it would change the section to meet the FCC Order's requirements.

Interconnection Distribution Frame Testimony

AT&T similarly argued that SGAT Section 8.4.4 should be modified to conform to the FCC's newly announced physical collocation intervals.[322] Jato expressed concern about the lack of

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[315] Newell Direct at page 13, citing CC Docket Nos. 98-147 and 96-98, *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*, Order on Reconsideration and Second Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, ¶114 (rel. Aug. 10, 2000). .

[316] Newell Direct at page 14.

[317] Bumgarner Rebuttal at page 56.

[318] Rhythms Comments at page 3.

[319] Wilson Direct at ¶ 229.

[320] Bumgarner Rebuttal at page 53.

[321] Wilson Direct at ¶ 230, citing the FCC's Order on Reconsideration at ¶¶ 28 and 36 and 47 CFR § 51323.

guidance on how a CLEC could comply with the forecasting language of Section 8.4.4.1. Qwest agreed to change the ICDF interval from 90 to 45 days.[323]

Briefs

The Qwest and AT&T briefs focused on the impact that compliance with forecasts should have on collocation intervals. Qwest relied upon an FCC order issued in response to collocation interval waiver requests by itself, Verizon, and SBC to support intervals longer than the national 90-day default standard.[324] Qwest argued that this FCC order allowed an extra 60 days for unforecasted collocation applications not requiring major infrastructure modifications and for even longer intervals where such modifications were necessary.[325] Qwest argued that its use of a 120-day interval for physical and virtual collocation was well within the 150 days that the FCC order would allow for unforecasted collocation applications.[326] Qwest also noted its willingness to accept the physical collocation intervals for virtual collocation, even though the FCC did not require it to do so.[327] Qwest argued that forecasts are not only supported by the FCC, but are "necessary to allow Qwest to plan and direct its resources."[328]

AT&T argued that Qwest overstated the level of support for lengthened intervals that can be inferred from FCC pronouncements. Specifically, AT&T underscored the 90-day intervals set by the FCC and the need for state commission approval for longer intervals.[329] AT&T also argued that the FCC has determined that intervals significantly longer than 90 days would impede CLEC ability to compete effectively.[330] While conceding that the FCC allowed Qwest to increase intervals by up to 60 days, AT&T countered that any extension requires Commission approval and that the FCC expected "Qwest to use its best efforts to minimize any such increases." AT&T argued that Qwest's establishment of 30-day interval extensions for unforecasted applications, even where space is available, were unreasonable and outside what the FCC contemplated.[331] AT&T also said that the FCC intended its order to be interim, emphasizing again that it would apply even then only in the absence of state rules.[332]

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[322] Wilson Direct at ¶ 231.

[323] Bumgarner Rebuttal at page 57.

[324] Qwest Brief at page 43.

[325] Qwest Brief at page 44, citing *Attachment B* to Qwest's *Petition for Waiver* and *Amended Order* at ¶¶ 9 and 19.

[326] Qwest Brief at page 43.

[327] Qwest Brief at page 46.

[328] Qwest Brief at page 46.

[329] AT&T Brief at page 50.

[330] AT&T Brief at page 55.

[331] AT&T Brief at page 56.

[332] AT&T Brief at page 57.

AT&T proposed a number of changes to the SGAT language addressing virtual collocation (Section 8.4.2), physical collocation (Section 8.4.3), and ICDF collocation (Section 8.4.4).[333] These changes include:

- Changing from 45 days to 30 days the deadline by which CLEC equipment must be delivered for virtual collocation
- Providing in the case of all forms of collocation that Qwest must use best efforts to minimize the interval provided in those cases where it permitted to extend the standard intervals
- Requiring Qwest to complete unforecasted virtual and physical collocations within the same intervals as apply to forecasted ones (90 days from completed application receipt), unless Qwest demonstrated insufficient space, power, or HVAC, in which case 120 days would be allowed (Qwest would allow 120 days without such demonstration)
- Allowing the ICDF interval to increase from 45 to 90 days if unforecasted, but only if there is insufficient existing ICDF space or space to add additional ICDFs in an amount sufficient to meet all forecasted needs (Qwest would not require the space showing to extend the interval).
- Requiring Qwest to complete forecasted virtual and physical collocations requiring major infrastructure modifications in the 90-day interval (Qwest would have allowed it to request the state commission to extend the interval).

Proposed Issue Resolution: Qwest agreed to add language providing that it would seek to minimize the extent of any allowed lengthening of physical, virtual, and ICDF collocations, thus making the limits it agreed to maximums. Accordingly, CLECs maintain the right to object in the case of bad faith or negligence by Qwest in provisioning collocation according to extended intervals. Moreover, Qwest's extension of the deadline for CLEC equipment to be virtually collocated by 8 days, as opposed to the 15 days requested by AT&T was based upon an analysis of its schedule requirements. The evidence of record supports it as reasonable.

There remains the principal issue of whether extending intervals for unforecasted collocations should depend upon the special showings that AT&T requested. AT&T is correct that the FCC cannot be read as having given blanket authorization to interval extensions in the case of a failure to forecast. Moreover, it cannot be concluded that a failure to grant Qwest an extension in all cases will discourage CLECs from forecasting. Finally, there is no evidence in the record to support a conclusion that Qwest has a clear need to extend durations in cases where, despite the lack of a forecast, it nevertheless has the space, the electrical power, and the HVAC capacity to respond.

While AT&T conceded the need for extensions in cases where facilities are inadequate, Qwest conceded (through accepting the obligation to minimize interval expansions in particular cases) the propriety of relating interval lengths to actual need. AT&T's approach of tying interval extensions to space, power, and HVAC needs establishes a better connection between need and solution. It addresses three of the principal reasons why Qwest might need added provisioning time, while the basic infrastructure modification provisions, upon which there is agreement,

[333] AT&T Brief Exhibits or Attachments H, I, and J.

allow for consideration of other reasons. In addition, it should be recognized that the FCC does expect ILECs to improve their ability to respond to collocation requests over time. That proper expectation, especially when combined with the resource and facility planning benefits that Qwest can expect from CLEC forecasting, indicate that it is appropriate to narrow future sources of interval extension from the level that the FCC considered to be appropriate on an interim basis.

Qwest certainly did not present substantial evidence that, in a future environment where it could rely substantially on CLEC forecasts, it will necessarily need substantial extensions to meet the occasional unforecasted request for collocation at premises where there is adequate space, power, and HVAC capability. It is true that the lesser the quality of CLEC forecasting the greater will be Qwest's difficulty in responding to collocation requests. However, there is no basis for concluding that forecast quality or completeness would degrade if AT&T's changes were adopted. CLECs who fail to forecast will remain subject to interval risk where space, power, HVAC, or major infrastructure needs exist. One can hardly postulate a general decline in CLEC forecasting in these circumstances. What one can continue to expect is that CLECs will not be able to forecast each and every collocation need with precision. Neither will Qwest.

The SGAT should not punish a failure to apply perfect foresight in an uncertain marketplace. It already will discourage haphazard or negligent forecasting, even after the AT&T changes. Therefore, AT&T's space, power, and HVAC limits on extending virtual, physical, and ICDF collocation should be incorporated into SGAT Sections 8.4.2, 8.4.3, and 8.4.4.

There remains the question of whether Qwest should have the ability to petition to extend the period for forecasted collocations that will require major infrastructure modification. Whether forecasted or not, such collocations may not only take an extended period of time, but may also require very large expenditures. A forecast does not ensure an order, which means that any pre-order work in response to such a forecasted collocation would be at Qwest's risk. It is not reasonable to require Qwest to take such a risk. Qwest's proposal to allow it to request a state commission waiver provides an appropriate method for considering the cost and the interval considerations that are likely to be associated with necessarily infrequent requests of the type involved here. Therefore, AT&T has not shown that a denial of the Qwest right to seek a waiver in these circumstances is warranted.

15. Maximum Order Numbers

WCOM wanted to change SGAT Section 8.4.3.3 to provide that the 5-order maximum for obtaining the provided intervals would be applied on a single-state basis.[334] Qwest's rebuttal testimony agreed to a clarifying change, but did not make a change that would alter the need for individual negotiation of orders in excess of five in the same week.[335]

AT&T briefed this issue. It said that the FCC has not allowed a blanket extension of intervals based on the mere number of applications, but rather has confirmed the need to meet required intervals "absent the receipt of an extraordinary number of complex collocation applications

[334] Priday Direct at page 35.

[335] Bumgarner Rebuttal at page 56.

within a limited time frame".[336] AT&T argued that SGAT Section 8.4.1.9 did not reasonably limit Qwest's right to waive time limits: therefore, it should be eliminated in its entirety.[337] Qwest cited the large fluctuation it has experienced in CLEC collocation orders, which ranged from 34 in May of 1999 to more than 800 in April of 2000.[338] In supporting its limit on orders subject to provisioning intervals, it relied upon the same FCC provision about an "extraordinary number of complex collocation applications" that AT&T cited.[339]

Proposed Issue Resolution: Qwest should have the opportunity to adjust collocation intervals when the worload becomes unmanageable. Therefore, AT&T's recommendation to eliminate the issue from the SGAT is too harsh. However, while the FCC has said that ILECs must adjust to CLEC demands, it has also clearly said that there is a limit, without providing much guidance about what that limit is or how a state might go about putting specific dimensions on it. Five orders from one CLEC in a single state, whatever their complexity and whatever else is happening across the rest of Qwest's 13 states clearly will not serve well as an expression of the level of work that Qwest can reasonably be expected to accommodate.

To paraphrase the arguments of the briefs, the difference between the CLEC's and Qwest is that the number of collocation applications that should trigger an interval extension is between 5 and infinity. The lack of guidance that the parties have provided in narrowing this vast gulf is not the only difficulty in resolving this issue. The frozen SGAT that Qwest filed in this workshop strikes Section 8.4.1.8, which is what AT&T sought. The Qwest brief notes that the section has been renumbered as Section 8.4.1.9, but that Section of the frozen SGAT filing addresses a different issue. It is not clear whether and in what form Qwest has reconstituted this section, which it defends with some vigor in its brief. Nominally, it would appear that Qwest has acceded to AT&T's request to eliminate the section. However, accepting a default resolution does not appear to be warranted either by:

- The fact that Qwest did argue the issue in its brief
- The FCC's recognition that some accommodation of Qwest's concerns (presumably at a number of applications that falls between 5 and infinity) is appropriate.

The best way to deal with these curious circumstances is to invite the participants to propose SGAT language in their 10-day filings in response to this report. In order to address the relevant considerations, those filings should specifically address the following criteria:

- Why any state-specific (as opposed to regional or sub-regional) limit should be considered to comport fully with the way that Qwest responds to collocation requests
- How the FCC's sound recognition that complexity of the applications is material should be reflected in any provision granting Qwest relief from established intervals

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[336] AT&T Brief at page 52, citing the *Order on Reconsideration* at ¶ 27 (emphasis added).

[337] AT&T Brief at page 53.

[338] Exhibit WS1-QWE-MSB-11.

[339] Qwest Brief at page 48.

- Why an argument that rejects any defined standard of relief (i.e., one expressed in terms of a specific language proposal) should not be viewed as justifying a default to another defined standard, however liberally expressed
- Where between the end-points of the application frequency cited by Qwest (34 to over 800 per month across the region) lies the level of applications to which Qwest can be expected to respond.[340]

[340] If one were to interpolate Qwest's reported monthly number from May of 1999, one would calculate an average weekly total of about 8. If a CLEC had submitted as little as one more collocation order than half of those requests in an "average" week during that month, then Qwest could justify for that CLEC an interval extension in the month with the smallest reported collocation application workload.

VII. Checklist Item 11 – Local Number Portability

Background

Number portability is defined as the ability of customers "to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one service provider to another."[341] Section 271(c)(2)(B) of the Telecommunications Act, or checklist item 11, requires Qwest to comply with the number portability regulations adopted by the FCC.[342] Section 251(b)(2) requires all LECs "to provide to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."[343]

Issues Resolved During This Workshop – Local Number Portability

1. Restricted Numbers

AT&T requested the inclusion in the SGAT of language that would preclude the porting of restricted numbers. Qwest agreed, and made a change to SGAT Section 10.2.2.5 to accomplish this purpose.[344] This issue can be considered closed.

2. Identifying NXXs Available for Porting

In response to a WCOM request, Qwest agreed to add an SGAT provision (Section 10.2.2.6) defining when NXXs are available to port.[345] This issue can be considered closed.

3. Porting of Direct Inward Dial Block Numbers

In response to an AT&T request, Qwest agreed to add SGAT language (Section 10.2.2.7) allowing the porting of a portion of a block of numbers.[346] This issue can be considered closed.

4. LIDB De-Provisioning

In response to an AT&T request, Qwest agreed to add an SGAT provision (Section 10.2.2.8) de-provisioning the Line Information Data Base entry where the CLEC is not using it.[347] This issue can be considered closed.

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[341] 47 U.S.C. §153(30).

[342] 47 U.S.C. §271(c)(2)(B)

[343] Id., §251(b)(2)

[344] Bumgarner Rebuttal at page 66.

[345] Bumgarner Rebuttal at page 67.

[346] Bumgarner Rebuttal at page 67.

[347] Bumgarner Rebuttal at page 67.

5. Introductory Section Amplification

Both AT&T and WCOM requested substantial additional detail in the introductory sections of the SGAT portions that deal with LNP.[348] Qwest agreed to make most of the recommended changes.[349] The changes that Qwest made essentially accomplished what AT&T and WCOM were seeking and neither objected to Qwest's way of responding in briefs (WCOM filed no brief on any issue under this checklist item). Therefore, these issues should be considered closed.

6. Service Management System

In response to AT&T and WCOM requests, Qwest added SGAT Section 10.2.3, which subjects its service management system to the standard-agreement and processes requirements and standards of certain, identified industry groups and documents.[350] This issue can be considered closed.

7. Applicability of "Operations Team" Guidelines

WCOM objected to the SGAT Section 10.2.3, which makes "consolidated Regional Operations Team requirements and guidelines" applicable to the provision of LNP. WCOM in particular was concerned about the application of industry-group guidelines, which it said it had difficulty in the past in trying to apply guidelines.[351] Qwest's frozen SGAT filing deletes the reference to the guidelines of this group. This issue can therefore be considered closed.

8. Database and Query Services

In response to an AT&T request, Qwest added SGAT language (Section 10.2.4) addressing charges for data base queries, responsibility for populating data bases, and minimizing service outages for LNP-related activities.[352] This issue can be considered closed.

9. Ordering Standards

Qwest proposed to change the SGAT Section 10.2.5.1 ordering standards by incorporating a reference to SGAT Section 12 and by removing the reference to the IRRG as a source for LNP ordering details. Qwest observed that the language had been agreed to in Washington's workshops;[353] no participant objected to this language or addressed it in briefs. Therefore, this issue can be considered closed.

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[348] Wilson Direct at ¶¶ 13 through 18; Friday Direct starting at page 35; Testimony of Leilani J. Hines on behalf of WORLDCOM, Inc, September 29, 2000.

[349] Bumgarner Rebuttal, beginning at page 62.

[350] Bumgarner Rebuttal at page 70.

[351] Friday Direct at page 36.

[352] Bumgarner Rebuttal at page 70.

[353] Exhibit WS1-QWE-TRF-1-5.

10. Managed Cuts

Qwest agreed to add a number of SGAT details (Section 10.2.5.4) that AT&T wanted for the purpose of detailing the managed cuts offering.[354] This issue can be considered closed.

11. Maintenance and Repair

Based upon the request of AT&T, Qwest agreed to add SGAT language (Section 10.2.6) to address maintenance and repair responsibilities.[355] This issue can be considered closed.

12. Prices

As requested by WCOM, Qwest agreed to delete as unnecessary a statement about preservation of its legal rights to contest FCC rules involving prices.[356] This issue can be considered closed.

13. Provisioning Intervals

AT&T objected to the length of the SGAT Section 10.2.6 provisioning intervals. AT&T felt that the intervals for LNP where the CLEC (rather than Qwest) was provisioning the loop should be shorter. AT&T also argued that the size thresholds (at which longer intervals begin to apply) were too low. Finally, AT&T argued that the facility-unavailability exception to intervals should be removed, because there are no facilities involved with number portability.[357] WCOM requested that the 3:00pm reference be specified as meaning Mountain Time.[358] Qwest's frozen SGAT filing made changes to address these issues. Therefore, this issue can be considered closed.

Non-SGAT Issues

Several parties filed testimony on issues not related to the SGAT. Sprint's testimony contained some specific concerns about Qwest's ability to port numbers.[359] First, Sprint noted that the porting process for a line that is currently a DSL line takes an additional five days to complete, as compared to a non-DSL line. Second, Sprint complained that it has a problem with Qwest "tearing down" service. The problem apparently occurs when the customer has changed plans and Sprint must verbally request a stop on the porting order. Sprint stated that Qwest has frequently failed to actually stop the order from progressing, which results in the existing service being "torn down" and not replaced, causing loss of service. In its brief, Sprint failed to follow-up on either of these issues, and in fact did not submit any argument at all on number portability.

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[354] Ramgarner Rebuttal at page 77.

[355] Ramgarner Rebuttal at page 79.

[356] Ramgarner Rebuttal at page 80.

[357] Wilson LNP Direct at ¶ 19.

[358] Priday Direct at page 36.

[359] Intervenor Responsive Testimony of Jeffrey J. DeWolf on behalf of Sprint Communications Company L.P., September 5, 2000 at 7-9.

David LaFrance of NEXTLINK also noted issues with Qwest on the issue of number portability.[360] The primary issue related to problems associated with coordinated cut-overs of unbundled loops and LNP. NEXTLINK believes that these are primarily performance issues that are to be addressed by the Regional Oversight Committee (ROC), and will delay submitting any testimony on that issue until the Commissions evaluate Qwest's performance during ROC testing.

The Wyoming Consumer Advocate Staff (WCAS) also discussed local number portability in its testimony[361] and brief.[362] The WCAS brief noted that while the Commission has received complaints, "David Walker concluded that he could not gauge the extent to which local number portability works in Wyoming, except that there have been reports of huge delays in transferring service. We simply will not know if the SGAT will alleviate those problems until competitive companies have had some experience with Qwest pursuant to the SGAT terms and conditions".[363] This argument was addressed in the ***Common Issues*** portion of this report.

Issues Remaining in Dispute – Local Number Portability

1. Coordinating LNP and Loop Cutovers

When a customer switching to a CLEC wishes to retain the same phone number, it is important to assure that the number is ported in a timely fashion. The two key activities in making a successful number port are the nearly contemporaneous (a) establishing a loop connection between the customer's inside wire and the CLEC switch cutting and (b) porting the number. Where Qwest will continue to provide the loop (as a UNE) after the change, it performs much of the work associated with both these activities. In that case, the coordination that it offers between number porting and loop cutover appears to be satisfactory to the participants.

There is a dispute, however, in the case where the CLEC will use its own loop. In this case, Qwest's responsibility begins by setting a trigger, which alerts the Qwest switch that the number will be ported. The CLEC then makes the loop connection and it ports the number by sending a message to a regional database. Qwest also will have preset the disconnection of the customer (which is accomplished through switch translations) from its switch, to occur at a specified time. Unless the CLEC gives Qwest notice of 4 hours or more before that preset time, the customer will be disconnected from Qwest's switch. If the CLEC has not been able to complete its loop connection work and port the number when this disconnection occurs, the customer will be without service.[364]

This issue arises from the distinction that Qwest's makes between "coordinated" and "managed" cuts. Basically, AT&T wants the added benefits of coordinated cuts, while Qwest is willing only

[360] LaFrance Direct at page 18.

[361] Walker Direct at page

[362] Post-workshop Brief of the Consumer Advocate Staff on Issues Relating to Interconnection, Collocation, Local Number Portability, Resale and Reciprocal Compensation, April 10, 2001.

[363] Id. at page 7.

[364] AT&T Brief at page 6 and Qwest Brief at page 55.

to offer managed cuts. This problem is important to AT&T in the residential market: there are satisfactory procedures for dealing with the business market. Those procedures are for "managed cuts", during which a Qwest representative is in live communication with CLEC personnel as they do the work needed to transfer the customer. The Qwest representative can deal in real time with any problems that would otherwise cause a Qwest disconnect before the CLEC was ready for it to happen. AT&T considers that method, which is labor intensive for Qwest and thus expensive, appropriate (apart from concerns about what Qwest wants to charge for it) for transfers of high volume, particularly outage-sensitive users, where cutovers are necessarily complex, but inappropriate in the residential market, where one or only a few lines per customer are being transferred.[365]

AT&T argued that the problem is especially important to carriers like itself, who are using cable or fixed wireless networks to provide loop capability, thus obviating the need to take loops from Qwest as UNEs. In such cases, Qwest is unwilling to provide the same type of coordination that it offers when it is providing the loop as a UNE. Qwest provides that service through coordinated cuts, in which Qwest can assure that the customer transfer work is completed before the customer is disconnected from the Qwest switch.

It is this disconnect that lies at the heart of AT&T's problem. Specifically, if the customer is disconnected from the Qwest system before the CLEC can cut the loop over, then the customer will experience a service disruption. AT&T argued that exposing customers unnecessarily to such disruptions (only when they are changing service) would create a barrier to competition. Moreover, AT&T argued that the particular problems associated with cutover coordination where a CLEC is using its own facilities to provision loops (given that the coordination problem is addressed where Qwest is providing the loop as a UNE) will especially discourage the development of facilities-based competition.

The service-disruption issue arises largely because of the timing involved in how Qwest addresses the number porting and loop disconnection needs. When a number is to be ported, whether Qwest or the CLEC is to provision the loop, Qwest sets a trigger that is timed according to the due date that the CLEC sets. The CLEC tells Qwest when it intends to cut the loop over and port the number. Qwest automatically accomplishes: (a) the switch translations (i.e., the activity that disconnects its service to the customer), and (b) completion of the service order late on the day provided by the CLEC. Qwest agreed during the workshop to set this completion time and with it to accomplish the disconnection of its customer at 11:59 p.m. on that day. Prior to the workshop, Qwest had used an 8:00 p.m. disconnect time.[366]

Importantly, Qwest has sought to keep these events within the same day as the CLEC's specified day in order to allow the flow through of all ordering, porting, disconnect, and other service-order activities to be done on an automated basis. Qwest said it must deal with more than 4,000 number ports per day. Its current systems limit it to completing activities on the same day, if they are to remain automated. In addition to citing these OSS limitations, Qwest also noted that avoiding double billing and assuring proper 911 database updates also support the requirement for "same-day" disconnection of service from Qwest.[367]

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[365] AT&T Brief at page 9.

[366] Qwest Brief at page 55.

[367] Qwest Brief at pages 54 through 57.

If CLECs actually finish their work on their specified date, there are no problems. However, if, for some reason, they do not, then the customer is left without service, because Qwest will disconnect its service at midnight. Qwest noted that none of the reasons for non-completion of the work were its responsibility. Qwest essentially has argued that it is appropriate for CLECs to bear responsibility for their own failure to get their scheduled work completed, whether due to CLEC workload, weather, or customer failure to be present for premises visits. Qwest felt that the SGAT and its operating practices already made adequate provision for CLECs to provide notice in time to delay disconnects, should problems occur. These provisions included:

- Moving disconnect time back to midnight, which would allow for CLECs to provide notice as late as 8 p.m. in order to be reasonably assured that disconnect could be delayed;
- Availability of managed cuts to allow for real-time changes in disconnect as CLECs encountered problems with particular cutovers;
- Increased staffing at late hours to allow for the possibility (but not the assurance) that post-8 p.m. CLEC notifications would still enable a delay in disconnects.

Moreover, Qwest cited the fact that disconnects after CLEC notice ran at only a 2 to 3 percent level, and that two CLECs were accounting for a disproportionate share of those.[368] AT&T presented evidence that disconnects were happening no matter what time during the day that it notified Qwest of a desire to delay.[369]

AT&T expressed a willingness to accept alternate solutions to the problem:

- Requiring Qwest not to disconnect until after confirmation of a successful disconnect
- Automated queries to verify number porting before disconnecting
- Setting disconnects for 11:59 p.m. of the day after scheduled cutover.

AT&T's witness believed that there were querying methods that could work on an automated basis. However, he did not demonstrate that any specific method would surely work.[370] Qwest made inquiries of its technical staff and in the industry, and concluded: (a) that system changes would be necessary to give it the capability to make automated inquiries, and (b) that there was no ILEC currently offering that capability. However, Qwest was not able to indicate what specific system changes would be necessary, how long they would take, or what they would cost. Qwest also argued that the confirmation option and the "day-after" option would require it manually to address more than 4,000 number ports per day, which would be cumbersome and expensive. Given the low number of problems with "premature" disconnects, the fact that they were confined largely to two CLECs, and the availability of managed cuts for CLECs with particular problems or needs, and believing that Qwest should not be required to bear the cost of special manual efforts, Qwest declined to accept any of AT&T's proposed remedies.

Proposed Issue Resolution:

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[368] Qwest Brief at page 56

[369] AT&T Brief, Attachment A, "Utah Broadband Port Cancellation Data".

[370] AT&T Brief at page 10, Qwest Brief at page 54.

It is first important to deal with parity and discrimination issues, which ultimately are but a distraction in resolving this issue. Two important and countervailing factors define the dilemma that resolving this issue presents.

First, this is a problem that affects CLECs only; even more narrowly, it appears in particular to affect to a substantial degree only those seeking to bring facilities-based competition to the loop portion of the network. Therefore, the issue cannot be resolved through the application of notions of parity; Qwest does not have this problem in serving its own end users. Neither is this issue one of discrimination: one cannot conclude that managed cuts represent an inferior version of coordinated cuts. The two processes apply to demonstrably different circumstances: the former is for cases where Qwest provides number porting set up and provides the loop as a UNE, while the latter is for cases where Qwest provides only number porting set up while the CLEC provisions its own loop.

Second, Qwest does not cause the things that prevent CLECs from completing their work as scheduled. Moreover, some of them, like weather and the failure of customers to be present for premise visits, are the very same kind of problems that cause work difficulties and inefficiencies for all carriers, including Qwest. Therefore, care must be taken to assure that the resolution of this issue does not improperly serve to transfer CLEC-caused costs to others. For example, if a CLEC falls behind on its new-service work, how much of the obligation should it bear in the form of overtime to finish work on time, as opposed to the obligation that Qwest must bear if it is to be asked to provide manual intervention at its own expense?

The FCC has addressed the standard for evaluating ILEC performance in the related, but distinct area of coordinated cuts, saying that:[371]

> *The BOC must demonstrate that it can coordinate number portability with loop cutover in a reasonable amount of time and with minimum service disruption.*

There is no reason to apply a lesser standard in cases where the CLEC, rather than Qwest, is providing the loop. The need for minimizing service disruptions is no less when the CLEC provides its own loop and there should be no penalty applied to a carrier who brings facilities based competition to the local marketplace. Thus, while there may be appropriate differences in what the incumbent can be expected to do, based on whether its personnel are or are not involved in making loop arrangements as part of a cutover, the standard for judging their sufficiency should be the same. Thus, Qwest should undertake reasonable efforts to minimize service disruptions associated with number porting where CLECs provision their own loops.

What is reasonable is, however, more than a matter of what is technically feasible. If a particular form of coordination or management of cutovers imposes demonstrably greater costs, it is reasonable to expect those CLECs requesting them to pay them. Otherwise, responsibility falls to Qwest or must be picked up by other CLECs who require a less burdensome form of coordination. Neither of those two alternatives is appropriate. Nor would it be correct to attribute the costs here to number porting; they are a function of the service disconnection process. That number porting may add complexity to the disconnection process is not determinative.

Therefore, if there are material cost differences in the activities necessary to minimizing service disruptions where CLECs provision their own loops, they should be chargeable to those CLECs that use the more resource intensive process. The evidence does not support a finding that Qwest

[371] BellSouth Second Louisiana 271 Order at ¶ 279.

can provide the coordination that AT&T wants through simple, inexpensive changes in its service-order system or by automated querying of Qwest's switches. Even AT&T's alternative, "day-after" solution would appear to require substantial manual intervention by Qwest. Qwest has presented evidence that the capability to adopt AT&T's automated solution or its alternative solution (without substantial manual intervention) does not exist. AT&T has argued that similar solutions have been ordered in the case of other ILECs, but there is no basis on the record for deciding that Qwest's systems have the same capabilities.

There is a more material dispute, however, about what Qwest can do to provide a timely response when it is notified by a CLEC that a disconnect should not occur on the requested date. Qwest's brief talks of 8 p.m. notices in terms close to conceding that Qwest can respond in time if notice comes to it no later.[372] Qwest Witness Bumgarner also said at the workshop that setting disconnects at 8 p.m. (i.e., before Qwest agreed to change the disconnect time to 11:59) "would give them [CLECs] plenty of time to give us a call so that we could try to stop that disconnect from happening at eight o'clock and move the due date out."[373] AT&T presented evidence that it has experienced disconnects even for notifications made in the morning.

Qwest's testimony and argument support a finding that it is reasonable to expect Qwest to defer disconnects provided that notice is given by the CLEC by 8 p.m. of the day involved. Pending resolution of the remainder of this issue's aspects, therefore, there is a basis for requiring Qwest to commit to responding to notices provided by 8 p.m. Applying Qwest's evidence and argument, there should not need to be a standard of less than 100 percent in meeting this obligation. If the failure-to-disconnect rate is only 2 to 3 percent when there is no notice by 8 p.m., then notice by this deadline should produce exceedingly few, if any, failures. While AT&T's evidence to the contrary was disturbing, it came from only a few-day sample.

Moreover, Qwest has committed in its brief to the introduction of new processes, which were developed through a recent trial in Utah, to better assure that timely CLEC notices result in deferral of disconnects.

Assuming the adoption of the 8 p.m. standard, there is no basis for demanding that Qwest undertake at its expense any as yet unidentified automated methods or that it provide for the manual support involved in the day-after alternative. However, we must conclude that the nature of the evaluations that Qwest has undertaken are not sufficient to rule out the reasonable possibility that further investigation will discover a cost effective means for providing even further assurances of an effective disconnect deferral process. Therefore, Qwest should be obliged to undertake prompt and reasonable efforts, in consultation with any CLECs who wish to participate, to determine whether there are low-cost means for automating coordination activities under either the day-of or the day-after alternatives. After completion of such study and analysis, any party would be free to recommend any changes in the SGAT provisions it considered to be appropriate.

In the meantime, there is no basis for concluding that the managed cut provisions of the SGAT will fail to provide whatever additional assurances that a particular CLEC may feel that it requires. AT&T did argue that Qwest's prices for managed cuts are in excess of its costs.

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[372] "It is only CLEC's that fail to complete their work **and** fail to timely notify Qwest, that may have their customer disconnected from Qwest before the number porting is complete. This occurs only two to three percent of the time." Qwest Brief at page 53.

[373] October 4, 2000 transcript at page 405.

However, AT&T recognized as well that these workshops are not going to resolve pricing issues.[374] In any proceeding involving costs, AT&T and any other participant may argue that position and may test as well whether the kind of "management" needed in the residential switches of concern is lesser in scope and therefore cost than is the case for complex, business-customer cutovers. To the extent it can demonstrate a categorically lesser level or complexity of work, a party could then argue that a lower rate for residential or small customer managed cutovers is appropriate.

Adding the following language at the end of SGAT Section 10.2.2.4 will accomplish the purpose of assuring that Qwest is subject to a sufficient obligation to minimize disconnects:

> *If a CLEC requests Qwest to do so by 8 p.m. Mountain Time, Qwest will assure that the Qwest loop is not disconnected that day.*

Beyond making this change, Qwest should also commit to the study of more automated means of providing the required coordination.

[374] AT&T Brief at page 18.

VIII. Checklist Item 13 - Reciprocal Compensation

Background

Reciprocal compensation refers to the method for compensating carriers for completing local calls that are originated on the network of another carrier. Section 271(c)(2)(B)(xiii) of the Act (Checklist Item 13) requires an RBOC's access and interconnection agreements to include reciprocal compensation arrangements that are consistent with the requirements of Section 252(d)(2).[375] Section 252(d)(2) of the Act governs such compensation for transport and termination of traffic; it states that, in order for these arrangements to be considered just and reasonable, they must provide for the mutual and reciprocal recovery by each carrier of the costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. The compensation must be determined on the basis of a reasonable approximation of the costs of terminating such calls.[376]
Section 251(b)(5) places the duty on LECs to establish a reciprocal compensation arrangement for transport and termination. Section 51.701 of the FCC rules addresses the scope of the reciprocal compensation:

> *(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers.*
>
> *(b) Local telecommunications traffic. For purposes of this subpart, local telecommunications traffic means:*
>
> *(1) telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission; or*
>
> *(2) telecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.*[377]

The FCC has determined that the ILEC's transport and termination rates should be used as a presumptive proxy for the CLEC's costs of transport and termination. Therefore, reciprocal compensation should be symmetrical and the same rates (i.e., Qwest's rates) should apply to both parties. Symmetry is described in Section 51.711:

> *(a) Rates for transport and termination of local telecommunications traffic shall be symmetrical, except as provided in paragraphs (a) and (b).*
>
> *(1) For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same service*

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[375] 47 U.S.C. §(c)(2)(B)(xiii).

[376] Id. §252(d)(2)(A).

[377] 47 C.F.R.§51.701.

> *(2) In cases where both parties are incumbent LECs, or neither party is an incumbent LEC, a state commission shall establish the symmetrical rates for transport and termination based on the larger carrier' forward-looking costs. (3) Where the switch of a carrier other than an incumbent LEC serves a geographical area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.*[378]

The parties to this proceeding agreed not to conduct any live examination of witnesses on the issue of reciprocal compensation. Qwest provided transcripts from the Washington and Colorado workshops involving reciprocal compensation, and those have been made part of the record here. Interested parties filed briefs on the remaining issues in dispute. The SGAT's reciprocal compensation provisions are found in several parts of Section 7, Interconnection, but primarily in Section 7.3, Reciprocal Compensation. Most of the SGAT language issues were resolved outside of this workshop among the parties.

Issues Resolved During This Workshop – Reciprocal Compensation

1. Tandem Switching Definition

AT&T contended that Qwest's Tandem Switching definition was inconsistent with the Act. AT&T argued that the FCC rule at 47 C.F.R.§ 51.711(a)(3) provides

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

AT&T asserted that Section 4.11.1 of the SGAT, which follows, improperly defined a tandem:

> *4.11.2 "Tandem Office Switches" which are used to connect and switch trunk circuits between and among other Central Office Switches. CLEC switch(es) shall be considered Tandem Office Switch(es) to the extent that such switch(es) actually serve(s) the same geographical area as U S WEST 's Tandem Switch or is used to connect and switch trunk circuits between and among other Central Office Switches. Access tandems provide connections for exchange access and toll traffic, while local tandems provide connections for EAS/Local Traffic.*[379]

XO/ELI also argued that Qwest's SGAT violated federal law by requiring that the CLEC switch be treated as an end office switch for reciprocal compensation purposes.[380]

Qwest agreed to amend its SGAT to provide that a CLEC's switch will be treated as a tandem switch for reciprocal compensation purposes if the CLEC's switch meets the functional and geographic requirements of a tandem switch.

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[378] 47 C.F.R.¶51.701. Paragraph b provides an exception for the CLEC to obtain non-symmetrical rates by filing its own cost studies and paragraph c addresses paging services. No CLEC files its own cost study.

[379] AT&T's brief at page 47.

[380] XO/ELI brief at page 8.

2. *Including IP Telephony in Switched Access*

AT&T argued that Qwest has attempted to include IP (Internet Protocol) Telephony as a switched-access service subject to access charges. AT&T asserted that IP Telephony has been classified as an Enhanced Service Provider (information service provider) and, because of its status as "end user" under the FCC rules, is considered exempt from access charges.[381] Accordingly, AT&T submitted that there has been no change in FCC policy on this issue since 1999, when a Qwest witness stated, "I understand that the Commission has required reciprocal compensation between carriers for IP traffic, and we see no reason why the Commission should change its position." AT&T recommended that Qwest delete the references. Sprint also requested that Qwest eliminate SGAT provisions regarding IP telephony traffic.[382]
Qwest's brief did not address the IP Telephony issue specifically but subsumed it in its opposition to the inclusion of ISP traffic for reciprocal compensation.
Section 5 of the Frozen SGAT contained changes that excluded references to IP Telephony. These proposed revisions to the SGAT addressed AT&T's concern about the treatment of IP Telephony and they are appropriate. References to IP telephony have been excluded by the revisions of the SGAT.

Issues Remaining in Dispute – Reciprocal Compensation

1. *Excluding ISP Traffic from Reciprocal Compensation*

AT&T, Sprint, Visionary and InTTec, and XO/ELI asserted that Qwest was improperly excluding ISP (Internet Service Provider) traffic from reciprocal compensation in the SGAT. Contact Communications,[383] WCOM,[384] NEXTLINK,[385] and e.spire[386] made the same point in their testimony. AT&T specifically identified Section 7.3.4.1.3, which provides:

> *7.3.4.1.3 As set forth above, the Parties agree that reciprocal compensation on a mutual exchange of traffic basis only applies to EAS/Local Traffic and further agree that the FCC has determined that Internet related traffic originated by either Party, (the "Originating Party") and delivered to the other Party, (the Delivering Party") is interstate in nature. Consequently, the Delivering Party must identify which, if any, of this traffic is EAS/Local Traffic. The Originating Party will only pay reciprocal compensation for the Delivering Party has substantiated to be EAS/Local Traffic. In the absence of such substantiation, such traffic shall be presumed to be interstate.*

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[381] AT&T's brief at 30.

[382] Sprint Brief at page 18.

[383] Testimony of Steve Mossbrook on behalf of Contact Communications, at pages 9-10.

[384] Testimony of Mark Argenbright of behalf of MCI WCOM, Inc. at pages 6-13.

[385] LaFrance Direct at page 7.

[386] Direct Testimony of David F. Kaufman on behalf of e.spire Communications, Inc., at page 6.

AT&T also pointed out that Qwest, through SGAT provisions 7.3.1.1.3.1 and 7.3.2.2, also sought to exclude ISP traffic from reciprocal compensation through its definition of local traffic.[387]

Qwest relied on a number of arguments to support its position that ISP traffic is not a proper subject for a 271 proceeding. First, Qwest argued that ISP traffic is jurisdictionally interstate and, as such, is not subject to reciprocal compensation treatment. Qwest contended that the FCC in its February 25, 1999, ruling in the *Local Competition* docket found that ISP-generated traffic was interstate and therefore not subject to reciprocal compensation.[388] Second, Qwest asserted that in the *Bell Atlantic New York Order*, the FCC conclusively determined that compensation for ISP traffic was an "inter-carrier compensation issue," not a reciprocal compensation issue, and therefore not a proper consideration for a 271 proceeding.[389] Qwest said that the FCC determined that addressing the treatment of ISP traffic is not a requirement of checklist item 13. Finally, Qwest contended that the SGAT provisions are consistent with the FCC's "Declaratory Ruling" in its Local Competition docket and that the Courts, while given the opportunity, have not remanded it for reconsideration on the issue of reciprocal compensation.[390]

AT&T asserted that the FCC has refused to interfere with commission treatment of ISP traffic as it relates to interconnection agreements. AT&T pointed out that the FCC acknowledges that it does not have an appropriate mechanism in place to address ISP traffic compensation, and therefore defers the matter to state commissions. AT&T also argued that the FCC found that where parties have included reciprocal compensation within their interconnection agreements, "they are bound by those agreements, as interpreted and enforced by the state commissions".[391] AT&T listed a number of different state commissions that have required the RBOCs to treat ISP traffic under reciprocal compensation provisions in their interconnection agreements.[392] Finally, AT&T pointed out that the Court of Appeals in the Bell Atlantic case had remanded the question whether ISP traffic was local or interstate back to the FCC for further explanation and analysis, and that the FCC has not yet acted on this issue.

After the filing of briefs, the FCC released, on April 27, 2001, an *Order on Remand And Report and Order* in CC Docket No. 96-98 and 99-68. That order found that Section 251(g) serves to exclude the traffic at issue here from the reciprocal compensation provisions of Section 251(c). The FCC went on to provide for reciprocal compensation for Internet-bound traffic under its Section 201 authority. The FCC provided for interim treatment for a 36-month period. The FCC also said, at paragraph 82:

> *This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here. Because we now exercise our authority under*

[387] AT&T's Brief at pages 24 and 25.

[388] Qwest's Brief at pages 63 and 64.

[389] Freeberg Rebuttal at pages 32 and 33.

[390] Qwest's Brief at page 64, footnote 150.

[391] AT&T's Brief at page 26.

[392] AT&T's Brief at page 28.

Section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue. For this same reason, as of the date this Order is published in the Federal Register, carriers may no longer invoke Section 252(i) to op into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic.

Proposed Issue Resolution: The FCC has asserted jurisdiction over ISP traffic under Section 201, has decided that Section 251 excludes ISP traffic from such compensation, and has precluded states from addressing it. Thus, the treatment of ISP traffic as a condition for approval of checklist 13 requirements is inappropriate. However, this conclusion does not make an examination of the SGAT irrelevant to state commissions for all purposes. The FCC's very recent order includes requirements that cause concerns with the SGAT language. For example, paragraph 79 establishes a presumption about the amount of traffic that is Internet-bound, in recognition of the inability of some carriers to measure the relevant traffic. SGAT Section 7.3.4.1.3 requires the delivering carrier to identify ISP traffic. For another example, paragraph 89 of the order does not permit an ILEC to benefit from the order's caps on reciprocal compensation rates for ISP traffic unless it elects to exchange all traffic between carriers at those same rates. Qwest's SGAT did not anticipate such a novel approach of first legally disconnecting then for some purposes reconnecting ISP traffic with other exchanged traffic. This provision has the effect, where ILECs make the required election, of negating state decisions about reciprocal compensation even in cases where there is no doubt about state authority to act. Where ILECs do not make the election, then the order provides that they must exchange ISP traffic at the rates that states have approved or arbitrated.

Provisions like these call for an examination of the SGAT in order to determine all those areas where it requires change to reflect the FCC's order. Whether or not the FCC wishes to hear about ISP traffic in the Section 271 context, the participating states have a substantial interest in assuring that the SGAT that CLECs in their states may use reflect applicable law and sound policy in those subject areas that the FCC has not taken from them in the now long-standing and almost undoubtedly unfinished struggle to find clearer, better, or more uniform ways of dealing with the relationships between ILECs and CLECs.

The participants should, therefore, provide as part of their 10-day comments proposals for changing all those sections of the SGAT affected by the April 27, 2001 FCC order.

3. *Qwest's Host-Remote Transport Charge*

AT&T maintained that SGAT provision 7.3.4.2.3 improperly requires CLECs to pay tandem transmission rates for transport between a Qwest host switch and a Qwest remote office. According to AT&T, Qwest chose to locate remote switching units in its network for economic purposes, in preference to other alternatives, e.g., digital loop carrier. AT&T said that, like digital loop carrier, Qwest's use of remotes is merely a loop aggregation technique. AT&T concluded, therefore, that Qwest's host switch is not performing tandem functions for the remote switch. Furthermore, AT&T asserted that Qwest has admitted that the "umbilical" between the host and remote is not a trunk, because the trunk modules remain at the host and are not moved to the remote as would be required for the umbilical to be classified as a trunk. Therefore, AT&T

argued that reciprocal compensation is therefore not due to Qwest for transport between its host switch and a Qwest remote office.[393]

AT&T argued, that, should its first argument not be accepted, then CLECs should be permitted to recover their costs for the transport to nodes along a SONET ring, because their function is similar; i.e., aggregating individual loops and delivering the traffic to CLEC loops. Therefore, AT&T proposed that CLECs should be permitted to assess Qwest transport charges for Qwest's use of the CLEC SONET rings.[394]

Qwest countered that the connection between its host and remote switches is not the equivalent of a local loop. The remotes switch calls in the areas they cover, without having to use the host switch. Calls outside this area must be transported the host for switching. Accordingly, calls outside of the local area require that Qwest transport those calls along dedicated paths between the host and remote switches. Therefore, Qwest contended that these "umbilicals" consist of trunks, which, according to accepted industry practice, terminology and costing conventions, constitute interoffice facilities.[395]

Under current FCC separation rules, Qwest said that the loop cost is allocated by using a fixed allocator consistent with its non-traffic sensitive nature, while traffic sensitive costs are recovered via local call termination rates. Qwest said that it does not recover the costs of the umbilical in its local loop rates, and denial of its proposed SGAT provision would result in ignoring federal law and industry engineering practices.[396]

Finally, Qwest contended that AT&T's argument for not being compensated for transport to nodes along a SONET ring is inappropriate in this proceeding. Qwest asserted that AT&T must rely on Qwest's costs and symmetrical transport and termination rates.

Proposed Issue Resolution: One issue that has been raised is whether the characteristics of the umbilical from the host to the remote make it more like a local loop or a trunk. It contains some features of both. The umbilical furnishes service to more than one end-user, which gives it a characteristic more typical of a trunk. However, other loop concentration techniques may share this characteristic, even though there is no contention that they are other than part of the loop. On the other hand, the line modules are moved to the remote switch while the trunk modules remain on the trunk side of the host switch that gives the umbilical characteristics of a local loop. Returning to the first hand, the umbilicals lie upstream from equipment that does perform switching and it can be observed that hosts and remotes together provide switching functions, much like end-office switches and tandems work together to share the switching burden involved in completing calls.

AT&T agreed that the remote constitutes a switch module. AT&T grounded its argument on the fact that "interoffice facilities" should end on the trunk side of the switch, which Qwest conceded to be at the host. AT&T's approach would make the umbilicals part of the loop. AT&T has underscored the value of remotes as switches in connection with collocation. AT&T argued in fact that these capabilities are very important to allowing competition to develop in areas where

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[393] Wilson Direct at page 42.

[394] Wilson at page 43.

[395] Freeberg Rebuttal at pages 75 and 76.

[396] Freeberg Rebuttal at page 78.

end users are far from central offices. That such end users are, if anything, more characteristic of the end users in these seven states was compelling evidence in support of allowing CLECs to use remotes as switches in rural areas. The resolution of this issue will be with recognition of the importance of these facilities as switches.

The starting point of Qwest's response to this argument was that AT&T would secure the use of the umbilical for free if it were to be excluded from transport charges. Qwest also demonstrated that these umbilicals constitute connections between two switching systems, showing that the remote performs its own "in area" switching functions in addition to carrying traffic to the host for switching outside that area. This feature of Qwest's network design makes the host and the remote identifiable as individual, albeit closely related, switching systems. Moreover, there is no basis for concluding that the use of remotes, which CLECs also consider so important to serving rural areas, represents an inefficient technology.

Assuming, therefore, that Qwest does not recover the costs of the umbilicals in its loops, it is proper to include them in transport prices. Should it be determined in a cost docket that this assumption is incorrect, then the costs should be removed from the calculation of loop or transport prices, as the evidence and argument merit.

AT&T's argument that it should receive compensation for transport to SONET ring nodes is unsound. Qwest's transport and termination rates must be based upon Qwest's costs. If a CLEC wishes to depart from the mutual and reciprocal nature of these costs, then it can present cost studies demonstrating that its own costs are different. The FCC did not require CLECs to undertake this burden and AT&T has not chosen here to meet it on a voluntary basis. Moreover, there would be no sound basis for allowing a CLEC to rely upon reciprocity in general, while picking off particular cost elements for separate treatment. Thus, it should be concluded that AT&T is being adequately compensated for all of its transport and termination costs, including but not limited to the specific cost element it raised here, through the mutual and reciprocal application of Qwest's prices.

3. Commingling of InterLATA and Local Traffic on the Same Trunk Groups

WCOM and AT&T said that certain spare special access circuits are being used for interconnection service, and therefore the Telecommunications Act requires that these circuits be priced at TELRIC prices.[397] These include circuits in facilities that interexchange carriers have secured in connection with the provision of long distance service. The issue arises when such a carrier seeks to use a portion of the capacity of those trunk groups to provide for interconnection with Qwest to exchange local traffic.

AT&T and WCOM asserted that the Section 7.3.1.1.2 of the SCAT should be rewritten as follows:

> *If CLEC chooses to use an existing facility purchased as a Private Line Transport Service from the state or FCC Access Tariffs the tariff rates shall be ratcheted to reflect the local usage and the recurring rate for Entrance Facility shall be priced at the TELRIC based rates.*

WCOM and AT&T argued that the FCC has prohibited CLECs from commingling of local traffic on UNEs with special access trunks, but did not address circuits used exclusively to

[397] AT&T's Brief at page 55.

provide local interconnection service. Specifically, WCOM and AT&T contended that in its Supplemental Order the FCC addressed a different scenario than the ratcheting proposal offered by the CLECs in this proceeding.[398]

Qwest opposed WCOM's and AT&T's proposed commingling of interLATA and local traffic on the same trunk groups. Qwest pointed out that the FCC's *Supplemental Order* and *Supplemental Order Clarification* rejected commingling, because of concern about the potential for bypass of special access by using unbundled network elements. Qwest argued that the FCC was concerned that inter-exchange carriers would use local facilities priced at TELRIC rates to avoid the higher cost special access. Qwest also said that the FCC in fact specifically considered and rejected the configuration that WCOM and AT&T were seeking here.

Furthermore, Qwest said that the FCC was concerned that commingling would result in the "use of the incumbent's network without paying their assigned share of the incumbent's costs normally recovered through access charges" and a resultant reduction in the support for universal service. Qwest indicated that if WCOM and AT&T were permitted to commingle interLATA and local traffic, using spare special-access circuits for interconnection facilities, then the CLECs should be required to pay the federally tariffed special access rates.[399]

Proposed Issue Resolution: This issue is one of balancing efficiency against universal service. No participant denied that WCOM and AT&T's proposed commingling and ratcheting would result in a more efficient use of CLEC networks. However, the FCC, along with most state commissions, has identified universal service as an important regulatory goal. Access charges have been and continue to be an important mechanism for commissions in achieving the goal of universal service. Adoption of SGAT provisions that have the potential to undermine the effectiveness of the current pricing mechanism for special access requires a more comprehensive review of all Qwest pricing policies and their effect on universal service than has been accomplished in this proceeding.

It would appear that WCOM and AT&T have failed to distinguish their proposal from those about which the FCC has expressed concern and about which it may be expected to provide further guidance in the future. That failure is material here, given the standard that the FCC has applied to its examinations under Section 271:

> *Because the substantive interim rules we have adopted in our orders on this subject define the nature of SWBT's statutory obligations, SWBT's adherence to them cannot constitute a basis for finding noncompliance with the checklist. It would be quite unfair to a BOC applicant to deny it approval to compete in the long-distance market on the basis of conduct that, in other proceedings, we have explicitly authorized. For the section 271 process to work, potential BOC applicants must have a reasonable degree of certainty about what they need to do to bring themselves in compliance with statutory requirements, and they therefore need to be able to rely on our rules for guidance.*[400]

The WCOM and AT&T proposed SGAT ratcheting provisions should therefore not be adopted at this point.

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[398] AT&T's Brief at page 57.

[399] Qwest's Brief at pages 71 and 72.

[400] *SBC Texas Order* ¶ 228.

There is a separate issue to resolve, i.e., the question of allowing the use of spare special-access circuits for interconnection. WCOM and AT&T should be permitted to exploit those economies. Qwest's proposal, to permit the use of spare special access facilities for local interconnection but with the stipulation that all circuits used are to be priced at special access rates, provides AT&T and WCOM the opportunity to enjoy the available efficiencies but protects the integrity of the pricing system.

4. Exchange Service Definition

AT&T proposed to alter the definition of "Exchange Service" to remove the words "as defined by Qwest's then-current EAS/local serving areas" in Section 4.22.[401] AT&T contended that the Commissions determine the boundaries of the local calling areas and that permitting Qwest to unilaterally modify this definition is inappropriate.

Qwest said that it recognizes that Commissions have historically managed the boundaries of flat-rated local calling areas.[402] However, Qwest asserted that the current wording was necessary to preclude any future dispute concerning the boundary.

Proposed Issue Resolution: Commissions have historically defined EAS/local service area boundaries. The adoption of Qwest's proposed wording would not change this condition. To make it clear to all parties that the commissions will continue to define the boundaries of EAS/local service area boundaries, it is appropriate that Qwest should delete the phrase "as defined by Qwest's then-current EAS/local serving areas"[403] in Section 4.22 of the SGAT.

5. Including Collocation Costs in Reciprocal Compensation

AT&T argued that several aspects of Qwest's interconnection requirements, e.g., its SPOP proposal, its 50-mile trunk limit, and its restrictions on interconnection at tandems, served improperly to increase AT&T's reciprocal compensation obligations.[404] Later in its brief, AT&T also argued that Qwest should be required to compensate AT&T for some portion of its collocation costs incurred at or in connection with AT&T's points of interconnection, observing the Qwest traffic traverses AT&T equipment collocated at the Qwest central office and located at the AT&T central office.[405]

Qwest argued that the FCC mandates the use of incumbent costs as a proxy for CLEC costs; therefore, the request contravenes federal law.[406] It also argued that no factual basis had been laid to support this request.

XO Utah also raised the issue of compensation for its collocation costs.[407]

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[401] AT&T's Brief at page 58

[402] Freeberg Rebuttal at page 42.

[403] AT&T Brief at page 58.

[404] AT&T Brief at pages 41 through 46.

[405] AT&T Brief at pages 54 and 55.

[406] Qwest Brief at 79, citing the *Local Competition Order*, ¶ 1085

[407] XO Utah Brief, starting at page 9.

Proposed Issue Resolution: The AT&T and XO Utah argument violates the notion that transport and termination prices should be based on Qwest's costs, except where CLECs, which they have not done here, present studies showing that their own costs are different. There has been no argument that Qwest should have but did not include its own collocation or long-loop costs in calculating transport and termination prices. Rather AT&T appears to have argued that only CLEC costs should be included, as it did in the case of host/remote umbilicals, appearing to argue for general acceptance of Qwest's prices with selective adjustment for a narrow range of specific cost elements. This approach is not consistent with FCC requirements or sound economic theory.

AT&T's approach involves other problems as well. AT&T argued that CLECs who uses new or different technologies, as compared with what Qwest uses, should not be penalized by inefficient requirements that arise from the nature of Qwest's network design or operation. This argument is tantamount to saying that a CLEC should not suffer the loss of economies that its network design and operation bring to the marketplace. However, where, for example, long loops are one of the diseconomies that result, AT&T would ask much more than that Qwest be prohibited from reducing the net economies that it brings. Rather it would ask Qwest in effect to improve those net economies by mitigating the cost effects that arise from the CLECs own network design or operations. It reaches too far to argue that one should both be not stripped of the benefits of its self-selected approach and be compensated for its detriments.

AT&T's arguments about collocation costs also have some troubling aspects. The notion that reasonable collocation costs should be borne by other than the collocator is not a concept that finds support in any FCC rules, regulatory commission orders, or court opinions. Moreover, the notion raises inherent concerns about how one might go about allocating costs between securing access to UNEs and providing interconnection. There was no substantial debate about the connection between collocation and access to UNEs; there was little if any guidance about what methods would be needed to apportion costs. The lack of authority to support such recovery of collocation costs and the absence of any clear proposal for providing for fair recovery mean that it should not be adopted here.[408]VIII. Checklist Item 14 – Resale

[408] Parenthetically, the record in this proceeding does not contain substantial evidence to show that CLEC loops are longer, nor does it contain substantial evidence about the degree to which CLECs use collocation for interconnection, as opposed to UNE access. The following discussion of the issue provides the benefit of the doubt to AT&T on this question; however a different outcome on the merits of the issue would still leave the need for proper support for the factual foundation for the collocation-for-interconnection and long-loops arguments.

VIII. Checklist Item 14 – Resale

Background

Section 271(c)(2)(B)(xiv) of the Telecommunications Act of 1996 requires Qwest to make "telecommunications services …available for resale in accordance with the requirements of Sections 251(c)(4) and 252(d)(3)."[409] Under Section 251(c)(4), Qwest must "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[410] In addition, Qwest may not place any "unreasonable or discriminatory conditions or limitations" on the services offered for resale. Section 252(d)(3) provides that the state commissions will "determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing collection, and other costs that will be avoided by the local exchange carrier."[411]

Issues Resolved During This Workshop

The participants raised a number of issues regarding resale, primarily through discussions about the provisions of the SGAT. The following is a list of issues that were resolved in this workshop.

1. Description of Resale Obligation

AT&T raised two concerns[412] about the language in SGAT Section 6.1.1, which defines Qwest's resale obligation. AT&T argued that the language was inconsistent with the Act, and that the language appeared to limit the resale obligation to only those products identified in Qwest's tariff. WCOM also recommended a modification to this SGAT section in order to would permit a CLEC to purchase at a discount any service offered by Qwest at retail.[413] Qwest agreed to change Section 6.1.1 to accommodate the concerns raised by AT&T and WCOM.[414] Therefore, this issue can be considered closed.

2. Qwest's Purchase of Services from CLECs

WCOM,[415] AT&T,[416] and McLeodUSA[417] objected to SGAT Section 6.1.2, which defined the obligations of CLECs to resell their services to Qwest. These companies noted that the

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[409] 47 U.S.C. §271(c)(2)(B)(xiv).

[410] 47 U.S.C. §251(c)(4)(A).

[411] 47 U.S.C. §252(d)(3).

[412] Wilson Direct at ¶244.

[413] Pruitt Direct at page 43.

[414] Rebuttal Testimony of Lori A. Simpson (hereafter Simpson Rebuttal) at page 4.

[415] Pruitt Direct at page 44.

obligations of the CLECs and the ILECs are not identical, and that Qwest must negotiate independently with the CLECs to establish rates for services. Qwest agreed to modify the SGAT to satisfy these comments.[418] Therefore, this issue can be considered closed.

3. Restrictions on Resale

AT&T commented that SGAT Section 6.1.3 placed unreasonable and discriminatory restrictions on the resale of certain Qwest services.[419] Qwest's SGAT matrix noted consensus on this issue, but no discussion was offered by Qwest to identify the negotiated solution. However, Qwest apparently adopted AT&T's proposed SGAT language, as it is included in the SGAT (WS1-QWE-TRF-1-4) filed after this workshop. Therefore, this issue can be considered closed.

4. Training Materials

AT&T[420] noted that SGAT Section 6.2.1 incorporated by reference certain training materials, and suggested that Qwest provide copies of these materials. Qwest agreed to do so, and this issue was closed.

5. Resale to the Same Class of End User

McLeodUSA commented that the provisions of SGAT Section 6.2.2 were inconsistent with the Act and the FCC's rules.[421] However, no explanation was given for this comment and Qwest noted that the FCC has determined that reseller CLECs may not make Qwest's telecommunications services available to a different category of end user where Qwest makes that same service available to only a specific category of retail end user.[422] Qwest has also made substantial changes to this section. Therefore, this issue can be considered closed.

6. Consecutive Promotional Offerings

WCOM noted that in SGAT Section 6.2.2.1, promotional offerings of 90 days or less are available for resale, but without the wholesale discount. WCOM[423] argued that by running promotions every 90 days, Qwest could avoid its wholesale discounting obligations. WCOM suggested modifications and stated that this section had been thus modified in Arizona. AT&T[424] also requested that language be added to Section 6.2.2.1 to more closely follow the language of Qwest's legal obligation. This section was discussed at the workshop[425] and

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[418] Wilson at ¶245.

[419] Response Testimony of Scott A. Jennings on behalf of McLeodUSA at WS1-MCL-SAJ-2.

[420] Simpson Rebuttal at page 6.

[421] Wilson at ¶246.

[422] Wilson at ¶247.

[423] WS1-MCL-SAJ-2.

[424] Simpson Rebuttal at page 42.

[425] Friday at page 44.

[426] Id. at ¶250.

ultimately resolved among the parties as Qwest indicated that consensus had been reached on the language.[426] Therefore, this issue can be considered closed.

7 *Market Trials Not Available For Resale*

McLeodUSA asked several questions about SGAT Section 6.2.2.2 and its restrictions on the resale of market trials.[427] In response, Qwest noted[428] that its market trials of telecommunications services are not provided "for free" to end users; there is a monthly charge. It also noted that the decision about whether the trailed services will be made available to all end users is made after the conclusion of a market trial. McLeodUSA did not respond to Qwest's explanation in any fashion; therefore, this section is considered closed.

8 *911 Not Available For Resale*

WCOM[429] and AT&T[430] both commented on the availability of N11 service for resale. SGAT Section 6.2.2.4 specified that 911 service is not available for resale, but did not address the availability of N11 (e.g. 311,411,611) for resale. WCOM offered suggested language that had been modified to its satisfaction in Arizona. Qwest indicated that consensus had been reached on this language.[431] Therefore, this issue can be considered closed.

9 *Restrictions on Contract Service Arrangements*

AT&T noted that SGAT Section 6.2.2.7 included language that could restrict retail offerings or the application of proper discounts to contract service arrangements (CSAs).[432] In addition, AT&T also argued that long term CSAs with strict penalty provisions for early termination could also be improper restrictions on resale.

McLeodUSA asked whether early termination charges would be waived if the customer upgrades to a higher service from the service provided under the CSA.[433] Qwest indicated that termination charges would be waived if the end user meets specific criteria.[434]

During Workshop 1, all parties agreed to the language that was included in Exhibit WS1-QWE-LAS-1.[435] Therefore, this issue can be considered closed.

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[426] Transcript of 10/3/00 at 173-176.

[427] Qwest SGAT Matrix (Exhibit 1) of 12/8/00 at page 2.

[428] WS1-MCL-SAI-2

[429] Simpson Rebuttal at page 42.

[430] Pesby at page 45

[431] Wilson at ¶251

[432] Qwest SGAT Matrix

[433] Wilson at ¶252, 253

[434] WS1-MCL-SAI-2

[435] Simpson Rebuttal at page 43

10. Grandfathered Services

SGAT Section 6.2.2.8 included language that withdrew "Grandfathered Services" from resale "except to *existing* end-users of the grandfathered service." AT&T stated that this restriction violated the FCC's First Report and Order, ¶958. [436] Qwest agreed in the Arizona 271 workshop to modify this section of the SGAT to clarify the language.[437] Qwest indicated that consensus was reached on this section.[438] Therefore, this issue can be considered closed.

11. Aggregation of Optional Features

McLeodUSA stated that CLECs should be permitted to "aggregate" optional features across multiple blocks within a single central office switching system, to the extent this is technically feasible (SGAT Section 6.2.2.9.1).[439] Qwest replied that its switches are not generally capable of providing use of Centrex features provisioned from one Centrex common block to another Centrex common block.[440] McLeodUSA offered no reply to Qwest's response on this issue, which can be considered closed.

12. Separate Centrex Service

McLeodUSA asked about the meaning of the language in SGAT Section 6.2.2.9.2. [441] Qwest explained that "...Centrex station lines from multiple central office switching systems within the same Qwest wire center and provisioned to the same end use location are charged for as separate Centrex service..."[442] There was no further discussion of this section. Therefore, this issue can be considered closed.

13. Private Line Service

McLeodUSA commented that if private line service for special access is offered at retail, it must be made available for resale.[443] Qwest noted that it is available for resale as SGAT Section 6.2.2.10 provides that "Private line service used for Special Access is available for resale but not at a discount".[444] There was no further discussion of this section. Therefore, this issue can be considered closed.

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[436] Transcript of 10/3/00 at pages188-189.

[437] Wilson at ¶254.

[438] Simpson Rebuttal at page 25.

[439] SGAT Matrix at page 2.

[440] WS1-MCL-SAJ-2.

[441] Simpson Rebuttal at page 44.

[442] WS1-MCL-SAJ-2.

[443] Simpson Rebuttal at page 44.

[444] WS1-MCL-SAJ-2.

[445] Simpson Rebuttal at page 45.

14. *Megabit Service Resold From Interstate Tariff*

AT&T questioned why Qwest requires CLECs to employ an interstate tariff for resale of Megabit services rather than an intrastate tariff[445] (SGAT Section 6.2.2.11). Qwest agreed to delete this section of the SGAT, which would have the effect of making Megabit available for resale from whatever Qwest tariffs, catalogs, or price lists that include Megabit as a retail telecommunications offering.[446] Therefore, this issue can be considered closed.

15. *Forecasts*

SGAT Section 6.2.5 requires the CLEC to provide Qwest with annual two-year forecasts, within 90 days of requesting service. WCOM, AT&T and McLeodUSA all questioned this provision. WCOM argued that a CLEC should not be required to provide forecasts to its competitors but should be able to generally estimate its use of OSS applications to allow Qwest to accomplish its planning.[447] Qwest replied that only the CLECs can forecast their resale of both previously uninstalled services and existing services and thus Qwest must have the forecasts to plan for future network and system requirements.

AT&T suggested that the section be modified to make it reciprocal (i.e., that Qwest must supply its forecasts to the CLECS).[448] McLeodUSA also questioned the need for the amount of information requested and suggested that Qwest should limit information to the absolute minimum to protect business plans.[449] Qwest offered SGAT language in its rebuttal to meet WCOM's and McLeodUSA's suggestions[450], but in a later workshop session, Qwest agreed to delete the section entirely.[451]
This issue can be considered closed.

16. *Numbering Obligations*

SGAT Section 6.2.6 delineates the CLEC's numbering obligations: The CLECs may not reserve blocks of telephone numbers. Both AT&T and McLeodUSA commented on this section: AT&T suggested that it be deleted[452] and McLeodUSA commented that the CLECs should be treated equally with Qwest. Qwest proposed a change in the Arizona 271 workshop, and proposed the same change here:

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[445] Wilson at ¶255.

[446] Simpson Rebuttal at page 26.

[447] Priday at page 46.

[448] Wilson at ¶258.

[449] WCI-MCLSAL-2

[450] Simpson Rebuttal at page 13.

[451] Transcript of 2/26/01 at page 104.

[452] Wilson at ¶259.

CONTINUATION

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6.2.8 CLEC may not reserve blocks of Qwest telephone numbers except as allowed by a Federal Communication Commission order. ~~Tariffs.~~

This issue can be considered closed.

17. CLEC Payment for Unbranding

WCOM argued that SGAT Section 6.2.9 "...obligates the CLEC either use Qwest's branding or pay to have CLEC's branding applied, even if CLEC chooses to have no branding".[453] WCOM argues that if it is technically feasible to order operator services and directory assistance with branding, it should be feasible to order those services without branding. Qwest argued that the FCC contemplated that the CLEC would have to pay for either unbranding or rebranding, and rejected WCOM's suggestion.[454]

AT&T commented that this section as worded diminishes the CLEC's right to obtain unbranded and rebranded services and transfers the burden to the CLEC to seek such branding.[455] To provide clarity, Qwest agreed to a change in the SGAT language in Arizona, and offered the same language in this proceeding. The section now provides[456]:

6.2.9 If Qwest provides and CLEC accepts Qwest's directory assistance service or operator services for CLEC's resold local exchange service lines, such directory assistance and operator services may be provided with branding as provided in this Agreement in Sections 10.5 for directory assistance service, and 10.7 for operator services.

This issue can be considered closed.

18. Primary Interexchange Carrier (PIC) Assignments and Slamming

Section 6.2.10 of the SGAT concerns the designation by the CLEC of PIC assignments and seeks to indemnify Qwest against slamming claims made against the reseller caused by the reseller. AT&T commented that this section should be made reciprocal or deleted.[457] Qwest agreed to

[453] Finley Direct at page 46

[454] Simpson Rebuttal at page 14

[455] Wilson at ¶60

[456] Recent SGAT

[457] Wilson at ¶61

make changes and AT&T agreed that the language answered its concerns.[458] Therefore, this issue can be considered closed.

19. Nonpayment Claims

WCOM commented that Section 6.2.12 "...allows Qwest to terminate resale service to CLEC for non-payment of charges; however, this section does not address circumstances in which CLEC is properly disputing such charges".[459] WCOM offered language changes in its testimony and Qwest countered with changes to sections 5.4.2, 5.4.3 (covering CLEC payment of bills from Qwest for services resold by CLEC) and 6.2.12.[460]
McLeodUSA also commented that Qwest should not be able to avoid responsibility if it wrongfully discontinues service and that the discontinuance should at least be lawful or proper[461]. Qwest agreed to add the word "properly" to modify this section.[462] Therefore, this issue can be considered closed.

20. Availability of Resold Services

AT&T noted that Section 6.2.14 limits Qwest's resale obligation "only" to locations in which "facilities currently exist", thus providing no ongoing obligation if new facilities are deployed.[463] Qwest agreed to delete the word "only" to satisfy AT&T's concerns.[464]
McLeodUSA also commented on this section but the language it quoted did not match the text from the SGATs.[465] McLeodUSA did not follow up on its question/comment in any way. Therefore, this issue can be considered closed.

21. Limitations on Resold Services

AT&T expressed concern that the SGAT Section 6.3.1 reference to "Exhibit A" as containing the list of services available for resale could limit the available services inappropriately. In addition, because the exhibit lists the discount, it created uncertainty as to the price at which unlisted services would be available.[466] AT&T raised a similar concern about the Exhibit A reference in

[458] Simpson Rebuttal at page 27.

[459] Pruday Direct at page 47.

[460] Simpson Rebuttal at page 16.

[461] WS1-MCL-SAJ-2.

[462] Simpson Rebuttal at page 47.

[463] Wilson at ¶262.

[464] Simpson Rebuttal at page 27.

[465] WS1-MCL-SAJ-2.

[466] Wilson Direct at ¶ 264.

SGAT Section 6.3.7. Qwest changed SGAT Section 6.3.1 to address AT&T's availability and pricing concerns.[467] Therefore, this issue can be considered closed.

22. Customer Transfer Charges

McLeodUSA questioned why customer transfer charges should apply under SGAT Section 6.3.2 when transferring services to a CLEC.[468] Qwest responded that these charges cover processing orders to transfer end users from one local service provider to another. This explanation is reasonable: McLeodUSA did not respond to it at hearings, nor did it brief this issue, which therefore can be considered closed.

23. Information for Billing CLEC Customers

AT&T requested that Qwest change SGAT Section 6.3.5 in order to obligate Qwest to provide CLECs with the information necessary for CLECs to bill their end users.[469] Qwest's frozen SGAT filing incorporates the language requested by AT&T. Therefore, this issue can be considered closed.

24. Application of Wholesale Discount Miscellaneous Charges

AT&T asked that Qwest change SGAT Section 6.3.6 to make clear that the wholesale discount applies to miscellaneous charges Qwest makes to CLECs.[470] WCOM sought clarification about the nature of the charges that could be made, how they could be made, and what rights Qwest might have to change them unilaterally.[471] Qwest's frozen SGAT filing contains a change that provides the clarification sought by AT&T. This language also addresses WCOM's concern by making it clear that the charges are limited to those applicable to Qwest's retail customers. The change includes a sentence stating that the charges include those provided for in the applicable Qwest tariff. Therefore, this issue can be considered closed.

25. Notice of Changes to Available Services

McLeodUSA asserted that there should be a notice when the state commission makes additional services available for resale. SGAT Section 6.3.7 merely provides for adding such services to those available for resale under the SGAT.[472] As Qwest noted, the additions or changes at issue would arise from a commission order, which would be issued pursuant to the notice requirements deemed appropriate by the commission issuing it. Therefore, there need not be a separate notice provision in the SGAT. McLeodUSA did not argue that such notice would not suffice, nor did it brief this issue, which, therefore, can be considered closed.

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[467] Frozen SGAT.

[468] WS1-MCL-SAJ-2.

[469] Wilson Direct at ¶ 265.

[470] Wilson Direct at ¶ 266.

[471] Friday Direct at page 48.

[472] WS1-MCL-SAJ-2.

26. Billing Changes

AT&T sought a change to SGAT Section 6.3.8, in order to make it clear that billing changes resulting from Commission orders should apply from the effective date of Commission-ordered change, not from the time when Qwest changes its billing systems to reflect them.[473] Qwest's frozen SGAT language filing reflects a change that responds fully to AT&T's concern. Therefore, this issue can be considered closed.

27. Use of Commission-Approved Rates

AT&T wanted to remove a phrase from SGAT Section 6.3.9 to make it clear that Qwest would only charge rates that have been approved by the Commission in the case of any change.[474] Qwest's frozen SGAT makes the deletion that AT&T requested. Therefore, this issue can be considered closed.

28. Applying the Wholesale Discount to Non-Recurring Charges

AT&T sought a change to SGAT Section 6.3.10 to make it clear that the discount applies to non-recurring charges.[475] Qwest's frozen SGAT makes a change that would apply the discount to any related service to which the discount applies. Therefore, this issue can be considered closed.

29. Incorporating Ordering Information By Reference

SGAT Section 6.4.2 required that CLECs provide ordering, installation, repair, and maintenance information provided for in standard Qwest procedures, as they are described in the IRRG, which the section said were available on an identified web site. AT&T asked that the documents referred to by reference be provided for examination, or, at least, that Qwest update the web site referred to in the section.[476] Qwest corrected the applicable web site address, but argued that the details of these procedures need not be reviewed as part of these proceedings.[477] Discovery on this matter was available to AT&T. Absent a specific objection to the content of the material, and absent pursuit of this issue in briefing, the issue should be considered closed. However, AT&T is not foreclosed from arguing in the workshop on general SGAT terms and conditions that there needs to be adequate provision in the SGAT to assure that documents incorporated by reference are not intended to modify the mutual obligations set forth in the SGAT.

30. Parity Standard Definition

AT&T wanted to clarify SGAT Section 6.4.3 to make it clear that the parity benchmark is not limited to Qwest itself, but includes any subsidiaries, affiliates, or anyone to whom Qwest directly provides service.[478] Qwest's frozen SGAT includes a change to this section, which

[473] Wilson Direct at ¶ 269.

[474] Wilson Direct at ¶ 270.

[475] Wilson Direct at ¶ 271.

[476] Wilson Direct at ¶ 273.

[477] Simpson Rebuttal at page 31.

[478] Wilson Direct at ¶ 274.

change the parties have accepted in other state workshops as a satisfactory resolution of the AT&T concern.[479] Therefore, this issue can be considered closed.

31. Billing End Date for Resold Services

This issue concerns cases where a customer taking resold service from a CLEC wants to end that resale relationship with the CLEC. AT&T wanted to clarify SGAT Section 6.4.5 to make it clear that CLECs would be responsible for payment to Qwest only through the last date that the CLEC is reselling services to a customer who is ending its resale relationship with that CLEC.[480] Qwest's made a change to this section, which change the parties have accepted in other state workshops as a satisfactory resolution of the AT&T concern.[481] Qwest made a change that addresses this issue.[482] Therefore, this issue can be considered closed.

32. Proofs of Authorization to Change Providers

AT&T raised a concern that SGAT Section 6.4.7, which refers to Section 5.3 had the effect of eliminating a proof of authorization method specifically allowed by the FCC. AT&T also objected to the application of a $100 charge (under Section 5.3.2) in the event that a CLEC failed to produce an authorization of the type identified in the SGAT.[483] Qwest changed the SGAT to allow the method in question (i.e., any other "state-enacted verification procedure for intrastate orders"). Qwest, however, declined to remove the $100 charge, which it defended as a "modest" fine to reduce slamming.[484] While AT&T's comments claimed that the charge was not consistent with FCC rules, it did not identify those rules either in its comments or its brief. The change that Qwest made to the SGAT section and failure of AT&T to pursue the issue of the $100 charge and its consistency with FCC and state rules indicate that this issue can be considered closed.

Issues Remaining in Dispute – Resale

1. Indemnification

AT&T argued that the SGAT did not require Qwest to take an appropriate share of responsibility for the harm that customers of CLEC resellers suffer when Qwest fails to meet applicable performance standards. AT&T sought an indemnity provision that would provide for parity of treatment between Qwest retail customers and those served by CLECs who resell Qwest retail services. AT&T justified this request by citing the power of state commissions to enforce other provisions of state law in reviewing SGATs (47 U.S.C. § 252(f)(2)) and the obligation to treat

[479] Simpson Rebuttal at page 32.

[480] Wilson Direct at ¶ 275.

[481] Simpson Rebuttal at page 33.

[482] Simpson Rebuttal at page 35.

[483] Wilson Direct at ¶¶ 276 through 278.

[484] Simpson Rebuttal at pages 34 and 35.

wholesale and retail customers at parity (47 U.S.C. § 251(c)(4)(B)).[485] AT&T therefore recommended that the SGAT be changed to incorporate the following language.[486]

> *6.2.3 U S WEST shall provide to CLEC Telecommunications Services for resale that are at least equal in quality and in substantially the same time and manner that U S WEST provides these services to others, including subsidiaries, affiliates, other Resellers and end users. Notwithstanding specific language in other sections of this SGAT, all provisions of this SGAT regarding resale are subject to this requirement. In addition, U S WEST shall comply with all state wholesale and retail service quality requirements.*
>
> *6.2.3.1 In the event that U S WEST fails to meet the requirements of Section 6.2.3, U S WEST shall release, indemnify, defend and hold harmless CLEC and each of its officers, directors, employees and agents (each an "Indemnitee") from and against and in respect of any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any nature or kind, known or unknown, liquidated or unliquidated including, but not limited to, costs and attorneys' fees.*[487]
>
> *U S WEST shall indemnify and hold harmless CLEC against any and all claims, losses, damages or other liability that arises from U S WEST's failure to comply with state retail service quality standards in the provision of resold services.*

Qwest argued that subjecting it to such liability was not a requirement of the resale checklist item, but did agree to accept a more limited form of liability, which it offered by means of SGAT Section 6.2.3.1.[488] That section provides as follows:

> *6.2.3.1 Qwest shall provide service credits to CLEC for resold services in accordance with the Commission's retail service requirements that apply to Qwest retail services, if any. Such credits shall be limited in accordance with the following:*
>
> *a) Qwest's service credits to CLEC shall be subject to the wholesale discount;*
>
> *b) Qwest shall only be liable to provide service credits in accordance with the resold services provided to CLEC. Qwest is not required to provide service credits for service failures that are the fault of the CLEC;*
>
> *c) Qwest shall not be liable to provide service credits to CLEC if CLEC is not subject to the Commission's service quality requirements;*

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[485] AT&T Brief at page 66.

[486] Wilson Direct at ¶ 256.

[487] AT&T reserves the right to address its concerns regarding Section 5.9 (Indemnity) of the SGAT in the appropriate multi-state workshop on General Terms and Conditions of the SGAT.

[488] Qwest Brief at pages 83 and 84.

d) Qwest shall not be liable to provide service credits to CLEC if CLEC does not provide service quality credits to its end users.
e) In no case shall Qwest's credits to CLEC exceed the amount Qwest would pay a Qwest end user under the service quality requirements, less any wholesale discount applicable to CLEC's resold services.
f) In no case shall Qwest be required to provide duplicate reimbursement or payment to CLEC for any service quality failure incident.

AT&T responded to this Qwest proposal.[489] It argued that the Qwest proposal would not make CLEC customers whole and it would provide no remedy at all where there were no retail service quality rules applicable to CLECs. AT&T was concerned also that a CLEC would be responsible under Qwest's proposal for making up the difference between what Qwest would pay the CLEC and what the CLEC would have to pay its end user customer (Qwest would apply the wholesale discount to the payments it must make to CLECs) if a state makes CLECs responsible for retail service quality payments. AT&T also argued that reliance upon Post Entry Performance Plan (PEPP, or what AT&T termed "PAP") payments is misplaced, because they do not address harm to the reseller CLEC's reputation, nor do they address parity of recovery opportunities between Qwest's end users and the end users of CLECs who are reselling Qwest services. AT&T therefore continued to believe that its original proposed language should be adopted.
Qwest responded to several of AT&T's specific concerns about Qwest's proposed language.[490] Qwest first stated that it should be permitted to limit its payment to CLECs to what it charged CLECs for the underlying resale service less any applicable wholesale discount. Qwest said that it has no control over what CLECs charge their end users; therefore, undertaking liability for an unknown sum over which it has no control is unreasonable and subject to abuse. Qwest also argued that its duty of care and its commercial relationship are to and with the CLEC, not the end user of the CLEC. Qwest also defended the portion of its recommendation [Section 6.2.3.1(e)] that precludes duplicate reimbursement, which may result from any applicable PEPP payments that Qwest must make.
Proposed Issue Resolution: The general conclusions about indemnity, which were addressed in the discussion the issue in the context of the Interconnection checklist item apply here to a significant degree. Except as particularly discussed below, the general indemnity issues that AT&T's requested language addresses can, like those associated with Interconnection, be addressed in the workshop session that will cover general SGAT terms and conditions.
Thus, Qwest's elimination of the extremely broad and inadequately delimited liabilities, in favor of an approach that places the issue in the strict context of state-imposed standards for failing to meet retail service standards is appropriate. The reason is that provisions for such payments consist of or are akin to tariff provisions. Such provisions form the foundation upon which the concept of resold services is grounded. Even where they may be cast as penalties, payments to customers for failure to meet retail service standards essentially amount to rebates of a portion of the amounts that customers pay under tariffs or other established methods by which states allow LECs to charge for local service.

[489] AT&T Brief at pages 67 through 69.

[490] Qwest Brief at pages 84 and 85.

AT&T begins by focusing on parity of treatment between Qwest and CLEC customers served by resale of Qwest services. Its arguments that spring from principles founded in the parity provisions of 47 U.S.C. § 251(c)(4)(B) and the ability of states to enforce state requirements under 47 U.S.C. § 252(f)(2) are on point. However, AT&T expanded upon those arguments include notions such as harm to CLEC reputation, which are far afield from these other, legitimate considerations. Therefore, to the extent that AT&T's proposal is intended to address damages to AT&T per se, they are not relevant here and they must be dealt with in the upcoming treatment of general terms and conditions.

Recognizing, as Qwest does in its brief, that the issue that is relevant here arises from the peculiar nature of the treatment of payment for services applicable in the resale context brings us a major step closer to resolution of this issue. The parity of treatment that is required is between wholesale customers (the CLEC, not its customers) and Qwest retail customers. AT&T incorrectly introduces the concept of parity between its end user customers and Qwest's end user customers. The Act and the FCC do not seek equal treatment among all end users, by whomever they may be served. Far from it; the point of competition is to give all carriers a fair opportunity to distinguish themselves from their competitors. We must return to the concept behind service-quality payments, which is to get back to the customer a defined portion of what the customer has paid for, but not gotten. The proper comparison is between what each type of customer to be compared has paid. The Qwest end user has paid retail rates; the CLEC as customer has paid retails rates less any applicable discount.

Therefore, it is proper to take any applicable discount off the amount that Qwest should pay its CLEC customer. The argument that this leaves the CLEC end user worse off, apart from being of questionable relevance, is also not necessarily true. It only becomes true if a CLEC decides not to make up the difference from the margin it charges on top of the wholesale rate it has paid Qwest. After all, Qwest must make up the difference between its cost and its margin; the CLEC has an equal opportunity and at roughly equivalent cost to itself to do the same. To hold otherwise is less a matter of making two different kinds of end users equally whole and it is much more a matter of preserving a CLEC profit opportunity.

However, just as AT&T's solution concerns itself inappropriately with the relationship between the CLEC and its customers, so does that of Qwest. In particular, Sections 6.2.3.1(c) and (d) of Qwest's proposal raise questions. The first of these provisions exempts Qwest from making payments to CLECs not subject to the requirements; the second exempts Qwest if a CLEC does not provide credits to its customers. The other aspects of CLEC payments to Qwest for resold services do not depend upon what the CLEC charges or credits to its customers. As this aspect of payments and credits is founded upon the same basis, neither should it. It should, however, be emphasized that what is at issue here are credits that a state provides for retail customers. As discussed above, fines or incentives and penalties that do not involve payments or credits to customers are a function of the more general discussion of indemnity that is to come in the general SGAT terms and conditions workshop.

Finally, it is proper for Qwest to provide protection in the event that PEPP payments clearly include payment to CLECs or their customers for state quality "misses." There is no sound policy for making Qwest pay twice for the same thing; nor is it at all clear that PEPP payments will necessarily not include such items. To the extent that they eventually may do so, Qwest

should have explicit SGAT recognition that Section 6.2.3.1 is not intended to duplicate them. To the extent that they eventually do not, inclusion of 6.2.3.1(d) will cause no harm to anyone.

Therefore, the SGAT should include Qwest's language for Section 6.2.3.1, except that subsections (c) and (d) thereof should be eliminated.

2. Marketing During Misdirected Calls

AT&T argued that, in limited circumstances, Qwest should not have the opportunity to market or sell services to CLEC customers, without first asking them. Specifically, AT&T would prohibit such communications with CLEC customers who have mistakenly contacted Qwest business or repair offices.[491] To this end, AT&T proposes the following SGAT language:

> *6.4.1 CLEC, or CLEC's agent shall act as the single point of contact for its end users' service needs, including without limitation, sales, service design, order taking provisioning, change orders, training, maintenance, trouble reports, repair, post-sale servicing, billing, collection and inquiry. CLEC's end users contacting Qwest in error will be instructed to contact CLEC; and Qwest's end users contacting CLEC in error will be instructed to contact Qwest. In responding to calls, neither Party shall make disparaging remarks about each other. To the extent the correct provider can be determined, misdirected calls received by either Party will be referred to the proper provider of local exchange service; however, 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 users who call the other Party seeking such information.*

AT&T defends this language on the grounds that there exists a substantial state interest in opening local telecommunications markets and in preventing anticompetitive behavior that will threaten competition. AT&T believes that its limit on Qwest communications to misdirected call, which can be determined through minor changes to the scripts that call center representatives use to manage communications with telephone callers. AT&T also cites limits on confidential or proprietary information, which it believes Qwest necessarily receives when taking a call from a CLEC customer.[492]

Qwest called the AT&T proposal an improper restriction on Qwest's rights of commercial free speech, citing a number of precedents.[493] Qwest, however, did not cite any case that would

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[491] AT&T Brief at pages 69 through 72.

[492] 47 U.S.C. § 222 (a) & (b).

[493] Qwest Brief at pages 86 through 91.

provide constitutional protection to engage in speech otherwise protected under the First Amendment, where the right to such speech has been contracted away. Yet that is precisely the context that is at issue here. The U. S. Congress has clearly decided that there is a substantial public interest to be served by opening the local exchange market to competition. That same body, buttressed by the pronouncements of the FCC, has decided that opening the market requires that ILECs, which control bottleneck facilities, act in effect as contractors or vendors to CLECs in making network components and services available. For this reason, the Telecommunications Act of 1996 envisions, and in fact it creates, methods to produce forced contracts between ILECs and CLECs, whether in the form of bilateral interconnection agreements or broadly available SGATs.

These agreements generally must envision the kind of relationship that would exist in an environment where mutual advantage brought a vendor and a customer together. Otherwise, there is no effective method for bringing about the market opening that the Congress seeeks. It goes without saying that entities that sometimes compete with each other sometimes put aside what divides them, in order to gain mutual advantage. In a normal commercial setting, a vendor is perfectly free to waive its otherwise existing speech rights in order to gain other forms of advantage. We all know that the same entities whose branded products appear on a supermarket shelf often stand next to products that it brands for others (often the supermarket owner itself). It is inconceivable to imagine a vendor voluntarily entering such a contract, then successfully suing to keep the contract in force in all respects except for the one preventing it from telling the supermarket's customers that what it bottled for the supermarket is inferior to what it bottled under its primary brand.

The only problem we have in extending that analogy here is that we do not know what kind of agreements might have been reached in a competitive telecommunications market. Congress has in fact already told those who seek to understand its intent that there would not be such contracts absent an obligation to force carriers to enter them and to enter them under terms that an independent arbitrator, not they, deem appropriate.

The commercial speech issue is not in this regard distinguishable from other types of constitutional issues. We can take it for granted that the Congressional finding underlying the Telecommunications Act of 1996 is that there is a compelling public interest in requiring the adoption of contracts and similar obligations that both serve to open the telecommunications market to competition and to require ILECs to act as one would if there did exist an incentive to voluntarily enter into obligations to serve those who would be competitors.

There is a peculiar irony in the fact that this Qwest claim arises in the context of one of the true incentives (in terms of self interest) that Congress did create in the Act. The irony is that this is a case that is all about the elimination of a lawful prohibition on Qwest's business operations and opportunities (i.e., the provision of interLATA telecommunications services). At the same time that Qwest asks for the elimination of that prohibition, which Congress could have freely left in place, it says that the price that Congress asks for that elimination is too high insofar as it enables a third party (such as an arbitrator or a public service commission) to tell Qwest what it thinks would represent, as between Qwest and CLECs, a reasonable relationship for purpose of opening Qwest's bottleneck control of network facilities and services.

We must also be mindful of the fact that the issue here is not limiting Qwest from providing product and service information to customers who are seeking it. The section only applies to calls from customers who are seeking other information. It permits inoffensive efforts by Qwest to determine if the customer does in fact want such information, provided that: (a) they do not

detract from the prompt, efficient, and good faith effort to act in accord with the requirements of Section 6.4.1, and (b) Qwest acts in accordance with the customer's expressed intent in response to those efforts.

This Qwest argument, quite simply, tries too hard. Given (a) the obvious Congressional determination about the importance of opening the market, (b) the reasonable relationship between market opening and "forced" contracts, (c) the particular context in which this issue is here decided (i.e., the Section 271 checklist), and (d) the fact that Qwest is not limited in any case from discussing its products and services from those seeking information about them, it is sufficient to determine that the kind of term or condition being sought is a reasonable approximation of what one might expect in a non-forced contract situation, there can be no doubt that precluding a vendor from marketing or selling in direct competition with the end user customer of its wholesale customer is reasonable, particularly when limited to the case of misdirected calls. Therefore, the language that AT&T proposes for Section 6.4.1 is generally appropriate for inclusion in the SGAT.

3. Special Contract Termination Charges

InTTec presented evidence that Qwest does not enforce termination charges when its own end users upgrade service in manners that go beyond the contract provisions. Because InTTec cannot offer comparable concessions (since the right to payments runs to Qwest), it claimed to have difficulty in competing for such customers. SGAT Section 6.2.2.7 addresses those charges in the resale context. InTTec asked that Qwest be required to provide relief of termination cost liability and waive termination charges for CLECs as resellers.[494] McLeodUSA made the same argument.[495]

Qwest did not address the InTTec or McLeodUSA argument in testimony or briefs. However, it did comment on a related, but distinct issue that AT&T raised.[496] Part of Qwest's testimony there does illuminate this issue. Qwest rebuttal witness Simpson said:[497]

> *If an end user chooses to terminate its service with Qwest, whether to switch to a reseller or for some other reason, it may be subject to reasonable and nondiscriminatory termination liabilities if they were part of the original terms of the CSA agreed to by the end user.*

The AT&T issue was generally addressed in its and Qwest's testimony,[498] but as the discussion lacked specific recommended solutions, it appears that AT&T and Qwest may have considered the issue to be resolved on the basis of what happened at the Arizona workshops. Neither Qwest nor AT&T briefed the issue here. InTTec did not participate in the Arizona workshops. At any rate, the unresponded to InTTec argument, which McLeodUSA made as well, form the only basis available on the record for deciding this issue.

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[494] Direct Testimony of D. J. Farmer by Affidavit for Visionary Communications Inc., and InTTec, Inc., On Checklist Items 1, 13 and 14 in the Wyoming Proceeding of the 6-State Collaborative Process (271-Workshop 1)

[495] Exhibit WS1-MCL-SJ-2.

[496] AT&T raised its issue in the Wilson Direct Testimony at ¶¶ 252 and 253.

[497] Simpson Rebuttal at page 23.

[498] Wilson Direct at ¶ 253 and the Simpson Rebuttal at page 23.

Proposed Issue Resolution: Section 252(d)(3) provides that state commissions will "determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested." This provision should be read as requiring rates for resale to be set on the basis of what Qwest actually charges. It is to be expected that Qwest's charges will generally be in accord with tariffs (or the like) or the specific terms of special contract arrangements. However, it should not be assumed that this equivalency would necessarily exist in all situations. There may be cases where Qwest by custom and in accord with commission requirements makes certain concessions. The waiver of termination charges when a customer makes a corresponding or greater commitment to new or revised services is a case where such concessions are likely. It will often be logical for any business to waive a guarantee of certain levels of payment when they are replaced with a stream of payments likely to be higher.
Where Qwest's "rates charged to" its end users under special contracts generally include concessions in the upgrade situations of concern to InTTec, Qwest should not use a "to the letter" contract interpretation to disadvantage CLECs where its custom would not be to do so for its own end users. Qwest witness Simpson observed that the kinds of termination liabilities that are appropriate are those that are nondiscriminatory. It would be discriminatory and anticompetitive for Qwest to apply them differentially so as to make it more difficult for CLECs to compete for customers. However, care must be taken not to create for CLECs a broad right to avoid the legitimate and even-handed application by Qwest of termination charges. The following addition at the end of SGAT Section 6.2.2.7 will accomplish this purpose:

> *Where a CLEC seeks to continue serving a customer presently served through a resold Qwest CSA, but wishes to provide such service through alternate resale arrangements, Qwest shall provide the CLEC the same waivers of early termination liabilities as it makes to its own end users in similar circumstances. In any case where it is required to offer such a waiver, Qwest shall be entitled to apply provisions that provide Qwest substantially the same assurances and benefits that remained to it under the resold agreement as of the time it is changed.*

Qwest should incorporate a provision to this effect in the section.

4. Electronic Interface for Centrex Resale

In its brief[499], the Wyoming Consumer Advocate Staff argued that Qwest's failure to provide an electronic interface for the resale of Centrex service (an issue that was originally raised by McLeodUSA) provides evidence "...that resale is not working in Wyoming to an extent that the Wyoming Commission can find Qwest in compliance with the checklist criteria". McLeodUSA witness Scott Jennings testified at the workshop that the lack of electronic interface for Centrex created a hardship for McLeodUSA "... in that that creates delays, lost paperwork, general overall difficulties with the processing of orders".[500] On cross-examination, Qwest's attorney attempted to elicit testimony from the witness about a specific study and Iowa status reports

[499] Post-Workshop Brief of the Consumer Advocate Staff on Issues Relating to Interconnection, Collocation, Local Number Portability, Resale and Reciprocal Compensation, at 9.

[500] Transcript of October 4, 2000 at 275.

involving the electronic interface system. The witness was unaware of these documents and Qwest ultimately promised to provide the reports referred to in cross-examination.[501]
The participants failed to follow up on a commitment made to identify the relevant Iowa reports addressing progress. McLeodUSA's witness specifically said that he was unaware of progress being made in Iowa to address the issue there. McLeodUSA did not brief this issue; McLeodUSA in fact filed no brief at all. No reference was made to the obligations for electronic processing requirements, performance standards, or other relevant aspect of the ROC PID as they concern the electronic flow-through requirements or the provisioning intervals for CENTREX. It is to be expected that the PID deals with such issues. Thus, the record contains only enough information to determine that the issue has been raised before the Iowa Commission and that efforts have been made to address it. There is not enough information to conclude that Qwest even denies electronic flow through of CENTREX orders by McLeodUSA, let alone that it is required to provide it, or that failure to do so leads to competitive problems in securing such services on a retail basis from Qwest. Relevant questions that the participants have not addressed include:

- Whether the PID requires electronic flow through
- Whether in its absence, the PID requires performance at levels that either provide (with respect to issues that can be addressed through electronic interface, such as pre-ordering, ordering, provisioning, maintenance and repair) parity with retail or a meaningful opportunity for CLECs to compete
- What the record in Iowa would show about progress in resolving the issues raised there.

The arguments relied upon depend essentially entirely upon the statements of a McLeodUSA witness, which addressed none of these questions. It may be that that the 10-day comments on this report will shed more light on the facts surrounding this issue; should they not, then the Commissions should not find that the evidence relied upon supports a conclusion that Qwest here fails to meet the requirements of Section 271 as they relate to the Resale checklist item.

5. Inaccurate Billing of Resellers

Essen Communications commented that Qwest has been unable to bill resellers accurately. Specifically, Essen complains that the Customer Service Record (CSR) that it obtains from Qwest when a customer is converted deletes all the prices for the features.[502] Because a Qwest employee in a similar situation would have all the prices, Essen argues that it should have access to these prices as well since they are public information. Essen catalogs numerous similar examples for inaccurate billing, including being billed for the wrong federal access charge and for charges that should be billed to other CLECs.[503]
With respect to the CSR argument, Qwest responded that its prices are available to Essen via IMA and in Qwest's tariffs. Regarding the billing errors, Qwest notes that it has taken numerous

[501] Transcript of October 4, 2000 at 280-284.

[502] Comments of Essen Communications, 8/25/00, (hereafter Essen) at page 3.

[503] Essen at page 5.

steps to address Essen's concerns, including attending a Commission facilitated meeting with Essen and improving its billing processes.[504]

Proposed Issue Resolution: The effectiveness of Qwest's responses to these billing concerns will be addressed in the ROC OSS test. This issue will be held open for consideration after test completion.

5. Ordering and Other OSS Issues

This criticism was raised in the Essen Comments. No specific examples of substandard order processing were given. Essen also criticized the speed, order entry duplication, and reliability of Qwest's IMA system for order entry.[505] Qwest did not respond to this comment.

Proposed Issue Resolution: The lack of specificity surrounding this issue makes it difficult to identify the precise issue to be resolved. If it remains in issue after the completion of the ROC OSS test, the participants can address it at that time.

6. Other Pricing Issues

Essen asserted that the 18.1% discount received from Qwest is too small, and it will take a reseller 5 months to make a profit due to other expenses. Qwest responded that the Commission in an arbitration proceeding concerning another CLEC's interconnection/resale agreement determined the wholesale discount.[506] Essen also said that the customer transfer charge (or CTC) is the fee resellers must pay to Qwest for the transfer of a local telephone service account. Essen comments that this fee is much higher in Montana than in the other Qwest states, and cited some examples:

Residence First Line	
Montana:	$12.64
Arizona:	5.00
Colorado:	3.76
Iowa	2.80[507]

Qwest responded that the customer transfer charges are contained in Essen's resale agreement, which was negotiated between Essen and Qwest and approved by the Commission.[508]

Proposed Issue Resolution: The record here does not allow for any meaningful assessment of the propriety of the discount or of the costs underlying nonrecurring charges. Such issues should be considered in proceedings that have access to the cost information and analyses that underlie prices for such nonrecurring items.

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[504] Simpson Rebuttal at pages 39-40.

[505] Essen at page 13.

[506] Simpson Rebuttal at 39.

[507] Essen at 4-5.

[508] Simpson Rebuttal at 39.

7. Qwest Centrex Contracts

Centrex is a discounted program that is available to businesses with three or more phone lines both Qwest and resellers can provide the service. Essen said that Qwest has two significant advantages in reselling Centrex. First, Centrex is typically sold on a long-term contract, because the customer pays significantly lower prices, as compared to month-to-month service. Essen argued that Qwest has 'locked up' the majority of existing Centrex 21 customers in 37 to 60 month contracts, and also has exclusive knowledge of who are the most profitable customers. Second, the Qwest contract for Centrex services in now location-specific, and cannot be transferred from business to business. Therefore, if a customer defaults at that location, a reseller would be responsible for paying Qwest for the remainder of a long-term contract.

Qwest responded that it is not unfair for it to enter long-term agreements with end users since the end users are free to enter into agreements with the provider of their choice. Once they choose a provider, that provider should be able to enforce the terms and conditions of the agreement. With respect to the second argument, Qwest notes that the practice of enforcing long-term agreements (and requiring termination charges) against the reseller is nondiscriminatory as the same thing would happen to a Qwest retail end user under the same circumstances.[509]

Proposed Issue Resolution: The record will not support a conclusion that Qwest has used long term contracts to impede competition. The granting of price concessions in return for long-term contracts is an acceptable means of assuring the recovery of investments made to support the needs of a particular customer. Essen's comments in fact corroborate the prevalence in the case of long-term contracts for Centrex services.

There is no inherent reason why the enforcement of termination provisions should be deemed suspect, because they provide a means for recapture of the costs that would otherwise have been paid over a longer term. Essen's argument that Qwest only loses income in the event of an early customer while a reseller actually pays costs is not convincing. Qwest loses the income to recover costs it has incurred; the reseller has not incurred the costs already; thus, in the event of an early termination, the party that advanced the costs to provide the service (i.e., Qwest) gets the same recovery of costs through the application of early termination provisions. In the absence of evidence that Qwest applies them in a discriminatory manner, there is no basis for questioning them here.

8. Merger-Related PIC Changes

Essen commented that "Qwest dramatically slows down reseller's day to day work by subjecting them to mistakes, problems and provisioning errors that are very time consuming to fix."[510] The prime example of this concern was the requirement that resellers move all of their accounts from one PIC code to another during the Qwest/US West merger. Essen had to "basically shut down for 8 days" and during that time "had to turn down all new orders and all new customer inquiries".[511]

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[509] Simpson Rebuttal at page 38.

[510] Essen at page 14.

[511] Essen at page 12.

Qwest responded that it was unable to find a technical way to complete the PIC changes for the CLECs and eventually asked the CLECs to change the end users PICs. Qwest notes that Essen was paid for its time and work in processing these service requests.[512]

Proposed Issue Resolution: The PIC changes occasioned by the merger appear to have caused a substantial problem for Essen. However, given the unique circumstances, which are unlikely to recur, and Qwest's compensation for the direct effort undertaken by Essen to respond, this case does not present evidence suggesting that Qwest fails to meet the requirements of this checklist item. Moreover, as noted above, any issues associated with Qwest's OSS can be raised at the completion of ROC testing.

9. Breach of Confidentiality Agreements

Essen provided two examples of this breach: first, when Essen's reseller bill was sent to one of its customers (two occurrences)[513] and second, when Essen received the reseller bill for another reseller.[514] Qwest responded that it has been working on improving its billing processes and stated "Qwest has provided additional training and bill format changes to assure that bills will be sent to the correct party only.[515]

Proposed Issue Resolution: The billing problems cited by Essen ran largely from the late fall of 1999 through January of 2000. The comments, which Essen filed on August 25, 2000 do not indicate whether the problems have persisted. Qwest did cite training programs and bill format changes undertaken since that time. The lack of evidence that such problems have continued after the Qwest changes support a conclusion that Qwest has responded to the need for corrections.

10. Superior Service to Qwest's Internal Sales Force

It appears that this complaint is based on Essen's concern that Qwest is able to offer limited time specials to retail customers without offering them to its wholesale customers at a discount, creating an unfair financial advantage.[516] Qwest replied that retail promotional offerings of 90 days or less duration are available for resale and that a wholesale discount does not apply, consistent with the FCC's First Report and Order.[517]

Proposed Issue Resolution: There is no evidence that Qwest has failed to abide by the requirements applicable to promotions.

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[512] Simpson Rebuttal at page 41.

[513] Essen at pages 5 and 7.

[514] Essen at page 8.

[515] Simpson Rebuttal at page 40.

[516] Essen at page 11.

[517] Simpson Rebuttal at page 40.

BEFORE THE NEW MEXICO 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

Report on Emerging Services

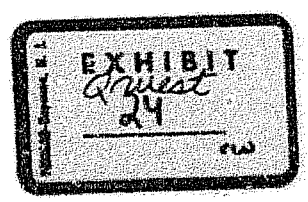

Table of Contents

I. Scope Of This Report 1

II. General Background 2

III. Disputed Issues And Recommendations Summary 4

Line Sharing 4
1. Ownership of and Access to Splitters 4
2. Tying Qwest Data Service and Voice Service 4
3. Line Sharing Over Fiber Loops 4
4. Provisioning Interval 5

Subloop Unbundling 5
1. Subloop Access at MTE Terminals 5
2. Requiring LSRs for Access to Premise Wiring at MTEs 6
3. CLEC Facility Inventories 6
4. Determining Ownership of Inside Wire 6
5. Intervals 7
6. Requirement for Qwest-Performed Jumpering at MTEs 7
7. Expanding Explicitly Available Subloop Elements 7

Packet Switching 8
1. Availability of Spare Copper Loops 8
2. Denial of DSLAM Collocation 8
3. ICB Pricing 9
4. Unbundling Conditions as a Prerequisite to Ordering 9
5. Line Card "Plug and Play" 10

Dark Fiber 10
1. Affiliate Obligations to Provide Access to Dark Fiber 10
2. Access to Dark Fiber in Joint Build Arrangements 11
3. Applying a Local Exchange Usage Requirement to Dark Fiber 11
4. Consistency With Technical Publications 11

IV. Line Sharing 13

Background – Line Sharing 13

Issues Resolved During This Workshop – Line Sharing 13
1. Collocating DSLAMs 13
2. *Direct Connections Option* 14
3. Requiring Separate CLEC "MELD" Runs 14
4. Allowing for Direct Connection in Common Areas 14
5. Line Sharing Cost Elements 14
6. Line Splitting 14

Issues Remaining in Dispute – Line Sharing 15
1. Ownership of and Access to Splitters 15
2. Tying Qwest Data Service and Voice Service 15

3. Line Sharing Over Fiber Loops 18
4. Provisioning Interval 19

V. Subloop Unbundling 23

Background – Subloop Unbundling 23

Issues Resolved During This Workshop – Subloop Unbundling 23
1. Subloop Definition 23
2. Unbundling All Loop Types 24
3. Spectrum Restrictions 24
4. Subloop Ordering Information 24
5. Rights of Way 24
6. Dispute Resolution 25
7. Copper Feeder and Fiber Subloops 25

Issues Deferred – Subloop Unbundling 26
1. Undefined Rates 26
2. Pricing for Overly Broad Definitions of Subloop Categories 26

Issues Remaining in Dispute – Subloop Unbundling 27
1. Subloop Access at MTE Terminals 27
2. Requiring LSRs for Access to Premise Wiring at MTEs 30
3. CLEC Facility Inventories 33
4. Determining Ownership of Inside Wire 34
5. Intervals 35
6. Requirement for Qwest-Performed Jumpering at MTEs 36
7. Expanding Explicitly Available Subloop Elements 37

VI. Packet Switching 39

Background – Packet Switching 39

Issued Resolved During This Workshop – Packet Switching 39
1. Defining Packet Switching 39
2. Defining the Condition Regarding No CLEC Collocation of DSLAMS 40
3. Access at Any Feasible Point 40
4. Availability of CLEC-Specified Packet Switching Options 40
5. Limiting Access to Packet Management Systems 40
6. Separate Rate Elements for Packet Switching Components 40
7. Satisfying the Condition Relating to DSLAM Collocation Denial 41
8. Maintenance and Repair Responsibilities 41

Issues Remaining in Dispute – Packet Switching 41
1. Availability of Spare Copper Loops 41
2. Denial of DSLAM Collocation 44
3. ICB Pricing 45
4. Unbundling Conditions as a Prerequisite to Ordering 46
5. Line Card "Plug and Play" 47

VII. Dark Fiber 49

Background – Dark Fiber 49

Issues Resolved During This Workshop – Dark Fiber 49
1. Dark Fiber Forecasts 49
2. Access to Dark Fiber Without Collocation 49
3. Testing 50
4. Addition of E-UDF rate elements. 50
5. Purchase of a Single Dark Fiber Strand 50
6. Provisioning and Ordering Processes 51
7. Dark Fiber at Collocation Build-Out Completion 51
8. Cross Connect Charges 51

Issues Remaining in Dispute - Dark Fiber 52
1. Affiliate Obligations to Provide Access to Dark Fiber 52
2. Access to Dark Fiber in Joint Build Arrangements 55
3. Applying a Local Exchange Usage Requirement to Dark Fiber 56
4. Consistency With Technical Publications 57

1. Scope Of This Report

This report discusses the second group of issues that fall within the seven-state workshop process addressing Qwest's compliance with the Section 271 Checklist of the Telecommunications Act of 1996. This report covers the issues assigned to "Workshop Two" by the initial procedural orders, which are the first of a series of orders under which the workshop process has operated. This report addresses the following issues:

- Line Sharing
- Subloop Unbundling
- Packet Switching
- Dark Fiber

Transport issues were addressed in the same testimony and workshop days that included these four subjects. However, transport issues will be addressed in the upcoming report that addresses other Unbundled Network Element (UNE) issues. Line sharing, subloops, and packet switching are all UNEs. Dark fiber is better thought of as a medium that can comprise a loop or transport UNE. In general, these UNEs were not unbundled by the FCC in its *Local Competition First Report and Order*, but were unbundled later in the *UNE Remand Order* or the *Line Sharing Order*. They are here considered as a group of what are referred to as the "Emerging Services."

The Summary of Findings and Conclusions section of this report identifies the issues raised under each of these four subject areas, and briefly describes those deferred to other workshops or proceedings for resolution, and those remaining in dispute. For those issues remaining in dispute, the summary section describes the recommended resolution of the disagreements. The later sections of this report provide more detailed discussions of the issues, particularly those that remain in dispute. The Summary of Findings and Conclusions and the detailed sections use the same numbering for these disputed issues.

II. General Background

The purpose of this report is to assist the seven state Commissions (Iowa, Idaho, Utah, New Mexico, North Dakota, Montana, and Wyoming) in reaching a decision as to what recommendations to make to the Federal Communications Commission (FCC) on the question of whether Qwest should be granted the authority to provide in-region interLATA services. To be eligible to provide in-region interLATA service, Qwest must meet the competitive checklist and other requirements of Section 271 of the Telecommunications Act of 1996 (the Act). A Qwest May 4, 2000 filing encouraged the several state commissions to consider a multi-state process to jointly review track A (competition issues), various aspects of the 14-point competitive checklist, Section 272 (separate subsidiary issues), and public interest considerations. Iowa, Idaho, Utah, North Dakota and Montana joined together (with Wyoming joining in September 2000 and New Mexico thereafter) in a multi-state collaborative proceeding, and issued procedural orders to govern the conduct of joint workshops. The joint workshops provide a common forum for all participants in all the states involved to present, for individual consideration by the seven commissions, all issues related to Qwest's Section 271 compliance.

On November 20, 2000, Qwest filed the testimony of Karen A. Stewart. On or about December 20, 2000 the following intervenors filed testimony: the Wyoming Consumer Advocate Staff; AT&T Communications of the Mountain States, Inc., AT&T Communications of the Midwest, Inc. and TCG affiliates (AT&T); the Information Services Division, Department of Administration, State of Montana; Rhythms and New Edge (Joint Comments); and the New Mexico Advocacy Staff. Qwest filed Rebuttal Testimony on January 5, 2001, and an Open Issues Matrix On January 8, 2001 and a Supplemental Affidavit on January 9, 2001. AT&T filed a Statement Regarding Dark Spectrum on February 20, 2001.

We have adopted a general rule that requires Qwest to file, before briefing of the issues, a copy of SGAT language related to those issues. This "frozen SGAT language" is intended to reflect language on which there is general agreement among the parties and language proposed by Qwest to address issues or language on which there is not general agreement. The purpose of this language is to provide a reference base first for the participants' briefs and second for the commissions in reviewing this report. It is not intended to offer new language that has not before been seen or discussed in workshops, filings, or discussions among the parties.

Qwest filed the required language here on March 20, 2001.[1] The language is set forth as an appendix to this report.

The following participants filed briefs on or about April 30, 2001: Qwest, AT&T, Sprint, Rhythms Links Inc., and the Wyoming Consumer Advocate Staff. Qwest's timely filing of the frozen SGAT language has provided the participants a fair opportunity to brief any disagreements with any language that Qwest may have added or changed since its original and rebuttal filings on the issues addressed by this report.

[1] Hereafter, the Frozen SGAT.

This report assumes that the SGAT language filed by Qwest on March 20, 2001 will remain in effect, except as commission acceptance of any of the findings and conclusions of this report may require such language to change. Therefore, to the extent that any further changes in SGAT language are proposed (e.g., as a result of agreements reached in similar workshops in other states) they must be separately filed and supported, in order that the commissions may consider any issues associated with such proposed language changes. Absent individual commission approval of any such proposed changes, the language set forth in the appendix hereto shall be considered to be the final language for purposes of any state SGAT review or consultation with the FCC under Section 271.

III. Disputed Issues And Recommendations Summary

The following summary addresses the deferred and disputed issues and it provides a brief description of how each issue was resolved.

Line Sharing

The parties raised and resolved prior to the briefs a total of six issues related to Line Sharing. Four issues remain to be resolved. Of these four issues, none requires an SGAT language change. However, Qwest pursues a policy (i.e., of not providing its data services to customers who switch to a CLEC for voice services) that imposes an inappropriate barrier to the development of voice competition. Qwest should not be deemed to be in compliance with this checklist item before it changes this policy. However, upon making an appropriate change, Qwest can be deemed to have met its burden of proof, subject to the completion and commission consideration of the results of any OSS testing that may relate to the item. The four issues and the proposed resolutions are summarized below.

1. Ownership of and Access to Splitters

Several CLECs testified that Qwest should be required to own splitters and to make them available to CLECs on a line-at-a-time basis. Existing FCC requirements provide no basis for obliging Qwest to provide splitters, nor has the evidence in this proceeding provided any basis for concluding that a requirement for such access is necessary or appropriate.

2. Tying Qwest Data Service and Voice Service

Qwest's policy is to disconnect its high-speed data service (called "Megabit") from a customer deciding to change to a CLEC for local voice service. Qwest's provision of voice and Megabit services to one of its end users over the same loop is the functional equivalent of line sharing. The threatened loss of Megabit service from Qwest will affect customer decisions about taking voice service from others. Qwest's refusal to continue to provide Megabit services in these circumstances imposes significant barriers to competition, particularly in an uncertain data service market. Qwest should not be considered to be in compliance with public interest requirements as long as it maintains a policy of denying its end users Qwest's own Megabit or xDSL services when it loses a voice customer to a CLEC through line sharing.

3. Line Sharing Over Fiber Loops

Several CLECs argued that the SGAT should require Qwest to provide line sharing over fiber loops. Qwest said that the FCC has merely recognized the possibility of line sharing over fiber portions of loops, but has not determined that it is feasible. Qwest agreed to change the SGAT to provide for fiber sharing when the technology becomes available and when Qwest is obliged to provide access to it by law. The record will not support a conclusion that there are other technologies and methods already proven to be feasible for providing line sharing over fiber facilities. The feasibility of the suggested "plug and play" option is at issue now before the FCC, which will presumably decide it upon much more than the scant evidence available here.

4. Provisioning Interval

Rhythms proposed that Qwest provision line-sharing in three days (compared with Qwest's proposed five days), with a future reduction to one day. Qwest argued that the FCC required ILECs to provision line sharing under intervals similar to those in which ILECs provide DSL service to their own end users. Qwest said that the five-day line-sharing interval to which it could commit here is significantly less than its 10-day retail DSL provisioning interval for its own end users. Qwest noted that the testimony would support CLEC needs for only a day or two (at most) on top of the Qwest's proposed interval of five days.

The correct standard here should be one that promotes parity with Qwest retail performance, recognizing that CLECs need an extra day or two to begin service to end users. Qwest's five-day interval will allow ample opportunity overall for CLECs to complete remaining work in time to provide end users with xDSL services within time frames that are competitive with what Qwest is now experiencing in serving its own retail customers. However, if Qwest succeeds in materially shortening the 10-day interval for its end users, then a failure to change the five-day line-sharing interval for CLECS could leave them disadvantaged. Therefore, the acceptance of Qwest's interval should be with the understanding that it should be revisited if Qwest's retail performance improves in the future.

Subloop Unbundling

The parties raised and resolved prior to the briefs a total of seven issues related to Subloop Unbundling. Two issues were deferred. Seven issues remained to be resolved by the facilitator. Of these seven issues, five require SGAT language changes, and two require no change. Qwest should not be deemed to be in compliance with this checklist item before it makes the changes necessary to deal with the five issues. However, upon making those changes, Qwest can be deemed to have met its burden of proof, subject to the completion and commission consideration of the results of any OSS testing that may relate to the item. The seven issues and the proposed resolutions are summarized below.

1. Subloop Access at MTE Terminals

AT&T argued that access to wiring on customer premises as a subloop element at the terminal block in multi-tenant environments (e.g., campus-type arrangements or high rises) should not require collocation. Qwest agreed to drop the SGAT requirement for collocation and Qwest performance of cross connections at MTE terminals on or in buildings, but would not do so for detached MTE terminals.

A rote application of collocation and CLEC access rules crafted primarily with reference to collocation in settings like central offices will not work well for access to subloops at remote locations. A more case-specific approach is needed to consider the service reliability, safety, work efficiency, cost, and engineering and operating practices involved in terminal access. Such a process would begin from an examination of the specific circumstances and let an emerging understanding of the particular situation at hand lead to what became a reasonably self evident set of necessary conditions, limits, and durations. The SGAT should be changed to allow advance solutions to be worked out for particular configuration types, provided that the focus is on the factors relevant to those particular types. Carriers should be able to request them in

advance and on a categorical basis where the applicable field circumstances are adequately defined.

2. Requiring LSRs for Access to Premise Wiring at MTEs

AT&T argued that the requirement to submit LSRs to gain access to such subloops represents an unreasonably complex and expensive means for facilities that have nominal cost. AT&T proposed that it merely specify monthly on an aggregate basis (by MTE terminal) the addresses of the MTEs where a CLEC has obtained access and the cables and pairs it is using there.

Qwest is entitled to bill for the wiring if it owns it; LSRs efficiently provide for billing regularity and completeness. LSRs also provide for the control necessary to support maintenance and repair, carrier switching, and customer-turnover needs. However, a brief delay in LSR processing by Qwest would expedite subloop ordering and lessen CLEC burdens in submitting information to Qwest. Therefore, Qwest should change the SGAT to preclude delay in CLEC access while it processes LSRs for MTE access to on-premise wiring. Qwest should hold those LSRs in suspense while it accumulates the information needed to identify CLEC terminations, then include that information in the LSR, and process it after CLECs proceed to gain access to the facilities involved.

3. CLEC Facility Inventories

The SGAT allows Qwest to inventory CLEC cable and pair terminations at MTEs. AT&T proposed instead a requirement that Qwest, at its expense, mark its owned or controlled on-premises wire and related facilities, tagging each cable pair currently being used to serve an end user. Qwest did not propose any reason for inventories other than to provide information necessary for LSRs. The inventories, as discussed under the immediately preceding issue, may be performed during the LSR suspense period. For the reasons discussed under the same issue, AT&T's alternate facility identification proposal should not be adopted.

4. Determining Ownership of Inside Wire

The on-premise wire at MTEs could be owned by Qwest, by the MTE owner, or by the occupants. Only in the former case is a CLEC required to get access to it from Qwest. Absent an owner's self-declaration of ownership, AT&T would allow Qwest 10 days to determine ownership, but would limit the response period to one day if another CLEC had already sought Qwest ownership information at the same MTE. It is reasonable to place upon Qwest the burden of determining facility ownership before it charges for those facilities. Therefore, absent bad faith by CLECs in MTE owner assertions of on-premise wire ownership, Qwest should also be responsible for costs beyond reasonable and minimal costs for examination of its records.

Determining ownership should take only a nominal amount of time after the issue has already been raised by another CLEC at the same MTE. Moreover, where a CLEC can provide Qwest with a written statement setting forth the basis for a claim that the MTE owner also owns the on-premises wiring, the period should be reduced. The provision of such information will provide Qwest with information that should help it to narrow the activities necessary to make a reasonable investigation of ownership.

5. Intervals

In the event of non-acceptance of its previous arguments about the FCP process, the determination of on-premises wire ownership, and the inventorying of circuit terminations, AT&T asked that the longest interval for determining ownership and inventorying be not greater than 15 days. FCP requirements have been eliminated for on-premises wiring access in a number of MTE situations; the LSR requirements have been eased; the need for a facility inventory is no longer a prerequisite to LSR issuance; and much of AT&T's argument regarding facility inventorying has been accepted. There is therefore no reason to consider added relief on the issue of intervals.

6. Requirement for Qwest-Performed Jumpering at MTEs

AT&T argued against the requirement that Qwest run the jumpers from subloop elements. Qwest said that, because the segregation of CLEC and Qwest equipment was not realistic at FDIs, allowing only Qwest technicians to have access to the FDIs for jumpering was reasonable.[2] The resolution of the first unresolved subloop issue, *Subloop Access at MTE Terminals*, recommended a case-by-case analysis of the needs and circumstances associated with unique and varying outside plant configurations and conditions. That consideration includes issues associated with jumpering. The record here does not support allowing CLECs to perform such work outside the context of in- or on-building MTE terminals. However, CLECs can presently request such authority as described under the first issue, and it should be granted to them where its propriety can be supported by showings made in the context of specific requests.

7. Expanding Explicitly Available Subloop Elements

AT&T argued that the SGAT must address the full range of subloop elements and access points contemplated by the FCC, which AT&T listed as including a large number of specific types and access points. Qwest responded that the "very limited" demand for subloops to date and the very large number of potential subloop access points made it impractical to develop standard offerings for more than the most likely expected circumstances. Qwest's brief offered the Special Request Process for additional subloop offerings for which there is not substantial "reasonably foreseeable demand."

Qwest's loop plant comprises a wide range of configurations and circumstances. It is not appropriate to expect Qwest to undertake the effort to design standard offerings for every conceivable case, without reference to potential demand for them. Qwest's offering of the special request process provides an adequate mechanism for considering such offerings when they become more tangible. We can address any potential inefficiency in the Special Request Process at the upcoming workshop on general SGAT terms and conditions.

[2] The subject of making connections at MTEs occasioned much testimony at the workshop. Qwest agreed to eliminate a distinction that it had been making between enclosed and open terminals that were located in buildings. Qwest agreed to allow CLECs to make connections and to eliminate the requirement of an FCP in either type of terminal.

Packet Switching

The parties raised and resolved prior to the briefs a total of seven issues related to Packet Switching. Five issues remained to be resolved by the facilitator. Of these five issues, one requires SGAT language changes; four require no change; assuming that Qwest has made substantial progress in developing prices for packet switching in the near future, Qwest should not be deemed to be in compliance with this checklist item before it makes the changes necessary to deal with the five issues. However, upon making those changes, Qwest can be deemed to have met its burden of proof, subject to the completion and commission consideration of the results of any OSS testing that may relate to the item. The five issues and the proposed resolutions are summarized below.

Packet switching is an alternative that allows CLECs to provide high-speed data services where suitable alternatives are not available, such as copper loops to the central office or the ability to collocate CLEC DSLAMs remotely. CLECs have said that Qwest's increasing use of DLC has magnified CLEC difficulties in providing competitive DSL services, because there are fewer continuous copper loops connecting end users with Qwest central offices. CLECs either need appropriate electronics on the DLC system, room to remotely deploy a DSLAM that can be connected to the end user's copper subloop, or a continuous, suitable (which generally means of not too long a physical distance) copper loop between the end user and the Qwest central office (a "home run" copper loop).

1 *Availability of Spare Copper Loops*

Several CLECs argued that access to home-run-copper loops will still leave them at a significant disadvantage, when Qwest can transfer signals at much higher rates in areas where it has remotely deployed its DSLAMs to shorten the copper portion of its connection with end users. CLECs, according to AT&T, need to be able to: (a) collocate their DSLAMs at the same place that Qwest has done so, or (b) gain access to Qwest's packet switching as a UNE, in order to be able to deliver service at the same level of quality. The SGAT already says that the test for determining necessary loop capability is the services the CLEC wishes to offer (including the data transfer rate). If a CLEC should wish to offer xDSL services that match all the characteristics of the service that Qwest is providing, then Qwest cannot meet its obligations by providing a copper loop that can only provide some of level service less than that, even if the loop could provide some defined level of DSL service.

AT&T also argued that it should not have to take copper loops in lieu of securing access to unbundled packet switching in cases where it seeks to serve more customers than there are appropriate copper loops. However, AT&T presented no evidence to support a conclusion that satisfaction of its actual orders for services through a combination of copper loops and unbundled packet switching in those cases is discriminatory, or that it would impede CLEC ability to compete for customers.

2 *Denial of DSLAM Collocation*

The ability to collocate CLEC DSLAMs at remote Qwest terminals would overcome the problem of a lack of suitable "home run" copper loops. However, AT&T stated that there was little chance that remote collocation of DSLAMs would give CLECs a "practical competitive

alternative," because too many circumstances would have to converge to make this alternative commonly available. AT&T also said that, because remote terminals and other Qwest field locations where CLECs could remotely deploy DSLAMS serve only limited numbers of customers, CLECs would have great difficulty in gaining the economies of scale necessary to justify such deployment. Therefore, AT&T sought to expand the standard for gaining access to unbundled packet switching from an actual denial of collocation to the economic infeasibility of collocation.

AT&T's proposal depends upon an assumption that there is a substantial difference in the economics of DLSAM deployment between CLECs and Qwest. However, apart from broad claims that were not supported by any specific analysis or quantification, there is nothing in the record to support this assumption. The failure to support those claims with evidence is particularly compelling in a case where, as here, a number of CLECs want to add an entirely new requirement to those already deemed appropriate by the FCC-- a requirement that would essentially rewrite completely the FCC's standard. Qwest's position on this FCC-established condition is appropriate.

3 ICB Pricing

AT&T commented that Qwest has presented no testimony about its prices or provisioning practices for unbundled packet switching. AT&T argued that it was not sufficient to offer ICB pricing. Qwest's brief noted that the company believes it will have finished its development of prices before it makes its Section 271 filing with the FCC. In any event, Qwest argued that its ICB approach would be an adequate interim solution for purposes of Section 271. There is no evidence of record to support a conclusion that price methods, other than ICBs, can now be supported. It is fairly clear that Qwest agrees conceptually that ICB pricing will not remain as the general rule after it completes its pending price development effort. It would prove to be of substantial benefit to complete that effort in time for state commission review as soon as possible, in order to support a conclusion about whether Qwest's final proposed pricing comports with the requirements of the Act.

4 Unbundling Conditions as a Prerequisite to Ordering

AT&T argued that CLECs would suffer competitive disadvantage under a 90-day collocation process, after which the CLEC would learn that collocation will be denied. Only after that denial would the CLEC be able to order packet switching as a UNE. AT&T argued that this long interval would allow Qwest to market its own advanced services, and to provide them on a timelier basis. AT&T sought a change that would: (a) permit simultaneous processing of DSLAM collocation and packet switching UNE requests and (b) set an interval of 10 days or less for Qwest to reject DSLAM collocation requests. Qwest agreed to streamline the processes involved in unbundling packet switching by providing information that would help CLECs to identify in advance those cases where there was likely to be insufficient space for CLECs to collocate DSLAMs remotely.

Qwest's streamlining activities should provide substantially faster notice than AT&T had anticipated. Thus, the introduction of a 10-day collocation denial notice period does not appear to be warranted. However, no evidence or argument was presented to show any necessity for packet

switching service requests to await DSLAM collocation denials. Qwest should therefore be required to respond to DSLAM collocation orders and packet switching orders in parallel.

j Line Card "Plug and Play"

Sprint argued for the right to allow CLECs to place their line cards into Qwest's DSLAM (an option known as "plug and play"). Sprint noted that this option would obviate the need for the "crushing expense of adjacent collocation at remote terminals." Other CLECs made similar arguments. The CLEC concern about extraordinarily long home-run copper loops was addressed under the issue heading of *Availability of Spare Copper Loops* above. That resolution substantially mitigates a claim of further need here. Moreover, as Qwest notes, the technical feasibility of the plug and play option is now being addressed at the FCC. Particularly given the pendency of the FCC proceedings, there is very little evidence on this record to support the conclusion that technical feasibility has been established. Finally, as Qwest also noted, allowing the plug and play option would in effect eviscerate the current FCC standard.

Dark Fiber

The parties raised and resolved prior to the briefs a total of eight issues related to Packet Switching. Four issues remained to be resolved by the facilitator. Of these four issues, two require SGAT language changes; two require no change. Qwest should not be deemed to be in compliance with this checklist item before it makes the changes necessary to deal with the four issues. However, upon making those changes, Qwest can be deemed to have met its burden of proof, subject to the completion and commission consideration of the results of any OSS testing that may relate to the item. The four issues and the proposed resolutions are summarized below.

i Affiliate Obligations to Provide Access to Dark Fiber

AT&T contended that Qwest should be required to make the in-region dark fiber of affiliates available to CLECs, because those affiliates are successors and assigns under Section 251(h) of the Act. In response, Qwest contended that Qwest Corporation is the only U S WEST Communications Inc. successor that provides local telecommunications services in the seven-state region; therefore, QCI's affiliates do not meet the "successor or assign" requirements of the Act. Qwest also argued that Section 251(c) does not extend to an ILEC's long-distance operations or network.

The record here contains no evidence that the Qwest corporate structure has been developed or is being used to deny access to dark fiber in cases where it would, absent such structure, be required to be made available. However, a particularly interesting feature of dark fiber in this situation is that it represents a form of in-place inventory. If Qwest decided, for example, to acquire a right to use such fiber from a third party when and as needed, Qwest certainly could not deny similar access to a CLEC merely on the basis that the inventory was technically owned by a third party. The same general standard should apply to a second-party arrangement (i.e., a lease or right-to-use agreement with an affiliate) as would apply to a third-party arrangement (e.g., Qwest rights to dark fiber that arise under a lease with a financial institution or under a right of use agreement with a customer). The standard should be that if Qwest has access rights for itself, it should not refuse to use them to provide access rights for CLECs.

Accordingly, the SGAT should be changed to provide that Qwest is required to offer access not only to that which it owns directly, but to all dark fiber to which it has a right to access under agreements with any other party, affiliated or not. Moreover, the test should not be based upon the type of form of such agreement, but rather upon the nature and degree of the access that it provides to Qwest.

3 Access to Dark Fiber in Joint Build Arrangements

AT&T sought to allow CLECs to lease dark fiber that exists in "joint build arrangements" with third parties (e.g., other local, adjoining telephone companies), under which Qwest can use the other party's conduit, innerduct, or fiber to transport telecommunications traffic. Qwest testified that it would make available dark fiber in joint build arrangements up to Qwest's side of the meet point, but refused to permit CLECs to obtain access to any rights Qwest may have to the use of the "third party facilities."

The standard to which Qwest should be held here is similar to that set forth in the proposed resolution of the immediately preceding issue. The primary consideration is whether the agreement with the third party gives Qwest, with respect to the fiber owned by the third party, sufficient access rights to make it analogous to directly owned facilities that "carriers keep dormant but ready for service" and that are "in place and easily called into service." The language set forth in the proposed resolution of the immediately preceding issue accommodates this definition. There should also be a means for holding Qwest to a good-faith standard in bargaining away its rights to allow CLEC access in such situations.

5 Applying a Local Exchange Usage Requirement to Dark Fiber

AT&T objected to the application to dark fiber of the same local usage test that the FCC issued with regard to Enhanced Extended Links ("EELs"). AT&T also asserted that the requirement could not be implemented, because the FCC test cannot be applied to dark fiber.

The *UNE Remand Order* says that the loop element can consist of dark fiber, and the transport element can also consist of dark fiber. Paragraph 480 says that EELs are not a separate UNE, but consist of a loop connected to dedicated transport. Thus, when a CLEC secures access to dark fiber that provides the functionality of a loop that is connected to dedicated transport, it secures an EEL, which is a combined loop and transport element. A loop and transport combination that includes dark fiber remains a loop-transport combination. The logic behind the FCC's concern about access charges is in no way diminished because the facilities providing the combination were unlit before a CLEC gained access to them.

4 Consistency With Technical Publications

AT&T noted that SGAT Section 9.7.2.18 incorporated by reference Technical Publication 77384. AT&T determined that the publication's terms were inconsistent with the commitments Qwest has made in the language of the SGAT. According to AT&T, Qwest promised to provide a draft of the modifications to language that made it compliant with the SGAT by March 1, 2001. AT&T indicated that Qwest failed to provide the required language. Qwest in its brief did not identify Section 9.7.2.18 as being in dispute. This issue can be addressed, if the parties have not already resolved it by then, in the upcoming workshop on general SGAT terms and conditions.

We have already adopted the general proposition that the hierarchy among the SGAT, technical publications, operations guidelines and procedures, and the other documents that it will take to make the Qwest/CLEC relationship operate effectively can best be addressed in a general fashion.

IV. Line Sharing

Background – Line Sharing

Line sharing refers to the unbundling of the high-frequency portion of the local loop. Such sharing permits a CLEC to provide xDSL services over the high frequency portion of the loop, while the ILEC continues to provide voice service over the low frequency portion of that same loop. The related concept of line splitting, which will be addressed in the next report, refers to the situation where two different CLECs provide the voice and data services over the same loop, which has been acquired as a UNE from the ILEC. Line sharing operates through the use of splitters at the customer premises and at a central office or remote terminal.

The FCC required unbundled access to the loop's high frequency portion in its *Line Sharing Order*.[3] The FCC said:

> *(1) The high frequency portion of the loop network element is defined as the frequency range above the voiceband on a copper loop facility that is being used to carry analog circuit-switched voiceband transmissions.*
>
> *(2) An incumbent LEC shall provide nondiscriminatory access in accordance with section 51.311 of these rules and section 251(c)(3) of the Act to the high frequency portion of a loop to any requesting telecommunications carrier for the provision of a telecommunications service conforming with section 51.230 of these rules.*
>
> *(3) An incumbent LEC shall only provide a requesting carrier with access to the high frequency portion of the loop if the incumbent LEC is providing, and continues to provide, analog circuit-switched voiceband services on the particular loop for which the requesting carrier seeks access.*

Issues Resolved During This Workshop – Line Sharing

1. Collocating DSLAMs

AT&T requested the ability to collocate DSLAM equipment on Qwest premises.[4] Qwest agreed to allow such collocation in central office and remote locations, subject to space availability. Qwest noted that SGAT Section 8.1.2. has been changed to allow the collocation of DSLAMs.[5] Therefore, this issue can be considered closed.

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[3] *Third Improvement Rule Order*, CC Docket No. 98-147, and Fourth Report and Order, CC Docket No. 96-98, FCC 99-355 (December 9, 1999) (Line Sharing Order).

[4] AT&T's Comments for the Multistate Workshop II (AT&T Comments) at page 29.

[5] Emerging Services Rebuttal Testimony on Line Sharing, Sub Loop Unbundling, Dark Fiber, Packet Switching and Combinations of Karen A. Stewart Qwest Corporation, January 5, 2001(Stewart Rebuttal), at page 7.

3. Direct Connections Option

AT&T argued that the SGAT Section 9.4.2.2.4.2. requirement for CLECs to trunk to every module on the COSMIC frame or MDF (a point, generally at the central office, where loops are terminated, beyond which signals are carried to switching, transport, or CLEC collocation facilities, e.g.) would add unnecessary expense and exhaust COSMIC capacity. AT&T asked Qwest to allow CLECs a direct connections option that would enable them to provision cables to every other or every third module on the COSMIC/MDF.[6] Qwest agreed to allow to such connection at every other COSMIC/MDF line module in SGAT Section 8.3.1.11.2.3.[7] Therefore, this issue can be considered closed.

3. Requiring Separate CLEC "MELD" Runs

A Mechanized Engineering and Layout for Distributing Frame ("MELD") run provides Qwest information for making connections on the COSMIC efficiently. Because separate runs are expensive and not necessary just for addressing CLEC connections, AT&T requested that Qwest input CLEC needs into runs Qwest already planned for itself.[8] Qwest changes to SGAT Section 8.3.1.11.2.3 during the Collocation workshop addressed AT&T's concerns.[9] Therefore, this issue can be considered closed.

4. Allowing for Direct Connection in Common Areas

AT&T requested that the ICDF frame requirement be eliminated in common areas, which would allow direct connection between the COSMIC/MDF and a CLEC.[10] Qwest agreed and it modified the SGAT accordingly.[11] Therefore, this issue can be considered closed.

5. Line Sharing Cost Elements

AT&T noted that it did not agree with rate elements and prices included in the SGAT. The parties agreed that such issues should be considered in a cost docket.[12]

6. Line Splitting

Line sharing contemplates that Qwest will continue to provide voice service over the same circuit that a CLEC uses to provide the same end user with data services. Line splitting differs in that it contemplates that one CLEC will provide the voice services, while another will provide the data services. AT&T argued that the SGAT inappropriately failed to require Qwest to provide the line splitting required by the FCC.[13] This issue was deferred to the subsequent workshop in anticipation of the presentation of a Qwest proposal and SGAT language addressing line splitting. Line splitting will therefore be addressed in the next report.

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[6] AT&T Comments at page 33.
[7] Simpson Rebuttal at page 7.
[8] AT&T Comments at page 33.
[9] Simpson Rebuttal at page 8.
[10] AT&T Comments at page 33.
[11] Simpson Rebuttal at page 8.
[12] AT&T Comments at page 34 and Simpson Rebuttal at page 8.
[13] AT&T Comments at page 34.

Issues Remaining in Dispute – Line Sharing

1 Ownership of and Access to Splitters

AT&T testified that Qwest should be required to own splitters and to make them available to CLECs on a line-at-a-time basis, citing technical and practical considerations.[14] Rhythms and New Edge commented that Qwest should be required to purchase and maintain splitters, at the option of CLECs. They defended this approach by saying that the splitter should be placed close to the Qwest distribution frame, in order to minimize cable length, maximize the use of existing tie cables, make the most efficient use of central office space, and provide economies through bulk purchases.[15]

Qwest said that CLEC ownership of the POTS splitters necessary for line sharing was the method provided for in the original FCC *Line Sharing Order*. Qwest also said that the FCC has upheld the positions that ILECs need not provide access to their splitters in the SWBT 271 Order.[16] Paragraph 327 of that order stated that, "We [the FCC] did not identify any circumstances in which the splitter would be treated as part of the loop." AT&T did not brief this issue.

Proposed Issue Resolution: It is very clear that existing FCC requirements provide no basis for obliging Qwest to provide splitters and to make them available to CLECs on a line-at-a-time basis. Neither has the evidence in this proceeding provided any basis for concluding that a requirement for such access is necessary or appropriate. There is no evidence to support a conclusion that CLEC installation of splitters would impose distance, cable length, or central-office space problems. SGAT Section 9.4.2.3.1 allows for the location of CLEC splitters in common areas. Qwest will maintain common-area splitters.[17]

That CLECs could gain greater economies if Qwest combined CLEC and its own splitter needs for purchasing and maintenance purposes is not the issue. The same is true for virtually every other item of equipment used by both ILECs and CLECs, from trucks to switches. Nevertheless, the SGAT provides for Qwest to act as purchasing agent for CLECs in securing splitters. Therefore, there is not a basis for concluding that Qwest fails to meet checklist requirements by declining to provide splitters at its central offices for use by CLECs in support of line sharing.

2. Tying Qwest Data Service and Voice Service

AT&T argued that Qwest has made a policy decision to disconnect Megabit service from a customer deciding to change to a CLEC for local voice service over the same loop.[18] Citing the "hundreds of thousands" of Qwest Megabit service customers, AT&T argued that Qwest's decision to "walk away" from an established, profitable business reflects an intention to create entry barriers for CLECs seeking to provide voice services. The argument was that Qwest retail

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[14] AT&T Comments at page 35.
[15] Joint Initial Comments of Rhythms Links, Inc. and New Edge Networks Regarding Emerging Services (Comments of Rhythms and New Edge), at pages 12 and 13.
[16] Qwest Brief at page 25.
[17] Direct Testimony of Karen A. Stewart on Behalf of Qwest Corporation Re: Emerging Services and Checklist Item 5 (Stewart Direct) at page 15.
[18] February 27, 2001 Transcript at pages 79 through 85.

customers will be less likely to abandon Qwest's voice services, if doing so would also require them to abandon the high-speed data services that they secure from Qwest through Megabit.

Qwest acknowledged that its provision of voice and Megabit services to one of its end users over the same loop is the functional equivalent of line sharing. Qwest cited paragraph 26 of the *Line Sharing Reconsideration Order* as holding that an ILEC is not required to provide xDSL service when it is no longer the voice provider. Qwest said that the FCC also held in its Texas 271 decision that an ILEC has no obligation to provide UNE-P Combinations with xDSL data service:

> *Under our rules, the incumbent LEC has no obligation to provide xDSL service over this UNE-P carrier loop. In the Line Sharing Order, the Commission unbundled the high frequency portion of the loop when the incumbent LEC provides voice service, but did not unbundle the low frequency portion of the loop and did not obligate incumbent LECs to provide xDSL service under the circumstances AT&T describes. Furthermore, as described above, the UNE-P carrier has the right to engage in line splitting on its loop. As a result, a UNE-P carrier can compete with SWBT's combined voice and data offering on the same loop by providing a customer with line splitting voice and data service over the UNE-P in the same manner. In sum, we do not find this conduct discriminatory.*

Qwest argued that its practice was not a barrier to entry because CLECs could offer their own xDSL service or partner with another carrier who does.[19]

AT&T responded by saying that the FCC did not reject AT&T's argument in this regard, but merely found that Qwest's policy did not violate the *Line Sharing Order*.[20] In fact, AT&T noted, the FCC left explicitly open the question of the impact of ILEC denials of xDSL service when it loses voice service over the same line to a CLEC:[21]

> *To the extent that AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with the Commission's rules and/or the Act itself, we encourage AT&T to pursue enforcement action.*

Proposed Issue Resolution: This issue has its roots in the nature of the FCC's consideration of line sharing. Specifically, it considered and approved the unbundling of the high frequency portion of loops to expand competition for data services. It did not apparently consider, at least so far, the question of unbundling the low frequency portion to promote competition for voice services. This is essentially all that the FCC said in the quoted portions of the Texas decision. It has reserved for another day the question of whether actions such as Qwest takes in these circumstances impermissibly constrain competition. The FCC has decided that it will not exercise its responsibility to set new general policies in narrow proceedings, like the Texas 271 case cited by Qwest.

[19] *Qwest Brief* at page 21
[20] *AT&T Brief* at pages 24 and 25.
[21] *Line Sharing Reconsideration Order* at ¶ 26.

However, nowhere has the FCC stated that its own failure yet to declare a rule of general applicability should serve as a bar to state commission consultation on the very same issues that such a policy would address. Had it done so, the FCC would turn the state commission consultative process into merely a fact finding exercise to determine whether its existing policies of general applicability across the country, exactly as it has expressed them, are being carried out in the states where Section 271 compliance is being sought. Clearly, the states, as the Congress and the FCC have confirmed on many occasions, anticipate a much more robust role for state commissions.

Insofar as this question is concerned, that role requires a determination of the competitive impacts of Qwest's decision to withdraw from customers its Megabit service where a CLEC uses sharing to provide xDSL services across a loop's high frequency portion. Qwest's policy not to continue to offer its Megabit services when a CLEC captures a customer for voice services gives grounds for concern.

The evidence of this concern in the current marketplace for xDSL services makes appropriate an examination into the reasons why Qwest takes this approach. The record disclosed that there are no technical feasibility issues; in fact, when Qwest provides both voice and megabit service over the same loop to the same end user, it concedes that it is, for practical purposes, engaging in line sharing. Qwest raised no billing, customer perception or satisfaction, or other substantial business reasons either. AT&T claimed that Megabit service was profitable and was growing at a very fast rate on Qwest's system. Qwest did not refute this claim either at a general or specific, detailed level. The only reason Qwest offered at all in defense of its policy was that it had not undertaken the actions necessary to isolate Megabit service as a stand-alone Qwest retail offering.

The most logical conclusion to be drawn from the evidence of record is that Qwest's refusal to continue to provide Megabit services in these circumstances:

- More than likely is the result of an intention by Qwest to seek to retain voice service by creating consequences to switching voice services that Megabit customers are particularly likely to see as adverse in the current marketplace
- Certainly has the effect of inhibiting competition for voice services (for customers now taking or likely to take Megabit services), whatever Qwest's underlying intention may be.

Qwest's discussion of antitrust principles may be interesting as general background, but it is not determinative here. The Telecommunications Act of 1996 surely does not set as a standard of performance any ILEC conduct that would withstand antitrust scrutiny. ILECs were already subject to that standard. What is necessary to open markets and to promote competition in an industry whose infrastructure is dominated by ILECs is much more to the point. When viewed against this standard, Qwest should not be considered to be in compliance with public interest requirements as long as it maintains a policy of denying its end users Qwest's own Megabit or xDSL services when it loses a voice customer to a CLEC through line sharing.

3 Line Sharing Over Fiber Loops

AT&T argued that, in contravention of the *Line Sharing Reconsideration Order* at ¶¶ 10 through 13, Qwest was not obliged by its SGAT to provide line sharing over fiber loops. Rhythms considers the obligation to provide line sharing over the fiber portion of loops to be clear, citing paragraph 10 of the FCC's *Line-Sharing Reconsideration Order*:

> *We clarify that the requirement to provide line-sharing applies to the entire loop even where the incumbent has deployed fiber in the loop (e.g. where the loop is served by a remote terminal).*

Rhythms and New Edge commented that Qwest bears the burden of demonstrating that it is not technically feasible to unbundle loops, including cases where DLC has introduced fiber into the loop.[22] Rhythms also noted that the refusal of Qwest to offer such line sharing in an appropriate manner would make circumstances more difficult for competitors as IDLC installations increased the amount of fiber in the loop portion of Qwest's network.[23] Rhythms and New Edge commented that allowing CLECs to place line cards[24] in remotely deployed Qwest equipment would allow line sharing. Under this scenario, Qwest could make line sharing available by providing:

- An xDSL copper loop from the NID to the customer side of the Qwest remote terminal
- Electronics at the remote terminal to derive the bandwidth necessary
- Transport over the Qwest feeder network from the remote terminal back to the central office.

Qwest argued that there was no apparent dispute over the fact that line sharing over digital loop carrier and fiber would cause garbled signals. Its witness testified that it was not technically feasible to line share, except on a copper loop.[25] Qwest said that the FCC required line sharing only over the copper portion of the loop. Qwest argued that it does what the FCC has required at paragraph 12 of the *Line Sharing Order*, which provides that:

> *Where a competitive LEC has collocated a DSLAM at the remote terminal, an incumbent LEC must enable the competitive LEC to transmit its data traffic from the remote terminal to the central office. The incumbent LEC can do this, at a minimum, by leasing access to the dark fiber element or be leasing access to the subloop element.*

Beyond that, Qwest said, the FCC has merely recognized the possibility of line sharing over fiber portions of loops, which is demonstrated by the issuance of two notices of proposed rulemakings to look at technical feasibility.[26]

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[22] Comments of Rhythms and New Edge at page 5.
[23] Rhythms Brief at pages 7 and 8.
[24] The comments (at page 10) said that this "plug and play" option would allow the CLEC line card to perform the functions of the DSLAM.
[25] February 27, 2001 Transcript at pages 90 and 91.
[26] Qwest Brief at page 17.

Qwest did offer language that partially addressed this issue, by proposing a new SGAT Section 9.4.1.1:[27]

> *To the extent additional line sharing technologies and transport mechanisms are identified, and Qwest has deployed such technology for its own use, and Qwest is obligated by law to provide access to such technology, Qwest will allow CLECs to line share in that same manner, provided, however, that the rates, terms and conditions for line sharing may need to be amended in order to provide such access.*

Qwest argued that the Illinois Commerce Commission order cited by CLECs did not in fact order Ameritech to provide line sharing over fiber, but rather directed Ameritech to provide as UNEs "Lit Fiber Subloops" and the "High Frequency Portion of copper subloops."[28] That is, according to Qwest, not only different from line sharing over fiber loops, but also exactly what Qwest does offer.

Proposed Issue Resolution: There is no evidence of record that would support a conclusion that Qwest fails to provide any technically feasible form of line sharing over fiber. There were CLEC arguments about whether the SGAT acknowledged the need to address line sharing over fiber loops. The language of Section 9.4.1.1 does so. The only argument against its general propriety would be that it fails to deal on a routine basis with other technologies and methods already proven to be feasible for providing line sharing over fiber facilities. The record will not support a conclusion that there are such methods or technologies. The only one specifically cited in comments and testimony was the "plug and play" option addressed in the comments of Rhythms and New Edge. The feasibility of this method is at issue now before the FCC, which will presumably decide it upon much more than the scant evidence available here. A decision on that option should therefore come from the FCC and, when it does, the language of SGAT Section 9.4.1.1 is already expansive enough to address the option, should it prove a feasible and effective one.

4. Provisioning Interval

Rhythms proposed that Qwest provision line-sharing in three days, and that Qwest further reduce the interval to one day over time, citing an Illinois Commerce Commission order establishing such an interval in an Ameritech docket. Rhythms said that Qwest failed to respond to CLEC evidence that Qwest need only perform a lift-and-lay at the central office in order to provide line sharing. Rhythms also cited testimony from Qwest in support of the proposition that no dispatch

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[27] Qwest Brief at page 18.

[28] Arbitration Decision on Rehearing, *Covad Communications Company Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues, Rhythms Links, Inc. Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues*, Docket Nos. 00-312/00-313 (consol.), 2001 Ill. PUC LEXIS 205 (February 15, 2001), at pages 94 and 95.

of technicians would be required for line sharing.[29] Rhythms argued that the results that Qwest submitted for its retail DSL installations[30] did not support Qwest's claim that it took Qwest 10 days (averaging dispatch and no dispatch orders, with no dispatch averaging 70 percent of the total) on the retail side. Rhythms also said that the paragraph 174 of the *Line Sharing Order* makes it clear that provisioning intervals for xDSL capable loops should be determinative, not parity with the delivery of retail xDSL service.[31]

Rhythms also noted that the FCC made a finding in paragraph 175 of the *Line Sharing Order* that would actually support significantly shorter intervals where no dispatch is required. Specifically, the FCC observed that intervals should be much shorter where the ILEC was already providing the equivalent of line sharing for itself (i.e., already providing data services in addition to voice services to the same customer over the same facilities). Rhythms took this comment as reflecting an FCC assumption that dispatch was generally necessary where the ILEC was not already providing data services at a time when a CLEC requested line sharing. The Qwest data supported an inference of a 30 percent dispatch rate (very generously at that, according to Rhythms).[32] Rhythms closed by inviting attention to the Act's Section 706 admonition to each state commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."

Qwest argued that the FCC required ILECs to provision line sharing under intervals similar to those in which ILECs provide DSL service to their own end users. Qwest noted that the basis upon which the FCC decided to unbundle line sharing as a network element was its concern that failure to do so would inhibit the ability of CLECs to offer the equivalent of a service that ILECs were offering to their retail customers.[33] Qwest said that the five-day line-sharing interval to which it would commit here is significantly less than what it was offering to its own retail customers. Qwest argued that provisioning interval parity with retail operations is the clear standard under the *Line Sharing Order*, which held that:[34]

> *As a general matter, the nondiscrimination obligation requires incumbent LECs to provide to requesting carriers access to the high frequency portion of the loop that is equal to that access the incumbent provides to itself for retail DSL service its customers or its affiliates, in terms of quality, accuracy and timeliness. Thus, we encourage states to require, in arbitration proceedings, incumbent LECs to fulfill requests for line sharing within the same interval the incumbent provisions*

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[29] Rhythms Brief at pages 3 and 4, citing *In re Covad Communications & Rhythms Links Inc. Petition for Arbitration to Establish An Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company*, No. 00-0312 et al., Arbitration Decision (August 17, 2000) (Illinois Arb. Order), at pp. 24-27; rehearing granted on other grounds on February 15, 2001(Arbitration Decision on Rehearing).

[30] At the request of the facilitator, without objection from the participants, and with the option (unexercised as it turned out) for the participants to raise questions about the submission.

[31] Rhythms Brief at pages 4 and 5.

[32] Rhythms Brief at page 6.

[33] Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *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*, CC Docket Nos. 98-147 & 96-98, FCC 99-355 (Rel. December 9, 1999) ("*Line Sharing Order*") at ¶ 33.

[34] *Line Sharing Order*" ¶ 173 (emphasis added).

> *xDSL to its own retail or wholesale customers, regardless of whether the incumbent uses an automated or manual process.*

Qwest testified that its retail DSL provisioning interval is ten days.[35] Qwest noted that the Rhythms testimony would support at most a day or two on top of the Qwest wholesale interval of five days.[36]

Proposed Issue Resolution: Line sharing is only one of the activities that a CLEC must accomplish to provide xDSL services to an end user. CLECs need to undertake further actions after line sharing is secured. Qwest itself concedes that a day or two would be necessary. Therefore, establishing the line-sharing interval as parity with retail service initiation would place CLECs at a competitive disadvantage. Qwest's brief in effect appears to acknowledge that this conclusion is valid, although it does argue that parity with retail DSL provisioning is the standard. We begin by recommending that the correct standard should be one that promotes parity with Qwest retail performance, provided that it recognize:

- That the extra time required by CLECs to complete work to initiate service needs to be accommodated
- That, to the extent that Qwest's total interval to initiate service includes unnecessary time subsequent to loop provisioning, there is no sound reason for imposing time inefficiencies on CLECs as well.

The current Performance Indicator Descriptions (PID) document addresses loop-related intervals under Performance Measure OP-4. Where the PID does address intervals, it provides an important and perhaps determinative reference point for addressing the adequacy of provisioning intervals to allow CLECs a reasonable opportunity to compete with Qwest for local service customers. However, OP-4 does not adopt a specific standard for line sharing. Therefore, we do not have substantial guidance from the ROC in addressing the CLEC concern about provisioning intervals for line sharing.

The evidence of record does lead to the conclusion that Qwest's five-day interval will allow ample opportunity overall for CLECs to complete remaining work in time to provide end users with xDSL services within time frames that are competitive with what Qwest is now applying. Rhythms criticized the information provided by Qwest in response to a request by the facilitator, but those criticisms focus on factual circumstances that Rhythms could have explored earlier, but chose not to address until its brief. Moreover, the explanations provided in the information were reasonable, and suffered no self-evident inaccuracies or gaps. The information included a rational explanation of the way that Qwest records performance, including the creation of reporting categories, not all of which appear to be applicable to line sharing. That information supports a determination that Qwest's five-day interval is appropriate and, even allowing two days or more for additional CLEC work, will make CLEC service-delivery times competitive with those of Qwest.

[35] February 27, 2001 transcript at page 30.
[36] February 27, 2001 transcript at page 36.

The reasonableness of the five-day interval is also supported by its consistency with the loop intervals for which OP-4 does provide a specific benchmark (i.e., a fixed interval, rather than a parity-with-retail standard). As Rhythms itself noted, unbundled loop intervals are a more meaningful standard than parity with retail service delivery.

Therefore, Qwest's five-day provisioning interval is an appropriate reflection of circumstances that exist today. However, the record does not adequately address the issue of why provisioning need take five days where no dispatch is required. It also is not helpful in determining how to disaggregate the interval if a significantly shorter period were allowed for no-dispatch provisioning. Even more seriously, the need for a total Qwest retail interval approaching 10 days has not been addressed. Qwest's fixed five-day interval is defensible as allowing CLECs a substantial opportunity to meet or beat the 10-day Qwest retail service-initiation interval. If Qwest succeeds in materially shortening the 10-day interval, however, a failure to change the five-day line-sharing interval could leave CLECs disadvantaged. Accordingly, the future variability of the period for DSL services, which we need to recognize are "emerging" services, could render a fixed five-day line-sharing interval inappropriate.

It is perhaps comforting that OP-4 defines the line sharing interval standard as "diagnostic," which indicates that Qwest, the CLEC community, and regulators will be examining performance results and assessing, as time passes, what that information shows about performance comparability and, more importantly, what to do about the standard in response. Based upon this understanding of the status of the PID, the acceptance of Qwest's five-day interval should be with the following conditions:

- It is based upon allowing parity in initiating service to end users as between CLEC and Qwest end users
- It is based on the premise that Qwest provisioning is and remains at roughly 10 days
- It is subject to change if and as the ROC decides to change the PID based upon its consideration of results under the OP-4 diagnostic standard for line sharing
- It is also subject to change as Qwest retail intervals drop, under the general standard that the CLEC line sharing interval should remain at two days less than Qwest's retail interval for xDSL services
- If it can be demonstrated that Qwest is: (a) provisioning more than 25 percent of CLEC line sharing orders without dispatch, (b) providing xDSL service to at least the same percentage of its own end users without dispatch, and (c) there is a demonstrated difference of more than 2 days in provisioning with versus without dispatch, then the CLEC provisioning interval will be disaggregated.

V. Subloop Unbundling

Background – Subloop Unbundling

The FCC recognized that the *First Report and Order* left unfinished the question of access to incumbent networks beginning at points closer to the customer. When it returned to the issue, the FCC found that CLECs sought access to subloop elements to accomplish a number of purposes:

- Connect to incumbent co-premises wire
- Gain access to loops that incumbents fed over IDLC
- Provide advanced services over xDSL

The FCC determined that a lack of access to unbundled subloops was materially diminishing CLECs' ability to offer services, and that the granting of such access would stimulate the development of competitive loops over time. Therefore, the FCC decided to require ILECs to provide access to subloops where technically feasible.[37]

The FCC defines subloops as the portions of the ILEC loop that can be "accessed at terminals in the incumbent's outside plant." An accessible terminal "is a point on the loop where technicians can access the wire or fiber within the cable without removing a splice case."[38]

The FCC intended to create a broad and forward-looking definition of subloops:

> *We believe that a broad definition of the subloop that allows requesting carriers maximum flexibility to interconnect their own facilities at these points where technically feasible will best promote the goals of the Act. Our intention is to ensure that the subloop definition will apply to new as well as current technologies.*

Issues Resolved During This Workshop – Subloop Unbundling

1. Subloop Definition

AT&T said that Qwest's SGAT Section 9.3.1.1 definition of subloops was at variance with the FCC's definition as expressed in paragraph 205 of the *UNE Remand Order*. AT&T also questioned what Qwest meant in establishing under Section 9.3.1.1 a new point identified as the "Service Area Interface."[39] Qwest agreed to change the definition and it explained that the SAI was merely another term for the FDI.[40] This issue can be considered closed.

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[37] *UNE Remand Order* at ¶¶ 204 and 205.
[38] *UNE Remand Order* at ¶ 206.
[39] AT&T Comments at page 21.
[40] Stewart Rebuttal at page 17.

2. Unbundling All Loop Types

AT&T said that the SGAT should address access at all available speeds, including: (a) 2-wire copper, (b) 2-wire non-loaded copper, (c) 4-wire copper, DS-1 carrier, (d) DS-3 carrier, and (e) OC-3 through OC-xx SONET over fiber. AT&T noted that the SGAT and Interconnection and Resale Resource Guide (IRRG) do not adequately cover any of these elements, access points, or interface speeds and media. AT&T claimed that CLECs would need to have access to Qwest subloop elements at a variety of locations, in a variety of conditions, and to support a variety of network configurations.[41]

Qwest agreed, but noted that loops at DS3 and above have only "feeder" portions and that its cost model for fiber-based loops does not contain a traditional distribution component.[42] This issue can be considered closed; however these workshops leave open the issue of how costs for subloop elements should be modeled for pricing purposes.

3. Spectrum Restrictions

AT&T argued that the SGAT Section 9.3.2.1 restriction on spectrum usage for the two-wire distribution subloop element (between 300 and 3000 Hz) should be eliminated, because it would deny CLECs the full use of the element's capabilities, which is not consistent with the *UNE Remand Order* at ¶¶166-176.[43] Qwest testified that it would allow DSLAM and splitter collocation where space permits; thus making access to the high frequency portions of loops available to CLECs.[44] Therefore, this issue can be considered closed.

4. Subloop Ordering Information

AT&T asked that Qwest: (a) explain the practical operation of the SGAT Section 9.3.6.1 requirement that "CLEC will use the termination information provided at the completion of the FCP on the LSR for Sub-Loops" and (b) provide in the LSR all the NC/NCI codes for subloop elements that a CLEC might identify.[45] Qwest explained that the process would be similar to the provision of APOT information at the end of a central office collocation installation. Qwest provided a technical publication reference for obtaining NC/NCI code information.[46] This issue can be considered closed.

5. Rights of Way

AT&T commented on several aspects of the adjacent collocation that the SGAT contemplates at FCPs. First, AT&T observed that the right of way acquisition provisions of Section 9.3.8.1 were inconsistent with and should be changed to conform to the generally applicable right of way provisions of Section 10.8. Second, AT&T requested SGAT acknowledgement of the right of CLECs to build their own single points of interconnection or access for subloop elements, and to make the connections necessary for such access.[47] Qwest agreed to change the SGAT to make applicable the provisions of SGAT 10.8.

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[41] AT&T Comments at pages 10 and 11.
[42] Stewart Rebuttal at page 10.
[43] AT&T Comments at page 20.
[44] Stewart Rebuttal at page 17.
[45] AT&T Comments at page 23.
[46] Stewart Rebuttal at page 20.
[47] AT&T Comments at page 25.

AT&T also wanted to add assurances that Qwest would add no other obligations involving securing rights of way or other authorizations from landowners.[48] Qwest said that its changes to Section 9.3.8.1 would serve to give CLECs access to any applicable Qwest rights, but that if additional agreements were needed with landowners, e.g., for cross connecting from CLEC facilities to the FCP, CLECs would be obliged to procure them independently.[49] This issue can be considered closed.

6. Dispute Resolution

AT&T commented that SGAT Section 9.3.8.3 would require it to use dispute resolution or arbitration under Section 252 of the Act to address denial of access to subloop elements. AT&T felt that a more expeditious means of resolving disputes was required, given Qwest incentives not to be cooperative in providing access. [50]

Qwest agreed to remove the language, but noted that the SGAT's generally applicable dispute resolution procedures would apply to these, as well as other disputes.[51] This issue can be considered closed.

7. Copper Feeder and Fiber Subloops

Qwest responded to AT&T's request for subloop access in "fiber to the curb" configurations by saying that the fiber portion of the network in such cases was feeder, not distribution. Qwest agreed that it would provide collocation space or packet-switch unbundling where the conditions for the latter were met (packet switching is addressed separately in this report).[52] Qwest also opposed creating a standard offering for copper feeder subloops, because it projected virtually no demand for them, noting that AT&T declined to answer a Colorado discovery request seeking information about AT&T's projected use of this element.[53] Qwest did agree to make copper feeder subloop elements available by the special request process, through a change to SGAT Section 9.3.1.7.[54] Qwest also said that its agreement to provide dark fiber at accessible terminals, through SGAT Section 9.7, had proven acceptable to AT&T, which sought access to fiber subloops. Qwest also noted that SGAT Section 9.2.2.3.1 provides for access to high-capacity loops at accessible terminals, to which AT&T also agreed.[55]

AT&T's brief agreed to treat these two subloop types as "nonstandard" offerings, which would only be available through Qwest's "Special Request Process." AT&T reserved its opportunity to address general concerns about the special request process (which applies to many situations other than subloop access) in the upcoming workshop on general SGAT terms and conditions.[56] This issue can be considered closed.

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[48] AT&T Comments at page 25.
[49] Stewart Rebuttal at page 22.
[50] AT&T Comments at page 25.
[51] Stewart Rebuttal at page 23.
[52] Stewart Rebuttal at page 15.
[53] Stewart Rebuttal at page 16.
[54] Qwest Brief at page 54.
[55] Qwest Brief at page 55.
[56] AT&T Brief at pages 66 and 67.

Issues Deferred – Subloop Unbundling

1. Undefined Rates

AT&T recognized that these workshops do not include the evidence necessary to examine the reasonableness of particular rates. Nevertheless, it commented that Qwest should at least be required in SGAT Section 9.3.5 to explain the basis on which Qwest would calculate the rates for recurring charges, nonrecurring charges, and the trouble isolation charge, in order to be able to assess whether or not such charges will be discriminatory.[57] Qwest responded that it would include subloop pricing in SGAT Exhibit A (where prices for all services are generally addressed), but that all pricing issues should be deferred to cost proceedings.[58] Qwest also noted that its cost studies have averaged shorter MTE distribution costs with the costs of its remaining distribution facilities which overall are longer. Any change to this approach, according to Qwest, should only be addressed in cost dockets, where the balancing of policy and economic considerations could be more fully addressed.[59]

It is difficult to see how a conceptual treatment of pricing would be helpful at this point. Whether the prices that Qwest proposes in SGAT Exhibit A will meet all applicable standards, including any discrimination test, will depend upon the specific and detailed means by which Qwest supports them, much as is the case for loops and other UNEs. It is fair to express concern about the basis for prices not yet provided or supported, but it is necessary to defer those questions to proceedings that can address them on the basis of focused and detailed cost information and analysis.

2. Pricing for Overly Broad Definitions of Subloop Categories

AT&T argued that CLEC cost increases would result from the Qwest decision to limit subloops to two categories in SGAT Section 9.3.1.2. By this overly broad approach, AT&T said, Qwest would effectively raise the prices to CLECs, by including general feeder or distribution costs that were not appropriate to the more narrowly defined and more extensive list of subloop elements requested by AT&T.[60]

In its brief, AT&T also argued that subloop pricing for campus environments should be based on narrower costs than included in Qwest's pricing for distribution subloops. This argument is similar to the one made in AT&T's testimony, but it addresses a narrower scope. The issue that AT&T briefed was whether a CLEC should pay the same price for the on-campus portion of a Qwest loop as it does when it takes a subloop that extends from the FDI to a customer's location. AT&T seemed to argue that this issue is more than a pricing issue, and, therefore, should be decided here. However, the brief did not serve to distinguish the problem it cited from those typical of the price "de-averaging" issues that are typically dealt with in pricing proceedings. As is true for the broader issue of costs and pricing, this issue should be deferred to proceedings that can more fully address more general deaveraging issues and, as appropriate, the detailed costs that underlie particular loop portions and functionalities.

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[57] AT&T Comments at page 20.
[58] Stewart Rebuttal at page 17.
[59] Qwest Brief at page 56.
[60] AT&T Comments at pages 21 and 22.

Issues Remaining in Dispute – Subloop Unbundling

1. Subloop Access at MTE Terminals

AT&T argued that the FCC has made it clear that technically feasible points for gaining access to subloops include accessible terminals at MTEs.[61] In particular, AT&T cited ILEC control over "on premises" wiring as a barrier to competition. AT&T phrased this issue in terms of whether the SGAT was consistent with FCC rules addressing NID access. AT&T cited the *UNE Remand Order* paragraph 233 description of the NID as including:

> *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.*

AT&T further argued that the FCC's redefinition of the NID in this order has special significance in the MTE context. Specifically, AT&T said that the change closed a gap CLECs had in reaching customers in cases where ILECs own or control the on-premises wiring that extends between the NID and wiring of the landlord, the building owner, or presumably the end user. The NID thus became in this context not the demarcation point between LEC and customer facilities, but the physical device connecting distribution plant with premises wiring. The demarcation point in this context could therefore be downstream from the NID (i.e., between the NID and the point where Qwest control over on-premises wiring ended).

The critical aspect of the FCC's order was that it made the demarcation point, rather than the NID, the key factor in determining where a loop stops on the end user side, according to AT&T. Therefore, there could be multiple demarcation points, e.g., one per building or one for every end user located in the building, depending upon location-specific circumstances. Therefore, the demarcation point could be at, within, or outside the NID.[62] AT&T sought assurances that it could get access to premise wiring in accord with the FCC's conception of demarcation points at MTEs.

Qwest's brief considered AT&T's continuing focus on NID definition to be misplaced, because the definition was only relevant when Qwest wanted to require collocation to get subloop access at MTE terminals. Having agreed not to require collocation at MTE terminals, Qwest considered the argument about NID definitions to be without practical import in this context. [63] Nevertheless, Qwest continued by offering a construction of the *UNE Remand Order* that differed from the one urged by AT&T. Qwest cited paragraph 234 as supporting the conclusion

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[61] AT&T Brief at page 40, citing *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, CC Docket 88-57; *First Report and Order and Further Notice of Proposed Rulemaking in* WT Docket No. 99-217, *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, (rel. October 25, 2000) ("MTE Order")

[62] AT&T Brief at pages 43 and 44.

[63] Qwest Brief at page 37

that the NID is equivalent to the demarcation point between "carrier and customer premises facilities".

Qwest asserted that AT&T's motivation in seeking a different definition of the NID was to avoid the FCC Rule 319(a)(2)(D) provision that the subloop access is subject to FCC collocation rules. While agreeing to waive collocation requirements at MTE terminals inside buildings, Qwest continued to assert that CLECs must comply with collocation rules when gaining access to subloop elements at accessible terminals, which include MTE terminals.[64]

Proposed Issue Resolution: The framing of the question in terms of NID definition appears to presume that the answer will by definition determine provisioning intervals and the degree of direct or unmediated access CLECs will secure to the points where subloop elements begin and end. For example, if the point of access to the subloop element is within what is described as the NID, then there is a contention that it cannot be subject to collocation requirements; conversely, if it is not within the NID, then there arises the argument that collocation and its 90-day standard intervals apply. There also arises the related argument that Qwest can demand measures, such as separate cross-connection facilities, as part of its right to segregation of facilities in collocation situations.

As one might expect, AT&T took a position on the NID definition question that would eliminate the 90-day collocation intervals, and would allow it fairly free access to the terminal involved. No more surprisingly, Qwest took a contrary position. However, neither position comports with what we consider to be the less dogmatic and a more pragmatic approach that is required here. It is difficult to conceive that the FCC in addressing subloop unbundling had in mind the rote application of collocation and CLEC access rules that have been crafted primarily with reference to more traditional and very different collocation environments; e.g., central offices. In any case, we do not propose a resolution here that will provide simple definitional answers. Such answers cannot be expected to respond to the full range and wide variety of possible field conditions at Qwest's "accessible terminals," i.e., those places where subloop access is required.

The benefits of a more case-specific approach were very well demonstrated on the record of this workshop. We began the discussion of MTE terminal access by addressing a Qwest proposal that would have allowed free CLEC access to Qwest terminals inside buildings in the case of unenclosed, in-building terminals connecting Qwest facilities to the on-premises wiring of end users. However, where the terminal was enclosed, regardless of how substantial or secured that enclosure might be, Qwest would have required a separate CLEC cross-connect block, collocation, and presumably Qwest performance of jumpering between CLEC and Qwest facilities. Moreover, all these steps could be avoided in those cases where the on-premises wiring on the customer-facing side of the Qwest terminal was owned by the building owner, rather than by Qwest.

There ensued a long and very illuminating discussion of the service reliability, safety, work efficiency, cost, and engineering and operating practices of the alternative means for providing CLEC access to such in-building terminals under the various physical and on-premise wiring ownership scenarios that might exist. Photographs depicting the principal possible configurations

[64] Qwest filing at page 40

aided that discussion. The discussion was between the engineering and operations personnel of the carriers; it was entirely unencumbered by definitions from FCC orders or presumptions that any particular FCC access rules must apply. From the discussion, it became clear what kind of equipment segregation was necessary from an engineering and operations standpoint, and, in turn, what intervals were appropriate. In other words, we did not begin from arguing which standard, pre-defined FCC situation was most analogous, and end by applying standard conditions or intervals on the basis of who won the definitional argument. Rather, we began from an examination of case-specific circumstances and let an emerging understanding of the particular situation at hand lead to what became a reasonably self-evident set of necessary conditions, limits, and durations.

The clarity of the solution, when viewed from this pragmatic perspective was underscored by Qwest's agreement to drop its previous distinctions between closed and unenclosed terminals. It was gratifying that the parties were able to agree on a solution in this context. It was less appealing to note that, in their briefs, they continued to try to approach the problem in other remaining contexts by relying upon the same collocation and NID arguments.

At least, the problem of collocation and Qwest-mediated access to accessible terminals has been resolved in the case of all in-building (and on-building) terminals. However, the dispute remains for all of the other accessible terminals that exist in Qwest's outside plant. Unfortunately, we do not have a record that will allow for a prior and similarly pragmatic solution in those cases. In fact, making such a record for all possible cases would appear to be unmanageable anyway, given the evidence from all sides confirming the wide variety of circumstances that exist in Qwest's network.

However, we should note that the in-building MTE terminal location appeared to be the one of greatest concern, and therefore greatest likelihood for common CLEC use to gain access to subloop elements. The ability to get to the practical bottom of that case suggests the wisdom of a similar approach to other situations. AT&T clearly prefers advance solutions to as many access types as possible, fearing appropriately that market entry plans could be delayed by the need for time consuming processes, such as BFRs. However, the workshop consideration of this issue showed the benefits of a case-by-case approach. Moreover, it shows that advance solutions can be worked out for particular configuration types, provided that the focus is on the factors relevant to those particular types. Therefore, there is no reason why the development of such solutions need await the time when live customers are waiting for service.

Therefore, the resolution of this issue (outside the context of in- or on-building MTE terminals) should not try to define the problem away generally by recourse to broad FCC NID and collocation definitions and requirements, which are not helpful in this particular context. There should rather be recognition in the SGAT of the need to address the particulars of access to "accessible" terminals for subloop elements. The following SGAT language will accomplish this purpose:

> *(a) For any configuration not specifically addressed in this SGAT, the conditions of CLEC access shall be as required by the particular circumstances. These conditions include: (1) the degree of equipment separation required, (2) the need*

for separate cross-connect devices, (3) the interval applicable to any collocation or other provisioning requiring Qwest performance or cooperation, (4) the security required to maintain the safety and reliability of the facilities of Qwest and other CLECs, (5) the engineering and operations standards and practices to be applied at Qwest facilities where they are also used by CLEC's for subloop element access, and (6) any other requirements, standards, or practices necessary to assure the safe and reliable operation of all carriers' facilities.

(b) Any party may request, under any procedure provided for by this SGAT for addressing non-standard services or network conditions, the development of standard terms and conditions for any configuration(s) for which it can provide reasonably clear technical and operational characteristics and parameters. Once developed through such a process, those terms and conditions shall be generally available to any CLEC for any configuration fitting the requirements established through such process.

(c) Prior to the development of such standard terms and conditions, Qwest shall impose in the six areas identified in item (1) above only those requirements or intervals that are reasonably necessary.

2. Requiring LSRs for Access to Premise Wiring at MTEs

AT&T argued that the requirement to submit LSRs to gain access to such subloops unjustifiably discriminates against CLECs. LSRs represent to AT&T a complex and expensive means for acquiring access to facilities that have nominal cost, and which Qwest can use for its own purposes without similar burdens.[65] Rather than submitting an LSR, AT&T proposed that it specify monthly and in aggregate (by MTE terminal) the addresses of the MTEs where a CLEC has obtained access and the cables and pairs it is using there.[66]

AT&T stated that the cable and pair information would suffice to provide Qwest the carrier facility assignment (CFA) information needed to bill CLECs; it is not necessary to use an LSR for providing billing information. AT&T said that Qwest's failure to provide as a late-filed exhibit the promised OBF document addressing subloop access supports a conclusion that there is at least as yet no industry standard that addresses subloop billing information.[67]

AT&T also said that an LSR is not necessary to address maintenance and repair needs. AT&T said that concerns about mistakes or sabotage in installing service at MTE terminals exist whether or not Qwest owns the on-premises wiring, and that Qwest failed to say how an LSR would affect the occurrence of installation problems. AT&T argued that its proposed monthly notifications, combined with its proposal that all parties identify their facilities separately, would be adequate notice to Qwest for maintenance and repair purposes.

[65] AT&T Brief at page 46.
[66] AT&T Brief at page 47.
[67] AT&T Brief at pages 48 and 49.

AT&T proposed language for SGAT Sections 9.3.8.3, 9.3.8.8, and 9.3.8.10, in order to address its proposals for monthly provision of circuit and pair information, billing and payment, and facility identification.

Qwest argued that LSRs represent an industry standard for wholesale orders generally. More specifically, Qwest asserted that the Ordering and Billing Forum, which is the national forum for LSR ordering guidelines, creates the "de facto" standard for ordering. Qwest said that its soon-to-be issued draft solution for subloop unbundling will require an LSR for subloop ordering.[68]

Qwest also said that the LSR information that it requires for subloops is substantially the same as what it requires for loops. Moreover, Qwest noted, AT&T conceded that more than half of the orders involved would require an LSR anyway, because of the prevalence of number porting when local service customers switch carriers. In summary, Qwest argued that the information is necessary for a number of reasons:[69]

- Allowing the CLEC representative to validate that interconnection point information is valid and will be accepted
- Providing billing information without which inefficient manual billing systems would be required
- Providing the information Qwest needs to fulfill its maintenance and repair obligations
- Providing in a readily available format the information necessary to allow customers later to switch to other carriers smoothly
- Preventing unexpected problems in connecting a customer who moves into vacated premises, but wishes to take service from a different carrier than the one serving the customer who vacated
- Putting burdens on technicians to make uninformed decisions about installation or service matters.

Proposed Issue Resolution: AT&T's argument about the low cost and the low incidence of repair for on-premises wiring does not support its proposed long-term solution. Because Qwest is entitled to bill for the wiring if it owns it, it is also entitled to regularity and completeness for billing purposes. LSRs provide an efficient means of getting Qwest's billing systems the information needed; comparable manual methods would not be efficient; and AT&T's solution is simply not rigorous enough to offer Qwest what it is entitled to have when it makes its facilities available for CLEC use as subloop elements.

AT&T similarly errs in concluding that the high reliability of the on-premises wiring makes maintenance and repair needs insufficient to justify LSRs for access to on-premises wiring. High reliability might reduce repair incidences, but it will not eliminate them. Qwest has a legitimate business need to have the information it requires to respond efficiently to repair requests. Moreover, the fact that customers may continue to switch carriers also argues for control over the information about which facilities serve them. Similarly, customers who move into vacated premises are by no means certain to want service from the same carrier who served the prior

[68] Qwest Brief at page 41.
[69] Qwest Brief at pages 42 through 44.

occupant. Allowing for the creation of reliable information without significant delay is also important for these service transfers. LSRs, which will be the standard means of getting such data into Qwest's information systems, serve these purposes more effectively than would AT&T's approach.

Therefore, there should be no general waiver of LSR requirements for CLEC access to Qwest's on-premises MTE wire as a subloop element. However, the issue of whether the LSR process can and should be altered to meet the particular needs of this element remains relevant. Depending on decisions about issues that cannot be resolved here, such as price deaveraging, the administrative costs imposed by a traditional application of LSR requirements could profoundly alter the overall costs of securing access to on-premises wire. We should not lightly adopt requirements that make the processing of requests of a service the most expensive cost of securing it. In addition, the issues of customer switching and cycling of occupants do not necessarily argue for advance LSR submission, provided there is an effective way of providing it soon after a CLEC begins to serve a customer. The undisputed fact that such facilities will have a substantially lower trouble rate also would support a brief delay in the provision of LSR information, provided that other reasons support such a delay.

There are such reasons. AT&T presented evidence that the addition of an LSR period would always put CLECs at a disadvantage relative to Qwest in serving customers. Qwest did note that such a delay would occur in many cases anyway, due to the number of switches that require number portability, which clearly requires an LSR. However, it would appear that for more than a third (at least) of AT&T LSRs involving a change of service provider, number portability is not required.

Therefore, if there is a way to provide for an alternate method of submitting LSRs to avoid costs or delay, the circumstances warrant it. The record makes it clear that such a method exists. If a CLEC provides Qwest with LSR filing, but Qwest holds it in suspense for five days, a CLEC could proceed with connection of its facilities to Qwest's on-premises wiring and begin service delivery. Such an LSR could inform Qwest's systems to begin payment responsibility from the beginning of suspense period, thus obviating any concern about payment for all services delivered. During the five days, Qwest could also secure the circuit identifying information and enter it directly (i.e., not requiring Qwest to route it to the CLEC for re-entry into an LSR for filing with Qwest). Thus, within five days, Qwest would have the data needed to support repair and maintenance, service provider change, and occupant cycling needs. Such a short period would mitigate concerns about these needs under the circumstances unique to on-premises Qwest wiring in MTEs.

Qwest testified that this approach would not impose upon it any substantial inefficiency, and would generally meet its concerns about billing and service issues.[70] This approach would also save CLECs the burden and costs associated with entry of the circuit-identifying information (which would otherwise be secured by Qwest and passed along to CLECs as described elsewhere in this portion of this report). It provides an effective balancing of the concerns of Qwest and AT&T. In contrast, AT&T's approach would be less satisfactory in addressing Qwest's billing and its service concerns. Moreover, the facility tagging requirements, which Qwest would have

[70] February 28, 2001 Transcript at page 237.

to meet at its own expense, introduces inefficiency, and begs the question of why Qwest should tag facilities to support access by CLECs. Therefore, the SGAT should contain a provision as follows:

> *For access to Qwest's on-premises MTE wire as a subloop element, a CLEC shall be required to submit an LSR, but need not include thereon the circuit-identifying information or await completion of LSR processing by Qwest before securing such access. Qwest shall secure the circuit-identifying information, and will be responsible for entering it on the LSR when it is received. Qwest shall be entitled to charge for the subloop element as of the time of LSR submission by CLEC.*

3. CLEC Facility Inventories

SGAT Section 9.3.3.5 requires that Qwest inventory CLEC cable and pair terminations at MTEs. AT&T proposed instead a requirement that Qwest, at its expense, mark its owned or controlled on-premises wire and related facilities, tagging each cable pair currently being used by Qwest to serve an end user. AT&T took the position that, if Qwest had no reason to conduct an inventory earlier, then the entry of a competitor at the MTE terminal adds no reason to perform an activity that only benefits Qwest operationally. Moreover, AT&T's belief in the low failure rate of on-premises wire meant that even Qwest would not gain much in terms of maintenance and repair needs by requiring inventories. AT&T also argued that identifying facilities would be much less intrusive and more effective than inventories as a means of informing technicians providing new services, changing customers over, or maintaining existing ones of which carrier is currently using what facilities at MTEs.[71]

AT&T therefore asked that its facility identification proposal (its proposed SGAT Section 9.3.8.3) replace Qwest's inventorying proposal contained in Section 9.3.3.5. As an alternative to its Section 9.3.8.3 proposal, AT&T asked that it be permitted to provide any termination information deemed necessary when it contacts Qwest to seek a determination of who owns on-premises wiring at MTEs. AT&T also objected to Qwest charges for inventorying CLEC facilities under SGAT Section 9.3.6.4.1.[72]

Qwest's argument focused on whether inventories needed to be completed before, rather than after, CLECs have completed their installation processes. Qwest said that it should precede installation because the inventory is a prerequisite to LSR issuance. Qwest inventories of CLEC facilities provide addressing information for subloop terminations, which are recognizable when a CLEC issues an LSR for a subloop. Qwest argued that the service delay impact of a five-day interval for inventories is mitigated because it need only be done once per MTE, i.e., as part of the CLEC's first subloop order at the MTE.[73]

Proposed Issue Resolution: Qwest did not propose any reason for inventories other than to provide information necessary for LSRs. The inventories, as discussed under the immediately preceding issue, may be performed during the LSR suspense period. For the reasons discussed under the same issue, AT&T's alternate facility identification proposal should not be adopted.

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[71] AT&T Brief at pages 52 and 53.
[72] AT&T Brief at page 54.
[73] Qwest Brief at page 47.

4. Determining Ownership of Inside Wire

AT&T cited FCC requirements for ILECs to negotiate in good faith to relocate a minimum point of entry (MPOE) within 45 days when requested by the owner, and for ILECs to provide information about the demarcation point between ILEC and owner facilities within 10 days. SGAT Section 9.3.5.4.1 allowed Qwest 10 days (measured from CLEC notification of an intent to provide service at an MTE) to determine what on-premises wire Qwest owned. AT&T would allow CLECs to rely upon an owner's declaration of ownership of on-premises wire, thus negating the need to await Qwest's determination, which could entail a 10-day delay.

Absent an owner's self-declaration of ownership, AT&T would allow Qwest 10 days to determine ownership, but would limit the response period to one day at MTEs where another CLEC had already sought Qwest ownership information. AT&T would also require Qwest to absorb the costs of the ownership determination.[74] AT&T argued that its proposal was reasonable because: (a) Qwest conceded that it too would sometimes need to consult or negotiate with the owner about ownership, (b) paragraphs 54 and 56 of the FCC's *MTE Order* creates a presumption that the owner can make a determination of wire ownership, and (c) Qwest's position that a CLEC would be converting Qwest property absent proof that the owner of the MTE also owned the on-premises wire conflicts with the policy behind the *MTE Order*. AT&T therefore asked that its proposed SGAT Sections 9.3.8.2 and 9.3.8.4 be accepted in lieu of Qwest's proposed Section 9.3.5.4.1.[75]

Qwest supported the existing SGAT language as providing a reasonable way for determining where exactly its maintenance and repair obligations would extend. Qwest considered AT&T's concern to be largely a matter of extending the time before CLECs could be able to provide service.[76]

Proposed Issue Resolution: The issue has two aspects: (a) responsibility for the Qwest costs involved in determining ownership, and (b) whether and by how much the ownership determination should delay CLEC access to subloop UNEs.

The determination of ownership is principally relevant to the question of whether CLECs must pay Qwest costs associated with on-premises MTE wire. Only if Qwest owns the facilities or the rights to their use could it be entitled to payment. The SGAT does not directly address the question of responsibility for ownership determinations. It is reasonable to place upon Qwest the burden of determining facility ownership before it charges for those facilities. Therefore, it should be responsible for the costs of such determination beyond reasonable and minimal costs for examination of its records. Such costs should be based upon the premise that Qwest is obligated to keep adequate and reasonably retrievable records associated with facility ownership. To the extent that failure to do so imposes added burdens, Qwest should absorb them. Qwest should also be entitled to reimbursement for any incremental ownership determination actions that it is forced undertake as a result of bad-faith CLEC actions associated with an assertion of ownership by parties other than Qwest.

[74] AT&T Brief at page 56.
[75] AT&T Brief at pages 56 and 57.
[76] Qwest Brief at page 47.

Much of the pricing for subloop elements remains to be initially determined by Qwest. Qwest should complete the design of its pricing in accord with these requirements.

The timing issue remains to be resolved. AT&T made a valid argument that determining ownership should take only a nominal time period after the issue has already been raised by another CLEC at the same MTE. Moreover, where a CLEC can provide Qwest with a written statement setting forth a reasonably clear, supported, and complete basis for a claim that the MTE owner also owns the on-premises wiring, the period should be reduced. The provision of such information will provide Qwest with information that should help it to narrow the activities necessary to make a reasonable investigation of ownership.

Therefore, SGAT Section 9.3.5.4.1 should be revised to include at its end the following sentence:

> *In the event that there has been a previous determination of on-premises wiring ownership at the same MTE, Qwest shall provide such notification within two (2) business days. In the event that CLEC provides Qwest with a written claim by an authorized representative of the MTE owner that such owner owns the facilities on the customer side of the terminal, the preceding ten (10) day period shall be reduced to five (5) calendar days from Qwest's receipt of such claim.*

5. Intervals

In the event of non-acceptance of its previous arguments about the FCP process, AT&T asked that, for the determination of on-premises wire ownership and the inventorying of circuit terminations, the longest interval for determining ownership and inventorying be not greater than 15 days. AT&T noted that Qwest discussed intervals of up to 30 days for open building terminals, and 45 days for closed building terminals.[77]

Qwest began its response on the interval question with a defense of the 10 calendar-day period for determining ownership, which Qwest said was less than the 10 business days to which it was entitled to have under the *MTE Order*.[78] Qwest said that it would, upon completion of the ownership determination, take up to five days for performing an inventory (but only if it were for the first LSR for subloop access at an MTE). Qwest argued that this one-time per-MTE interval for basic infrastructure reasons, which could take up to 15 days, was reasonable and unlikely to delay CLECs, who have their own work (e.g., placing the CLEC terminal and running conduit to the Qwest terminal) to do in any case.[79]

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[77] AT&T Brief at page 48.

[78] Qwest Brief at page 48, citing First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, 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, *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, CC Docket No. 96-98 & 88-57, FCC 00-366 (Rel. October 25, 2000) ("*MTE Order*") ¶ 16.

[79] Qwest Brief at pages 49 and 50.

Qwest also noted that AT&T did not specifically criticize the standard collocation interval of 90 days where the SGAT required FCPs. Qwest noted that it had eliminated the FCP requirement for building MTE terminals, limiting it to detached terminals.[80]

Proposed Issue Resolution: FCP requirements have been eliminated for on-premises wiring access in a number of MTE situations; the LSR requirements have been eased; the need for a facility inventory is no longer a prerequisite to LSR issuance; and much of AT&T's argument regarding facility inventorying has been accepted. There is therefore no reason to consider added relief on the issue of intervals.

6. Requirement for Qwest-Performed Jumpering at MTEs

The pre-filed testimony and comments of the parties addressed jumpering generally, i.e., not specifically in the context of MTEs. AT&T argued that the SGAT Section 9.1.8.4 requirement that Qwest run the jumpers from subloop elements at discounted Qwest cageside allows for abuse by Qwest.[81] Qwest objected to changing the provision, which it said was consistent with the practice of other RBOC's, and which it said was consistent with legal precedent addressing the ability of ILECs to segregate their equipment in collocation centers.[82] Qwest said that, because segregation was not realistic at FDIs, allowing only Qwest technicians' access to the FDIs for jumpering constituted a reasonable solution.

The subject of making connections at MTEs occasioned much testimony at the workshop. Qwest agreed to eliminate a distinction that it had been making between enclosed and open terminals that were located in MTE buildings. Qwest agreed to allow CLECs to make connections and to eliminate the requirement of an FCP in either type of terminal.

Qwest also agreed to eliminate requirements that CLECs establish at MTE terminals the separate cross connect field that Qwest earlier required, in order to avoid technician uncertainty about facility ownership.[83] Qwest noted that it had already extended requirements by allowing CLECs to run the jumpers at in-building MTE terminals. Qwest was not willing to extend this approach to other MTE terminals; its systems would not support it there.[84]

Proposed Issue Resolution: The recommended solution to the first unresolved subloop issue, *Subloop Access at MTE Terminals*, provided for a case-by-case analysis of the needs and circumstances associated with unique and varying outside plant configurations and conditions. That recommended solution included issues associated with jumpering. The record here does not support allowing CLECs to perform such work outside the confines of in- or on-building MTE terminals. However, CLECs can request such authority as described under the first issue and it should be granted to them where its propriety can be supported by showings made in the context of specific requests.

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[80] Qwest Brief at page 50.
[81] AT&T Comments at page 34.
[82] Stewart Rebuttal at page 29, citing *GTE v. FCC*, 205 F.3d 416 (D.C. Cir. 2000).
[83] Qwest Brief at page 37.
[84] Qwest Brief at page 52.

Qwest believed that the establishment of demarcation points through the collocation procedures would allow for the application of many of the aspects securing the feeder and distribution subloop elements, which the SGAT does address in some detail. Qwest considered this approach to be consistent with the requirements of the FCC's August 10, 2000 *Order on Reconsideration and Second Further Notice of Proposed Rulemaking* in CC Docket No. 98-147.

Qwest did agree to change the provisions requiring the use of the BFR process for other than the SGAT's standard subloop elements. Qwest offered to use instead the ICB (individual case basis) process. Qwest cited the example of feeder/distribution interfaces, of which it said there were more than 70,000 in its network, all of them subject to different field conditions and local regulations that can impose difficulties in using them as access points to subloop elements.[89]

Qwest's brief then moved further on this issue by offering the Special Request Process for additional subloop offerings for which there is not substantial "reasonably foreseeable demand." It considered this process adequate to make added offerings available, should they prove to be needed.

Proposed Issue Resolution: The participants agreed that Qwest's loop plant comprises a wide range of configurations and circumstances. It is not appropriate to expect Qwest to undertake the effort to design standard offerings for every conceivable case, without reference to potential demand for each. AT&T did little more than list all the conceivable types of unbundling that might be of concern to it in the future. Where there was one of particular interest or importance, e.g., access to MTE terminals and on-premise wiring, AT&T gave specific information about its needs and plans and about the details of gaining the access it felt it needed. In other cases, AT&T did not do the same.

It is appropriate to examine the alleged gaps in the SGAT in light of claimed needs. It is not appropriate to criticize Qwest for a failure to address configurations about which no CLEC provided any concrete expression of current or near term need. In these circumstances, Qwest's offering of the special request process allows for the consideration of such offerings when they become more tangible. There is also no reason why that process, once it identifies what terms and conditions are appropriate to specific circumstances, cannot serve to establish generally available offerings where appropriate. Finally, we will address the specifics of the Special Request Process at the upcoming workshop on general SGAT terms and conditions. To the extent that it is not efficient enough to address this particular need as well as it might, changes to it can be addressed at that time.

[89] Stewart Rebuttal at pages 13 and 14

VI. Packet Switching

Background – Packet Switching

Some networks divide messages into units, which are typically called packets, frames, or cells. Packet switches route these message units among network users. The FCC considers the DSLAM a part of the functionality of packet switching. DSLAMs split the voice and data signals carried over copper wire. The voice portion is transmitted toward a typical telecommunications switch, while the data signals are transmitted to a packet switch. Overall, the FCC defines packet switching as:[90]

> *The function of routing individual data units, or "packets," based on address or other routing information contained in the packets.*

The FCC did not unbundle packet switching in the *First Report and Order* because it considered the record inadequate to support it. However, the *UNE Remand Order* did require ILECs to unbundle packet switching when four conditions are met:[91]

- Qwest has provided end users with loops aided by digital loop carrier or a systems that replaces copper with fiber optic equipment in distribution facilities
- Qwest does not have spare copper loops that will provide adequate home run capability
- Qwest has not permitted CLECs to deploy CLEC DSLAMs at Qwest remote terminals or other suitable interconnection points in the area in question
- Qwest has deployed packet switching capability for its own use.

Issued Resolved During This Workshop – Packet Switching

1. Defining Packet Switching

AT&T commented that the SGAT Section 9.20.1 definition of packet switching was not consistent with that required by paragraph 304 of the *UNE Remand Order*.[92] Qwest agreed to modify the definition in a manner that proved acceptable to the parties in workshops in another state.[93] This issue can be considered closed.

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[90] *UNE Remand Order* at ¶ 304.
[91] AT&T Comments at page 45, citing the *UNE Remand Order* at ¶ 313.
[92] AT&T Comments at pages 56 and 57.
[93] Stewart Rebuttal at page 27.

2. Defining the Condition Regarding No CLEC Collocation of DSLAMS

AT&T commented that SGAT Section 9.20.2.1 did not conform to the requirements of FCC Rule 51.319, without specifying where in particular the problem lay.[94] Qwest agreed to change the condition to better match FCC language addressing the condition applicable to circumstances involving the failure of Qwest to permit collocation of CLEC DSLAMs.[95] This issue can be closed as it relates to the specific wording of this condition; however, disputed issues about the application of the condition remain for resolution below.

3. Access at Any Feasible Point

AT&T commented that SGAT Sections 9.20.2.2 through 9.20.2.5 should be broadened to make it clear that access to packet switching could be gained at any technically feasible point.[96] Qwest changed SGAT Sections 9.20.2.2 and 9.20.2.3 to address this concern.[97] This issue can be considered closed.

4. Availability of CLEC-Specified Packet Switching Options

AT&T asked for clarification of what Qwest meant by the SGAT Section 9.20.2.6 reference to "as available" CLEC options. Qwest testified that this section's intent was to allow CLECs to choose all available switching-equipment options, not only those currently being used by Qwest for its own end users.[98] This issue can be considered closed.

5. Limiting Access to Packet Management Systems

Qwest uses these systems to provision the virtual channel for packet network service. AT&T expressed concern about the SGAT Section 9.20.2.7 prohibition on CLEC access to those systems.[99] Qwest responded that it is not possible to build a firewall that will allow more than one entity to have access. Qwest did commit to give access that Qwest would mediate, through use of service orders, and to allow direct CLEC access should an acceptable means of partitioning be developed in the future.[100] This issue can be considered closed.

6. Separate Rate Elements for Packet Switching Components

AT&T expressed concern that the establishment of separate rate elements for the Customer Channel, the Switch Loop Capability, and the Switch Interface Port, suggested the existence of not one, but three separate UNEs.[101] Qwest replied that there is only one packet switching UNE, but that the way it costed the element produced three rate elements, which had the benefit of allowing CLECs to save costs if they could self-provision the associated transport elements. Qwest also acknowledged that the reasonableness of the magnitudes of these elements would be better considered in cost dockets.[102] Therefore, this issue can be considered closed for the purposes of these proceedings.

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[94] AT&T Comments at page 57
[95] Stewart Rebuttal at page 29
[96] AT&T Comments at page 57.
[97] Stewart Rebuttal at page 30.
[98] Stewart Rebuttal at page 30.
[99] AT&T Comments at page 58.
[100] Stewart Rebuttal at page 31
[101] AT&T Comments at page 58.
[102] Stewart Rebuttal at page 31

7. Satisfying the Condition Relating to DSLAM Collocation Denial

In response to concerns about how CLECs could make the SGAT Section 9.20.4 showing of a denial of access to remotely deploy a DSLAM, Qwest worked with CLECs to modify the section to specify available methods.[103] The incorporation of those methods into the section closes this issue. Qwest made a similar change to respond to an AT&T request to specify how a CLEC could comply with the connectivity requirement of this SGAT section.[104]

8. Maintenance and Repair Responsibilities

AT&T commented that SGAT Section 9.20.5 should be modified to provide for certain joint CLEC/Qwest responsibilities, such as cooperative testing.[105] Qwest asked for more specification about the nature of such activities. Qwest interpreted the lack of AT&T follow up on this issue in other states' workshops as an indication that the issue was closed.[106] The lack of AT&T response or briefing of this issue indicates that it can be considered closed.

Issues Remaining in Dispute – Packet Switching

1. Availability of Spare Copper Loops

AT&T commented that Qwest is increasingly using digital loop carrier (DLC) technology to:

- Multiply the number of loops that its facilities can serve (a practice known as "pair gain")
- Extend loops to geographically remote areas
- Enable Qwest to provide advanced services.

AT&T said that this increased use of DLC has increased CLEC difficulties in providing competitive DSL services, because there are fewer continuous copper loops connecting end users with Qwest central offices. CLECs either need appropriate electronics on the DLC system, room to remotely deploy a DSLAM that can be connected to the end user's copper subloop, or a continuous, suitable (which generally means of not too long a physical distance) copper loop between the end user and the Qwest central office (a "home run" copper loop).[107]

Therefore, AT&T said, the FCC required Qwest to provide unbundled packet switching (which will allow a CLEC to secure a loop that will provide advanced services of the same quality as Qwest or any data affiliate provides) when the four applicable conditions were met in an area where CLECs want to serve end users:[108]

- Qwest has provided end users with loops aided by digital loop carrier or a systems that replaces copper with fiber optic equipment in distribution facilities
- Qwest does not have spare copper loops that will provide adequate home run capability

[103] Stewart Rebuttal at page 32.
[104] Stewart Rebuttal at page 33.
[105] AT&T Comments at page 59.
[106] Stewart Rebuttal at page 33.
[107] AT&T Comments at pages 45 and 46.
[108] AT&T Comments at page 45, citing the *UNE Remand Order* at ¶ 313.

- Qwest has not permitted CLECs to deploy CLEC DSLAMs at Qwest remote terminals or other suitable interconnection points in the area in question
- Qwest has deployed packet switching capability for its own use.

AT&T argued that providing home run copper loops, even where they are available, will not enable CLECs to provide services at the same quality that Qwest can provide in cases where Qwest does not use such loops, but has remotely deployed DSLAMs. Such Qwest DSLAMs shorten the distance that signals travel over copper, thus enabling higher rates of data transfer. AT&T cited the example of ADSL, over which the data transfer rate more than quintuples if the copper portion is reduced from 18,000 to 9,000 feet.[109]

In summary, according to AT&T, giving CLECs access to home-run-copper loops will still leave them at a significant disadvantage, when Qwest can transfer signals at much higher rates in areas where its remotely deployed DSLAMs shorten the copper portion of its connection with end users. CLECs, according to AT&T need to be able to: (a) collocate their DSLAMs at the same place that Qwest has done so, or (b) gain access to Qwest's packet switching as a UNE, in order to be able to deliver service at the same level of quality.

Therefore, AT&T recommended that the SGAT Section 9.20.2.1.2 copper loop condition be changed as follows:[110]

> *There are ~~no~~ insufficient copper loops available capable of adequately supporting the xDSL services the requesting carrier seeks to offer.*

The term "insufficient" would address circumstances where there are some, but not enough, spare copper loops to support a CLEC's general business offering of DSL to a neighborhood. The term "adequately" would presumably address the comparability of data transfer rates issue.

Qwest objected to these changes, noting that the SGAT's recitation of the condition followed the FCC's wording and that AT&T's wording would extend Qwest's obligation beyond what the FCC has required. Qwest cited as support for this "no new obligations" standard FCC decisions in other Section 271 proceedings.[111] Qwest also argued that the term "adequately" introduces vagueness to an otherwise clear standard – a standard that unambiguously provides that the condition is met where the available copper loops are not "capable of supporting the xDSL services the CLEC chooses to offer." Qwest also argued that the term "insufficient" also introduces vagueness into what should be a customer-by-customer analysis of availability. Qwest also noted that this issue is likely to be without much practical significance, given the need of Qwest to have remotely deployed DSLAMs, which is another condition that must be met. Qwest said that it would only have remotely deployed its DSLAMs where the available loops will not support xDSL service; therefore, if this other condition has been met, so too will the available copper loop condition, in all probability.[112]

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[109] AT&T Comments at page 48.
[110] AT&T Brief at page 12.
[111] Qwest Brief at pages 3 and 4.
[112] Qwest Brief at pages 5 and 6.

Proposed Issue Resolution: As a threshold matter, Qwest inappropriately seeks to extend the FCC's standard for its own review of Section 271 applications in a way that would make it in effect a limit on state consideration of any issue where the FCC has failed to adopt its own rule or guideline. This argument certainly finds no support in the cited FCC language, which merely says that the FCC will not use its own authority to address itself issues of general significance on which the FCC either has not spoken or has not gone as far as some CLECs wish. Nothing in the language cited by Qwest would support the proposition that states must limit themselves to the precise boundaries set out by the FCC in its orders. The applicable standard under the Act and FCC rules and orders is not in precise conformity with FCC rulings. States may not speak where the FCC has appropriately precluded additional or different state requirements; otherwise, their contribution to the development of competitive markets in their jurisdictions is presumably welcome and certainly proper.

Therefore, we revert to the question of whether Qwest may exclude access to packet switching as a UNE where either of the two conditions exists:

- The spare loops are so long that they will not support data transfer rates at speeds Qwest can offer to the same end users that CLECs would have to serve over such home run loops (the "adequacy" issue)
- There are some spare copper loops in a neighborhood, but not enough to support CLEC efforts to serve there (the "sufficiency" issue).

Qwest's argument that the term "adequacy" would introduce vagueness is correct. The SGAT already says that the test for determining necessary loop capability is not some pre-defined technical standard or data transfer rate, but the services that the CLEC wishes to offer (which include that transfer rate). If a CLEC should wish to offer xDSL services that match all the characteristics of the service that Qwest is providing, then Qwest cannot meet its obligations by providing a copper loop that can only provide a level of service less than that, even if the loop could provide some defined level of DSL service. Moreover, if Qwest is actually providing xDSL service at a level higher than what it guarantees as part of its retail offerings, then the home-run copper loop that Qwest makes available to a CLEC must support the higher actual service level, not merely the level that Qwest guarantees to its end users.

Because the SGAT already provides that copper loops must support services that are at parity if that is what a CLEC requests, and because the ability to deliver service at parity is what AT&T sought, there is no need to alter the SGAT to give CLECs adequate protection.

AT&T's sufficiency argument does not have merit. The FCC has made it clear that where copper loops are available and sufficient (as defined immediately above), providing them constitutes full satisfaction of Qwest's requirements. Moreover, AT&T has presented no evidence to support a conclusion that satisfaction of its actual orders for services needs through a combination of copper loops and unbundled packet switching is discriminatory, or that it would impede CLEC ability to compete for customers. AT&T's addition of sufficiency also would change the basis for determining copper loop availability from the number of orders (or end users) involved to the number that AT&T would like to serve, assuming, one would imagine, that its marketing plans succeeded. Giving CLECs the ability to alter Qwest's obligations on the basis of expectations

(i.e., the customers that AT&T "seeks" to serve) as opposed to firm orders for facility access could have the effect of eviscerating the FCC's conditions. The problem is exacerbated where CLECs can self-define those expectations. It is preferable to address orders as they come, filling them first from available copper loops (assuming that those loops will support the parity of service that AT&T sought), particularly given the complete lack of evidence to support a conclusion that doing so will impose any unfair or otherwise inappropriate burdens on CLECs.

2. Denial of DSLAM Collocation

The ability to collocate CLEC DSLAMs at remote Qwest terminals should help to overcome the problem of a lack of suitable "home run" copper loops.[113] However, AT&T objected to Qwest's contention that the ability to collocate DSLAMs would not be a significant problem. AT&T predicted that collocating its DSLAMs would not prove to be a commonly available solution. AT&T cited the need for a concurrence of too many circumstances to make this alternative commonly available:[114]

- A location that would accommodate physical or virtual collocation of the CLEC DSLAM
- Power, heating, ventilation, and air conditioning to operate equipment
- Enough copper pairs downstream to reach enough customers to use the DSLAM at an economically viable portion of its capability
- Sufficient facilities upstream with enough bandwidth to connect to the CLEC's data network.

AT&T commented that remote terminals and other Qwest field locations where CLECs could remotely deploy DSLAMS serve only limited numbers of customers; therefore, CLECs would have great difficulty in gaining the economies of scale necessary to justify such deployment.[115] Therefore, AT&T sought a change in SGAT Section 9.20.2.1.3, in order to expand the standard from actual denial of collocation by Qwest to economic infeasibility of CLEC DSLAM collocation. AT&T argued that the significant costs and lead time (due to right of way acquisition and installation) and the small numbers of customers to be served from such DSLAMs would make it "extremely difficult" for CLECs to make enough money to justify deployment of their own facilities.[116] AT&T argued that Qwest can gain adequate economies of scale by deploying DLC and DSLAMs, because Qwest does so to "serve most of or the entire base of customers assigned to the remote terminal," whether or not they take advanced services. CLECs, however, would not be likely to capture enough customers for advanced services alone to make support the costs of remotely deployed DSLAMs.[117] Rhythms similarly argued that the economics of DSLAM collocation would make that option ineffective for CLECs.

AT&T recommended changing SGAT Section 9.20.2.1.3 as follows:

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[113] It proved impossible not to digress long enough to note that getting a home run here puts one at a disadvantage; however, this is undoubtedly not the greatest irony induced by efforts to make CLECs and ILECs partners in delivering local exchange service to end users.

[114] AT&T Comments at pages 49 through 51.

[115] AT&T Comments at page 53.

[116] AT& T Brief at page 13.

[117] AT&T Brief at page 13.

> *Qwest has placed a DSLAM for its own use in a remote Qwest Premises but: (i) Qwest has not permitted CLEC to collocate its own DSLAM at the same remote Qwest Premises, or (ii) from CLEC's perspective it would be uneconomical for CLEC to collocate its own DSLAM at the same Qwest Premises, or (iii) collocating a CLEC's DSLAM at the same Qwest Premises will not be capable of supporting xDSL service at parity with the service that can be offered through Qwest's Unbundled Packet Switching.*

Qwest argued that AT&T and Rhythms provided no evidentiary support for their argument about economics, and that, in any case, their request exceeded the scope of these workshops by asking for the introduction of new obligations. Qwest also argued that *Iowa Utilities Board*, 119 S.Ct. 721 (1999), requires the imposition of more than nominal added costs to meet the impairment of competition test for unbundling.[118]

Proposed Issue Resolution: As an initial matter, AT&T's language solution substantially overreaches even its own definition of the problem. It does so by making a CLEC's own and not unbiased perspective on economics the basis for deciding whether the FCC's established conditions for the unbundling of packet switching should be overridden. However, even language that left the decision to an objective standard or decision maker would still depend upon an assumption that there is a substantial difference in the economics of DLSAM deployment between CLECs and Qwest. Apart from broad claims that were not supported by any specific analysis or quantification, there is nothing in the record to support this assumption. The failure to support those claims with evidence is particularly compelling in a case where, as here, a number of CLECs want to add an entirely new requirement to those already deemed appropriate by the FCC. In fact, much more than an addition to the FCC requirements is anticipated; the request is to replace an operational condition with an economic one, which would serve to redefine the applicable FCC standard entirely.

It is difficult to imagine that the FCC has utterly failed to consider any relevant economic considerations. Certainly, we should not here consider them without at least a substantial showing that there are significant economic differences in CLEC versus Qwest deployment. Nothing prevented the participants from discovery and testimony that would specifically address such economic differences. The failure to provide any level of quantification of that difference is material, given the *Iowa Utilities Board* standard for economic impairment.

There is simply no sound basis for deciding that the FCC conditions regarding DSLAM collocation should be supplemented by the addition of an economic feasibility test.

3. *ICB Pricing*

AT&T commented that Qwest has presented no testimony about its prices or provisioning practices for unbundled packet switching. AT&T argued that it was not sufficient to offer ICB pricing.[119] AT&T cited the *Louisiana II* order as authority for the proposition that checklist compliance may be denied for failure to specify any price at all for an element, noting as well that true up commitments are not sufficient where no pricing method has been established.

[118] Qwest Brief at pages 6 and 7.
[119] AT&T Comments at page 56.

Therefore, AT&T argued that Qwest must at least insert specific prices, not merely ICB pricing, into the SGAT.[120]

Qwest's brief noted that the company is currently developing packet switching prices, which it believes it will have established before it makes its Section 271 filing with the FCC. In any event, Qwest argued that its ICB approach would be an adequate interim solution for purposes of Section 271.[121]

Proposed Issue Resolution: Neither Qwest nor the CLEC participants to these workshops has anticipated that cost and price issues would be addressed in cases where recourse to detailed cost studies and analysis would be necessary. There is, quite simply, no evidence of record to warrant a conclusion that price methods, other than ICBs, can now be supported. It is fairly clear that Qwest agrees conceptually that ICB pricing will not remain the general rule after it completes its pending price development effort. It would prove to be of substantial benefit to complete that effort in time for state commission review as soon as possible. However, there is presently no basis for anticipating what that review will produce. From the state perspective, ICB pricing subject to eventual true up is the only currently feasible approach.

4. Unbundling Conditions as a Prerequisite to Ordering

AT&T argued that CLECs would suffer competitive disadvantage under SGAT Section 9.20.4.1. That section would require the 90-day collocation process, after which the CLEC would learn that collocation had been denied. Then, only after that denial, would the CLEC be able to order packet switching as a UNE. AT&T argued that this long interval would allow Qwest to market its own advanced services, and to provide them on a timelier basis. Therefore, AT&T sought a change that would permit:[122]

- Simultaneous processing of DSLAM collocation and packet switching UNE requests
- An interval of 10 days or less for Qwest to reject DSLAM collocation requests.

Qwest interpreted this request as contrary to the FCC's packet switch unbundling Rule 319(c)(3)(B), and as a request to ask the participating states to go beyond what the FCC has required.[123] Qwest noted that it did agreed to streamline the processes involved in unbundling packet switching by:

- Disclosing to CLECs the locations where Qwest has remotely deployed DSLAMs
- Providing a space availability report indicating where there is not space at such locations
- Providing, on CLEC request, a list of locations where Qwest has made decisions to remotely deploy future DSLAMs

Qwest argued that these measures were sufficient to mitigate the timing disparity claimed to exist between Qwest and CLEC ability to provide the services at issue.[124]

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[120] AT&T Brief at page 20.
[121] Qwest Brief at page 16.
[122] AT&T Brief at pages 21 and 22.
[123] Qwest Brief at page 9.
[124] Qwest Brief at page 11.

Proposed Issue Resolution: The central aspect of AT&T's concern appeared to be the risk that 90 days would pass before a CLEC would learn that it could not collocate its DSLAMs. However, the combination of Qwest's disclosures about its current and future DSLAM locations and the issuance of space availability reports should provide substantially faster notice that AT&T had anticipated. Thus, the introduction of a 10-day collocation denial notice period does not appear to be warranted. However, no evidence or argument was presented to show any necessity for packet switching service requests to await DSLAM collocation denials. Because imposing a sequential ordering requirement can extend the date when CLECs can make service available, and because there is no demonstrated support for the requirement, the SGAT should make clear that Qwest should be required to respond to DSLAM collocation orders and packet switching orders in parallel.

5. Line Card "Plug and Play"

Sprint argued for the right to allow CLECs to place their line cards into Qwest's DSLAM (an option known as "plug and play"). Sprint also argued that CLECs should not be limited to the option of extraordinarily long copper loops where Qwest does not have to rely upon "an all-copper solution" and therefore has access that is better suited to providing DSL services. The problem with home run copper loops was addressed earlier under the *Availability of Spare Copper Loops* issue. Specifically, Sprint argued that it should have access to the plug and play option where Qwest uses "next generation" DLC, where line cards will provide the functionality of the splitter and the DSLAM.[125] Sprint noted that this option would obviate the need for the "crushing expense of adjacent collocation at remote terminals."[126]

Rhythms and New Edge also commented that Qwest should be required to permit CLECs to place their line cards into Qwest's remotely deployed terminals. The comments asserted that the option should be required because CLECs "would be impaired in providing line-sharing to end users." The comments noted that this scenario would require CLECs to obtain from Qwest a loop from the customer NID to the customer side of Qwest's remote terminal, electronics at the remote terminal, and transport from the other side of the terminal back to the central office.[127]

Qwest opposed the plug and play option, arguing that:[128]

- The FCC is now considering the issue, but has yet to conclude whether it is appropriate; Section 271 proceedings are not an appropriate forum for imposing new obligations
- The record here does not address the technical feasibility of this option
- Plug and play requires the functionality of the DSLAM to be effective; therefore, allowing it at would be tantamount to eliminating the four conditions that the FCC said were appropriate prerequisites to unbundling packet switching.

Proposed Issue Resolution: The CLEC concern about extraordinarily long copper loops was addressed under the issue heading of *Availability of Spare Copper Loops* above. That resolution

[125] Sprint Brief at page 3.
[126] Sprint Brief at page 5.
[127] Comments of Rhythms and New Edge at pages 10 and 11.
[128] Qwest Brief at pages 12 through 15.

mitigates here any claim of need, whatever its merits might otherwise be. Moreover, as Qwest notes, the technical feasibility of this option is now being addressed at the FCC. Particularly given the pendency of the FCC proceedings, there is insufficient evidence on this record to support the conclusion that technical feasibility has been established.

Finally, as Qwest also noted, allowing the plug and play option would in effect eviscerate the current FCC standard. Absent substantial evidence to support a conclusion that CLECs would generally be denied a meaningful opportunity to compete, unless that standard is fully rewritten, there is no basis for criticizing the general reliance that Qwest places upon it in the development of its SGAT. There has been, as noted above, an almost complete lack of tangible evidence addressing the degree of inherent "diseconomy" CLECs would face if the FCC rule were to stand largely intact. We have only conclusory statements from those who would benefit from the change that is at issue.

VII. Dark Fiber

Background – Dark Fiber

Paragraph 174 of the *UNE Remand Order* provides that the loop element includes dark fiber. The FCC defined dark fiber as fiber that has not been activated by connection to electronics, but that is nevertheless "in place and easily called into service." The FCC analogized such dark fiber to vacant copper wire that is ready for service when required. Paragraph 325 of that FCC order similarly treats the dedicated transport element as including fiber that is in place, but that is unlit by electronics. Thus, the FCC has decided that the loop and transport elements to which CLECs can gain access may consist of dark fiber.

Issues Resolved During This Workshop – Dark Fiber

1. Dark Fiber Forecasts

AT&T expressed concern with the language contained in SGAT Section 9.7.2.2. AT&T suggested that language be added to permit a CLEC to submit a nonbonding, good-faith forecast of dark fiber to Qwest. Qwest expressed concern that it would be required to build to the forecasts.[129] Qwest has removed the language for SGAT Section 9.7.2.2 with no objection from AT&T in its brief. This issue can be considered closed.

2. Access to Dark Fiber Without Collocation

WCOM requested that Qwest modify its SGAT language to permit access to Dark Fiber without collocation in a Qwest central office.[130] Qwest proposed to amend SGAT Section 9.7.2.12 as follows:

> *CLEC must have established Collocation or other technically feasible means of network demarcation pursuant to section 9.1.4 of this Agreement at both terminating points of the UDF-IOF or at the Serving Wire Center of either the UDF-Loop or the E-UDF unless loop and transport combinations are ordered. Qwest will provide fiber cross connects at the serving Wire Center to connect UDF-Loop or E-UDF with UDF-IOF if such are ordered in combination. No Collocation is required in intermediate Central Offices within a UDF or at Central Offices where CLEC's UDFs are cross connected. CLEC has no access to UDF at those intermediate Central Offices.*

AT&T, Sprint, and other CLECs did not object to Qwest's proposed language. This issue can be considered closed.

[129] AT&T Comments at page 4.
[130] Stewart Direct page 3.

3. Testing

CLECs expressed concern that the SGAT would require a CLEC to call repair personnel directly when there arose at the time of installation a problem with dark fiber. Qwest responded by proposing to conduct continuity testing with the CLEC. The proposed testing would be performed jointly with the CLEC on the "Plant Test Date." The continuity test would allow the CLEC to test whether the fiber was working prior to the "Due Date."[131] To incorporate this change, Qwest proposed to modify the SGAT Sections 9.7.2.17 and 9.7.2.17.1. There was no objection to the proposed change, which is generally responsive to the concerns raised. Therefore, this issue can be considered closed.

4. Addition of E-UDF rate elements.

AT&T requested SGAT language for an E-UDF rate element and a more general review of dark fiber rate elements.[132] Qwest proposed revisions to Section 9.7.5 to address AT&T's concern. AT&T did not raise it as an unresolved issue in its brief. Therefore, this issue can be considered closed.

5. Purchase of a Single Dark Fiber Strand

A number of CLECs requested the ability to purchase a single strand of dark fiber. In the Colorado workshop Qwest proposed to modify SGAT Section 9.7.2.4 as follows:

> *Qwest will provide Unbundled Dark Fiber to CLEC in increments of two (2) strands (by the pair). In addition, after May 31, 2001, Qwest will provide Unbundled Dark Fiber to CLEC in increments of one (1) strand. CLEC may obtain up to twenty five percent (25%) of available dark fibers or four (4) dark fiber strands, whichever is greater, in each fiber cable segment over a twelve (12) month period. Before CLEC may order additional UDF on such fiber cable segment, CLEC must demonstrate efficient use of existing fiber in each cable segment. Efficient use of interoffice cable segments is defined as providing a minimum of OC-12 termination on each fiber pair. Efficient use of loop fiber is defined as providing a minimum of OC-3 termination on each fiber pair. Efficient use of E-UDF is defined as providing a minimum of OC-3 termination on each fiber pair. CLEC may designate 5% of its fibers along a fiber cable segment, or 2 strands, whichever is greater, for maintenance spare, which fibers or strands are not subject to the termination requirements in this paragraph.*

In addition, Qwest indicated that it intended to modify the Dark Fiber Inquiry form and internal procedures to incorporate this change by May 31, 2001.[133] The SGAT for the multistate proceeding was also modified to reflect the Qwest's proposed language.

AT&T, Sprint, and other CLECs did not object to the proposed wording of the SGAT in their brief. However, AT&T did identify another technical publication in which Qwest had committed to modifying it as necessary to be consistent with the SGAT but had not completed the task as committed. AT&T identified it as an unresolved issue.

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[131] Stewart Direct at page 6.
[132] Karen Stewart Affidavit for Colorado Workshop, page 4
[133] Karen Stewart Affidavit for Colorado Workshop, page 4

6. Provisioning and Ordering Processes

AT&T expressed concern with the SGAT Section 9.7.3.2 provisions that address the processes for provisioning and ordering of dark fiber. AT&T requested that Qwest provide CLECs with more specific outlines of these processes.[134] Qwest modified Section 9.7.3.2 of the SGAT. AT&T did not raise any objection in its brief. Therefore, this issue can be considered closed.

7. Dark Fiber at Collocation Build-Out Completion

CLECs questioned whether dark fiber would be available when collocation build outs were completed. Qwest indicated that it believed that the most effective option to address this concern was to allow CLECs to "reserve" dark fiber.[135] Qwest also deleted the requirement for a CLEC to enter into an Interconnection Agreement before dark fiber could be reserved. Qwest proposed to modify SGAT Section 9.7.3.5 as follows:

> *CLEC may reserve dark fiber for CLEC during Collocation builds. Prior to reserving space, CLEC must place an inquiry pursuant to section 9.7.3.1 of this Agreement and receive a UDF Inquiry Response that reflects that the route to be reserved is available. CLEC is also strongly encouraged to request a Field Verification that the route to be reserved is available. If CLEC does not obtain Field Verification, CLEC assumes the risk that records upon which the UDF Inquiry Response is based may be in error. CLEC may reserve UDF for thirty (30), sixty (60), or ninety (90) days. CLEC may extend or renew reservations if there is delay in completion of the Collocation build. All applicable UDF recurring charges specified in sections 9.7.5.2 will be assessed at the commencement of the reservation.*

There was no objection to the changed language, which generally addressed the concerns raised. Therefore, this issue can be considered closed.

8. Cross Connect Charges

AT&T requested that Qwest confirm that the non-recurring cross connect charges would not apply if the cross connection was already in place when a CLEC placed a UDF order. AT&T's reasoning was that the non-recurring charge covered the cost of performing the cross-connect work.

Qwest modified SGAT Sections 9.7.5.2.1(c), 9.7.5.2.2(c), and 9.7.5.3(c) to reflect that cross-connection non-recurring charges would not apply where the cross connection is already in place at the time the CLEC placed a UDF order. Qwest indicated that it would continue the recurring charges that are intended to recover the cost of having a cross connection in place.

There was no objection to the changed language, which generally addressed the concerns raised. Therefore, this issue can be considered closed.

[134] AT&T Comments at page 6.
[135] Karen Stewart Affidavit for Colorado Workshop, page 2

Issues Remaining in Dispute - Dark Fiber

1. Affiliate Obligations to Provide Access to Dark Fiber

AT&T contended that Sections 251(c)(3) and 252(d)(1) of the Act obligate Qwest to make the in-region dark fiber of affiliates, specifically Qwest Communications International, Inc ("QCI"), available to CLECs. AT&T argued that Section 251(c)(3) obligates ILECs to provide non-discriminatory access to network elements on an unbundled basis at any technically feasible point, and under rates and conditions that are fair, just, and reasonable. According to AT&T, Qwest and its affiliates comprise "successors and assigns" under Section 251(h) of the Act, which makes them subject to ILEC unbundling duties thereunder.[136]

AT&T asserted that the United States Court of Appeals for the District of Columbia in an SBC/Ameritech merger approval interpreted "successor and assigns" broadly enough to include the affiliates of the ILEC that provide telecommunication services. In addition, AT&T cited the circuit court's rejection of the FCC conclusion in the SBC/Ameritech Merger Order that the "advance services affiliate" was not such a "successor and assign" as long as it complied with various structural and traditional safeguards. The Court said:

> [T]*he Commission is using language designed by Congress as an added limitation on an ILEC's 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.*[137]

AT&T recognized that this decision addressed advanced-service affiliates, but argued that a failure to require QCI and its affiliates to be subject to unbundling would permit Qwest to avoid the requirements of §251 by offering and investing in network infrastructure through its wholly owned subsidiaries. AT&T therefore recommended that Qwest be required to add language to the SGAT that clarifying that QCI and its affiliates are obligated to unbundle the in-region facilities of Qwest's affiliates.

In response, Qwest contended that Qwest Corporation is the only US WEST Communications Inc. successor that provides local telecommunications services in the seven-state region. Qwest argued that the QCI affiliates have neither provided, nor have they acquired, any affiliate that provides local exchange service. Further, according to Qwest, QCI's affiliates do not meet the "successor or assign" requirements of §251(h) of the Act. Qwest contended that the FCC has ruled that a "successor" for the purposes of §251(h) of the Act occurs if there is a substantial enough continuity between the companies to allow a conclusion that one entity has stepped into the shoes of or replaced another.[138] Qwest asserted that only Qwest among QCI's affiliates meets this requirement.

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[136] AT&T Brief at pages 30 and 31.
[137] AT&T Brief at page 31.
[138] Qwest Brief at page 4.

Qwest continued by arguing that the terms of §251(c) apply only to ILECs. Qwest contended that the Act specifically defines ILECs as local exchange carriers that meet certain specified conditions (e.g. a person or entity that, on after such date… became a "successor or assign" of a member of NECA). Qwest asserted that the FCC has ruled that, "a BOC affiliate should not be deemed an incumbent LEC subject to the requirements of section 251(c) solely because it offers local exchange service; rather, section 251(1) applies only to entities that meet the definition of an incumbent LEC under section 251(h)," in particular that section's "successor or assign" test.[139]

Qwest also argued that section 251(c) does not extend to an ILEC's long-distance operations or network. In particular, Qwest contended that the FCC in its *Advance Services Remand Order*, found no merit to requiring GTE and Sprint to unbundle their long distance networks.[140] Qwest asserted that, in a later appeal (still pending), the FCC asserted that the unbundling of an ILECs' affiliated networks would not serve the "underlying goal" of sections 251 and 252. Qwest pointed out that AT&T filed a brief in that proceeding supporting the FCC's position that the obligations of sections 251 and 252 are specifically directed to an incumbent's local service networks, in apparent contradiction to the position taken in this proceeding.[141] Qwest concluded by stating that its affiliates are providing operator and long distance services; therefore, any dark fiber held by them would be a part of a long distance facility, which is exempt from unbundling.

Proposed Issue Resolution: AT&T's argument depends principally upon the notion that Qwest cannot deny the applicability of the "successor and assign" provision of Section 251(h) on the grounds that QCI and its affiliates were not providing local service on the date the Act was enacted. However, AT&T does not confront the issues raised by the fact that they are not doing so now either, except through Qwest. The relevance of what affiliates do, with respect to providing telecommunications services is clear, even accepting AT&T's reading of the FCC's conclusion in the Qwest merger proceeding and in the D.C. Circuit opinion in the *ASCENT* case. In both circumstances, the issue was the use of an affiliate to bypass the obligations imposed on an ILEC under the Act.

The record here contains no evidence that the Qwest corporate structure has been developed or is being used to deny access to dark fiber in cases where it would, absent such structure, be required to be made available. In fact, AT&T has not grounded its argument at all on such a plan or scheme, choosing instead to rely upon the cases cited to support an obligation of all Qwest affiliates to unbundle generally, exactly as if they were Qwest itself. AT&T has cited no authority for such a proposition, nor is its propriety evident. Its application would eradicate for ILECs any distinction in lines of business, treating a non-ILEC as if it were an ILEC, apparently on the sole basis of its having affiliation with and some of the same kinds of facilities that ILECs use to provide local service. The notion that Congress envisioned such an interpretation is nowhere evident in the Act, nor is it even consistent with general utility regulatory principles, which allow for utilities to separate regulated and nonregulated operations (if done properly) without making them equally subject to regulation.

[139] Qwest Brief at pages 6 and 7.
[140] Qwest Brief at page 7.
[141] Qwest Brief at page 8.

Thus, there is no basis in the record for requiring dark fiber or other unbundling by affiliates because they are successors and assigns. However, it should be noted that this conclusion is not a blanket one applicable no matter what activities Qwest and its affiliates decide to undertake in concert. The cases cited by AT&T clearly do indicate that scrutiny is appropriate where there is a claim that corporate separation is being used to reduce the obligations of an ILEC from what they would otherwise be.

Interestingly, however, that claim, not made or supported by any evidence here, is not likely to ever be particularly material in the particular case at hand, which is dark fiber. The reason is that, where an affiliate is making access to such fiber routinely available to an ILEC affiliate, it can be concluded that such fiber constitutes part of the ILEC's facilities generally and already subject to unbundling.

The particularly interesting feature of dark fiber in this situation is that it represents a form of in-place inventory. By definition, it is currently not being used, but represents capacity that can generally be called to use in short order. If an ILEC decided, for example, to acquire a general right to use such fiber from a third party when and as needed, Qwest certainly could not deny similar access to a CLEC merely on the basis that the inventory was technically owned by a third party. The issue would be Qwest's rights and ability to get access to it. Certainly it would be inconceivable to imagine that a switch to third party sale/leasebacks of all types of network facilities would defeat CLEC access to them.

The same general standard should apply to a second-party arrangement (i.e., a lease or right-to-use agreement with an affiliate) as would apply to a third-party arrangement (e.g., Qwest rights to dark fiber that arise under a lease with a financial institution or under a right of use agreement with a customer). That standard should be that if Qwest has access rights for itself, it should not refuse to use them to provide access rights for CLECs.

The difficulty in applying such a standard to the second-party situation lies in the different ways that such access-rights agreements are likely to be recorded. Third-party arrangements of this type would be likely to be of a significant enough economic size to warrant formal agreements and clear and complete records. One should not expect otherwise for arrangements of consequence between parties who do not broadly share the same objectives and goals. The same is not true for second-party arrangements, where commonality of purpose, goals, and interests in net results can be expected to lead often to less formal arrangements. Thus, the application of the standard envisioned here needs to recognize that second-party arrangements are likely to be less formal or structured.

Accordingly, Qwest should be required to provide access not only to what it owns directly, but to all dark fiber to which it has a right to access for local telecommunications use under agreements with any other party, affiliated or not. Moreover, the test should not be the type of form of such agreement, but rather the nature and degree of the access that it provides to Qwest. The addition of the following language to the end of SGAT Section 9.7.1 will accomplish this result:

> *Deployed Dark Fiber facilities shall not be limited to facilities owned by Qwest, but will include in place and easily called into service facilities to which Qwest*

has otherwise obtained a right of access, including but not limited to capitalized Indefeasible Right to Use (IRUs) or capitalized leases. Qwest shall not be required to extend access in a manner that is inconsistent with the restrictions and other terms and conditions that apply to Qwest's access; however, in the case of access obtained from an affiliate: (a) the actual practice and custom as between Qwest and the affiliate shall apply in the event that it provides broader access than does any documented agreement that may exist, and (b) any terms restricting access by CLECs that are imposed by the agreement with the affiliate (excluding good-faith restrictions imposed by any agreement with a third party from whom the affiliate has gained rights of access) shall not be applied to restrict CLEC access.

3 Access to Dark Fiber in Joint Build Arrangements

AT&T contended that the Act and the FCC Orders call for the conclusion that CLECs should be permitted to lease dark fiber that exists in "joint build arrangements" with third parties. Such arrangements, according to AT&T, comprise those that permit either Qwest, the third party, or both to use the other party's conduit, innerduct, or fiber to transport telecommunications traffic. Qwest testified that it would make available dark fiber in joint build arrangements up to Qwest's side of the meet point. Qwest refused to permit CLECs to obtain access to any rights Qwest may have to the use of the "third party facilities."[142]

AT&T contended that Section 251(c) and 47 C.F.R. §§51.307 and 309 require Qwest to provide nondiscriminatory access to poles, ducts, and right of way. According to AT&T, to the extent that joint build arrangements may give Qwest control of facilities or a right of way on a third party's network, Qwest should be obligated to give the CLEC the same access. AT&T said that, without access to third-party facilities, CLECs would be unable to compete in communities where joint build arrangements exist.[143] AT&T asserted that Qwest must demonstrate that it is providing nondiscriminatory access to its poles, ducts, and right-of-ways at just and reasonable rate, terms and conditions.

Qwest stated it willingness to unbundle dark fiber that it owns. Qwest contended that it cannot and would not unbundle dark fiber belonging to other entities.[144] Qwest also argued that AT&T failed to provide a legal justification for how Qwest could unbundle an asset of a third party.

Proposed Issue Resolution: The standard to which Qwest should be held here is similar to that set forth in the proposed resolution of the immediately preceding issue. It has nothing to do with the fiber ownership criterion that Qwest would apply.

The primary consideration is whether the agreement with the third party gives Qwest, with respect to the fiber owned by the third party, sufficient access rights to make it analogous to facilities that "carriers keep dormant but ready for service" and that are "in place and easily called into service." These are the key tests that the FCC applies in defining dark fiber to which

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[142] February 27, 2001 transcript at page 233
[143] AT&T Brief at pages 32 and 33
[144] Qwest Brief at page 9

CLECs are entitled.[145] The language set forth in the proposed resolution of the immediately preceding issue accommodates this definition.

The secondary consideration is whether Qwest will have acted in good faith with respect to the imposition of any limits on its ability to make available to CLECs the Qwest fiber access rights obtained from the third party. There will certainly be cases where Qwest cannot enter agreements that it needs with third parties, except where Qwest is willing to restrict access rights to its own use. However, it should not be presumed that this will always be the case: where it is not, Qwest should not have the ability to "tie its own hands" in a manner that, while unlikely to hurt Qwest at all, may later become an undue constraint on competition. Qwest may be forced to deal with insistent third parties on terms that are not friendly to future competition, but it should not benefit from its own failure to accommodate future CLEC access. The "good faith" provision of the language recommended to resolve the immediately preceding dispute accomplishes this goal.

3. Applying a Local Exchange Usage Requirement to Dark Fiber

AT&T objected to the SGAT Section 9.7.2.9 application of the local usage test that the FCC issued with regard to Enhanced Extended Links ("EELs"). AT&T argued that the usage test when applied to dark fiber is prohibited by the FCC's *UNE Remand Order* and the FCC's rules. AT&T contended that 47 C.F.R. §51.309(b) explicitly provides for CLEC access to all unbundled elements unless the FCC provides an exception.[146] To support its position AT&T quoted 47 C.F.R. §51.309(b):

> *A telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers.*

Finally, AT&T asserted that the requirement could not be implemented, because the FCC test cannot be applied to dark fiber. AT&T concluded that Qwest should be required to remove Section 9.7.2.9 from the SGAT.

Qwest responded that EELs comprise combinations of the loop UNE and the transport UNE. Qwest said that dark fiber is not a UNE per se, but rather "a flavor of loop and transport," like EELs, which are a combination of loop and transport under paragraphs 477 and 480 of the *UNE Remand Order*. Therefore, according to Qwest, the local traffic exchange restriction should be applied to dark fiber loop and transport combinations.[147] Qwest said that the FCC imposed the restriction to prevent unbundling requirements from interfering with access charge and universal service reform. Qwest argued that eliminating the local service restriction on dark fiber and transport unbundling would present a threat to access revenues and universal service.[148] Qwest asserted that SGAT Section 9.7.2.9 is proper under the FCC's *Supplemental Order Clarification* and should be maintained.

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[145] *UNE Remand Order* at ¶ 174 for loops; a similar definition for transport is set forth at ¶ 325.
[146] AT&T Brief at page 36.
[147] Qwest Brief at page 10.
[148] Qwest Brief at page 10.

Proposed Issue Resolution: Paragraph 174 of the *UNE Remand Order* says that the loop element can consist of dark fiber. Paragraph 325 says that the transport element can consist of dark fiber. Paragraph 480 says that EELs are not a separate UNE, but consist of "an unbundled loop" that "is connected to unbundled dedicated transport." Thus, when a CLEC secures access to dark fiber that provides the functionality of a loop that is connected to dedicated transport, it secures an EEL, which is a combined loop and transport element. That dark fiber makes up this combination does not give it a different identity as a UNE.

The FCC has said that:[149]

> *IXCs may not substitute an incumbent LEC's unbundled loop-transport combinations for special access services unless they provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.*

There is no doubt that a loop-transport combination that includes dark fiber remains a loop-transport combination. The logic behind the FCC's concern about access charges is in no way diminished because the facilities providing the combination were unlit before a CLEC gained access to them. The fact that access charges associated with many users might be avoided (instead of the one contemplated in the preceding quote) hardly serves to lessen the concern. Increased measurement difficulty (which, moreover, was an issue first raised in AT&T's brief, and not supported by any evidence) does not call for elimination of the rule in those cases where the harm it seeks to avoid is the greatest. Therefore, AT&T's argument is without foundation.

4 Consistency With Technical Publications

AT&T noted that SGAT Section 9.7.2.18 incorporated by reference Technical Publication 77383. AT&T determined that the publication's terms were inconsistent with the commitments Qwest has made in the language of the SGAT. According to AT&T, Qwest promised to provide a draft of the modifications to language that made it compliant with the SGAT by March 1, 2001. AT&T indicated that Qwest failed to provide the required language. Therefore, AT&T proposed that, until Qwest submits language for the publication conforming to the requirements of the SGAT on dark fiber, the Commission should find Qwest not in compliance with this section of the 271 requirements.[150]

Qwest in its brief did not identify Section 9.7.2.18 as in dispute.

Proposed Issue Resolution: This issue can be addressed, if the parties have not already resolved it by then, in the upcoming workshop on general SGAT terms and conditions. We have already adopted the general proposition that the hierarchy among the SGAT, technical publications, operations guidelines and procedures, and the other documents that it will take to make the Qwest/CLEC relationship operate effectively can best be addressed in a general fashion. To the extent that any participant still considers this issue to require special treatment then, it may be raised at that time.

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[149] *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) ¶8.

[150] AT&T Brief at pages 34 and 35.

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S SECTION 271 APPLICATION AND MOTION FOR ALTERNATIVE PROCEDURE TO MANAGE THE SECTION 271 PROCESS

CASE NO. 3269

IN THE MATTER OF QWEST CORPORATION'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996

SEVEN STATE COLLABORATIVE 271 WORKSHOPS

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)

Table of Contents

I. Scope of this Report 1
II. General Background 2
III. Disputed Issues and Recommendations Summary 4
IV. Checklist Item 2 – Access to Unbundled Network Elements 17
Background - UNEs 17
Issue Deferred to Another Workshop 17
1. Bona Fide Request Process 17
Issues Resolved During This Workshop – UNEs Generally 17
1. Definitions 17
2. Changes in Law Regarding Access to UNEs 17
3. General Obligation to Provide UNE Access 18
4. UNE Use Restrictions 18
5. UNE Demarcation Points 18
6. UNE Testing 18
7. UNE Provisioning Intervals 19
8. Notice of Changes Affecting UNE Transmission Parameters 19
9. UNE Rates 19
10. Miscellaneous Charges 19
11. Construction Charges for Ancillary and Finished Services 20
12. Unbundled Customer Controlled Rearrangement Element (UCCRE) 20
13. UNE Demarcation Points 20
14. Access to Newly Available UNEs and UNE Combinations 20
15. Information Access When Customers Change Service Providers 21
Issues Decided in Earlier Workshop Reports – UNEs Generally 21
1. Including LIS in the Definition of Finished Services 21
2. Marketing During Misdirected Calls 21
3. Regeneration Charges 22
Issues Remaining in Dispute – UNEs Generally 23
1. Construction of New UNEs 23
2. Commingling UNEs and Tariffed Services on the Same Facilities 28
3. OSS Testing 30
Issues Resolved During This Workshop – UNE Platform and Other Combinations 33
1. Availability of Switch Features with UNE-Platforms 33
2. Features Available with UNE-P-PBX, UNE-P-DSS, and UNE-P-ISDN 33
3. Migrating from Centrex Services to UNE-P 33
4. High Speed Data with UNE-P-POTs and UNE-P-ISDN 33
5. Converting From Resale to UNE-P 33
6. Definition of Access 34
7. Restrictions on UNE Combinations 34
8. Use Restrictions 34
9. Combining Qwest Provided UNEs With Other Elements or Services 34

10. Non-Separation of Combined Elements 34
11. "Glue" Charges for Combinations 35
12. Ordering Equipment Ancillary to UNE Combinations 35
13. Restricting Available UNE Combinations 35
14. Loop and Multiplexing Combinations 36
15. CLEC Loop Terminations 36
16. UNE Combination Forecasts 36
17. Nonrecurring Charges 36
18. Delays From Loading CLEC Billing Rates into Qwest's Systems 36
V. Checklist Item 4 – Access to Unbundled Loops 38
Background – Loops 38
Issues Deferred to Another Workshop 38
1. Accepting Loop Orders With "Minor" Address Discrepancies 38
2. Resolving Conflicts Between the SGAT and Parallel Documents 39
Issues Resolved During This Workshop - Loops 39
1. Definition of Loop Demarcation Point 39
2. Digital versus Digital-Capable Loops 39
3. Parity in Providing Unbundled Loops 40
4. Limiting Available Analog Loop Frequency 40
5. Method for Providing Unbundled IDLC Loops 40
6. Choosing Loop Technology Types 41
7. CLEC Authorization for Conditioning Charges 41
8. Access to Loop Features, Functions, and Capabilities 41
9. Offering High Capacity and Fiber Loops on an Individual Case Basis 41
10. Charges for Unloading Loops 42
11. Extension Technology to Give Loops ISDN Functionality 42
12. DS1 and DS3 Loop Specifications 43
13. Access to Digital Loops Where Available 43
14. Loop Installation Process 43
15. Coordinated Installation 43
16. Limits on Loop Testing Costs 44
17. Obtaining Multiplexing for Unbundled Loops 44
18. Transmission Parameters 45
19. CLEC/End User Disagreements about Disconnecting or Connecting Loops 45
20. Qwest Access to Qwest Facilities on CLEC Customer Premises 45
21. Points of CLEC Access to Unbundled Loops 46
22. Relinquishing Loops on Loss of End Use Customers 46
23. CLEC Right to Select From Available Loop Technologies 47
24. Miscellaneous Charges 47
25. Installation Hours 47
26. Unforecasted Out-of-Hours Coordinated Loop Installations 48
27. Overtime for Out-of-Hours Installations 48
28. Proofs of Authorization 48

CONTINUATION

[4]

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29. ICB Intervals for Large Loop Orders 48
30. Firm Order Confirmations 48
31. Conditions Excusing Compliance With Loop Installation Intervals 49
32. Maintenance and Repair Parity 49
33. Specifying Repair Intervals in the SGAT 50
34. Responsibility for Repair Costs 50
Issues Remaining in Dispute - Loops 50
1. Standard Loop Provisioning Intervals 50
2. Loop Provisioning and Repair Intervals - Utah 53
3. Reciprocity of Trouble Isolation Charges 54
4. Delays in the Roll-Out of ADSL and ISDN Capable Loops 55
5. Cooperative Testing Problems 56
6. Spectrum Compatibility 56
7. Conditioning Charge Refund 63
8. Pre-Order Mechanized Loop Testing 65
9. Access to LFACs and Other Loop Information Databases 67
Issues Resolved During This Workshop – Line Splitting 69
1. Presumptions About the "Lead" CLEC 69
2. Pre-Provisioning of the Splitter in the End User's Central Office 69
3. Limits on Uses of the High- and Low-Frequency Loop Portions 69
4. Charges for OSS Modifications 69
Issues Decided in Earlier Workshops – Line Splitting 70
1. Line-At-A-Time Access to Splitters 70
2. Discontinuing Megabit Service 70
Issues Remaining in Dispute – Line Splitting 70
1. Limiting Line Sharing to UNE-P 70
2. Liability for Actions By an Agent 72
Issues Resolved During This Workshop – NID 73
1. Access to All NID Features 73
2. Smart and MTE NIDs 73
3. Availability of NIDs When CLEC Provides Loop Distribution 73
4. Other Kinds of Permissible NID Access 74
5. NID Ownership 74
6. Rates for Other Than Single-Tenant NIDs 74
7. NID Ordering Documents 74
Issues Remaining in Dispute - NID 75
1. "NID" Definition and Access to Terminals Where Qwest Owns Facilities in the Direction of the End User 75
2. Protector Connections 76
3. CLEC Use of Qwest's NID Protector Without Payment 77
VI. Checklist Item 5 – Access to Unbundled Local Transport 78
Background – Transport 78
Issues Resolved During This Workshop – Transport 78

1. Available Dedicated Transport Routes 78
2. Requiring Multiplexers for Access to Transport 78
3. Cross Connecting UDIT and EUDIT 78
Issues Decided in Earlier Workshop Reports – Transport 79
1. Access to the Facilities of Qwest Affiliates 79
2. Access to Dark Fiber in Qwest's Joint-Build Arrangements 79
Issues Remaining in Dispute – Transport 79
1. SONET Add/Drop Multiplexing 79
2. UDIT/EUDIT Distinction 80
3. Commingling UNEs and Interconnection Trunks 82
4. Applying Local Use Restrictions to Unbundled Transport 83
Issues Resolved During This Workshop - EELs 83
1. Waiver of Local Use Requirements for Particular EELs 83
2. Ways of Meeting the Local Use Requirements 84
3. Audits of Local Use Certifications 84
Issues Remaining in Dispute - EELs 84
1. Limiting Local Use Requirements to Existing Special Access Circuits 84
2. Allowing Commingling Where Qwest Refuses to Construct UNEs 86
3. Waiver of Termination Liability Assessments for EELs 87
4. Waiving Local Use Restrictions on Private Lines Purchases in Lieu of EELs 90
5. Counting ISP Traffic Toward Local Use Requirements 91
VII. Checklist Item 6 – Access to Unbundled Local Switching 93
Background – Switching 93
Issues Resolved During This Workshop - Switching 93
1. Specifying Additional Types of Switch Access 93
2. Availability of Switch Features 93
3. Unbundling Switch Centrex Management and Control Features 94
4. Notice of Switch Changes and Upgrades 94
5. Unbundling Tandem Switches 94
6. Definition of Tandem Switching Element 94
7. Tandem to Tandem Connections 95
Issues Remaining in Dispute - Switching 95
1. Access to AIN-Provided Features 95
2. Exemption from Providing Access to Switching in Large Metropolitan Areas 96
3. Basis for Line Counts in Applying the Four-Line Exclusion 98
4. Providing Switch Interfaces at the GR-303 and TR-008 Level 99

I. Scope of this Report

This report discusses the group four issues that form part of the seven-state workshop process addressing Qwest's compliance with the Section 271 Checklist of the Telecommunications Act of 1996. Some of the issues assigned to "Workshop Three" by the initial procedural orders are covered in this report; others (Track A, 272 and General Terms and Conditions) have been assigned to group 5. This report addresses the following issues:

- Unbundled Network Elements (UNEs) – Checklist Item 2
  - UNE Combinations
  - UNE Platform
- Access to Unbundled Loops – Checklist Item 4
  - Line Splitting
  - Network Interface Devices (NIDs)
- Access to Unbundled Local Transport – Checklist Item 5
  - EELs
- Access to Unbundled Local Switching – Checklist Item 6

II. General Background

The purpose of this report is to assist the seven state Commissions (Iowa, Idaho, Utah, New Mexico, North Dakota, Montana, and Wyoming) in reaching a decision about what consultation to provide to the Federal Communications Commission (FCC) on the question of whether Qwest should be granted the authority to provide in-region interLATA services in these seven states. To be eligible to provide in-region interLATA service, Qwest must meet the competitive checklist and other requirements of Section 271 of the Telecommunications Act of 1996 (the Act).1 A Qwest May 4, 2000 filing encouraged the several state commissions to consider a multi-state process to jointly review track A (competition issues), various aspects of the 14-point competitive checklist, Section 272 (separate subsidiary issues), and public interest considerations. Iowa, Idaho, Utah, North Dakota and Montana joined together (with Wyoming joining in September 2000 and New Mexico thereafter) in a multi-state collaborative proceeding, and issued procedural orders to govern the conduct of joint workshops. The joint workshops provide a common forum for all participants in all the states involved to present, for individual consideration by the seven commissions, all issues related to Qwest's Section 271 compliance. The commissions have amended their procedural orders on several occasions, in order to reflect changes in the schedule requirements set forth therein and to address issues regarding the scope of these workshops.

Qwest filed the group four issues testimony of Karen Stewart, Lori Simpson and Jean Liston on January 19, 2001. On or about February 23, 2001, the following parties filed testimony or comments: AT&T Communications of the Midwest, Inc., AT&T Communications of the Mountain States, Inc. and AT&T's subsidiaries and affiliates operating in these states, (collectively, "AT&T"); XO Utah, Inc (XO), Electric Lightwave, Inc. (ELI) and The Association of Communications Enterprises ("ASCENT"). The New Mexico Public Regulation Commission Advocacy Staff filed testimony on December 20, 2000. Qwest filed the rebuttal testimony of Lori Simpson and Karen Stewart on March 9, 2001. AT&T filed verified comments on loops, line splitting, and NIDs on March 26, 2001. Rhythms filed on March 23, 2001 the affidavit of Valerie Kendrick regarding loops. On the same date, XO filed the additional response testimony of David LaFrance. Qwest filed the rebuttal testimony of Jean Liston on April 18, 2001. Briefs were filed on or about May 31, 2001 by the following parties: Qwest, AT&T, ELI/XO, Rhythms, and the Wyoming Consumer Advocate Staff. Qwest and AT&T filed supplemental briefs on June 18, 2001.

We have adopted a general rule that requires Qwest to file, before briefing of the issues, a copy of SGAT language related to those issues. This "frozen SGAT language" is intended to reflect language on which there is general agreement among the parties and language proposed by Qwest to address issues or language on which there is not general agreement. The purpose of this language is to provide a reference base first for the participants' briefs and second for the commissions in reviewing this report. It is not intended to offer new language that has not before been seen or discussed in workshops, filings, or discussions among the parties.

1 See 47 U.S.C. Section 271(c)(2)(B).

Qwest filed the required language here on May 30, 20012. The language is set forth as an appendix to this report. This report assumes that the SGAT language filed by Qwest on May 30, 2001 will remain in effect, except as commission acceptance of any of the findings and conclusions of this report may require such language to change. Therefore, to the extent that any further changes in SGAT language are proposed (e.g., as a result of agreements reached in similar workshops in other states) they must be separately filed and supported, in order that the commissions may consider any issues associated with such proposed language changes. Absent individual commission approval of any such proposed changes, the language set forth in the appendix hereto shall be considered to be the final language for purposes of any state SGAT review or consultation with the FCC under Section 271.

2 Hereafter, "the Frozen SGAT."

III. Disputed Issues and Recommendations Summary

General UNE Issues Deferred

1. Bona Fide Request Process

Comments were filed about the bona fide request (BFR) process for handling requests for non-standard forms of interconnection or UNEs. The bona fide request process is of general applicability to the SGAT; therefore, it was addressed in the subsequent workshop on General Terms and Conditions.

General UNE Issues Decided in Earlier Reports

1. Including LIS in the Definition of Finished Services

There were objections to including Local Interconnection Service (LIS) in the definition of "finished services" in the SGAT. This issue was significant because of the SGAT prohibition against commingling UNEs and finished services in the same trunk group. The principal focus of that issue was commingling special access circuits (which are finished services as well) with UNEs in a manner that could allow CLECs to avoid access charges improperly. Qwest agreed to delete LIS from the definition of "Finished Services" in Section 4.23(a) of the SGAT. With this change, the commingling issue became similar to the third unresolved *Reciprocal Compensation Issue* (*Commingling of InterLATA and Local Traffic on the Same Trunk Groups*) of the May 15, 2001 *First Report – Workshop One* in these proceedings. That recommended resolution remains appropriate here.

2. Marketing During Misdirected Calls

As it did in the workshop addressing resale, AT&T asked for a change to SGAT Section 9.23.3.17, in order to provide controls on marketing and sales exchanges in cases where a CLEC customer misdirects a service, maintenance, or repair call to Qwest. This issue was addressed as the second unresolved *Resale* issue (*Marketing During Misdirected Calls*) of the May 15, 2001 *Second Report – Workshop One* from these workshops. That resolution, which required that Qwest change SGAT Section 9.23.3.17 so as to limit such communications when it receives such a call from a CLEC customer, remains appropriate here.

3. Regeneration Charges

AT&T argued that Qwest should be required to provide the signal as ordered by a CLEC at the CLEC's collocation point, without any charges for any necessary regeneration. This issue is essentially the same as the tenth unresolved *Collocation* issue (*Channel Regeneration Charges*) of the May 15, 2001 *Second Report – Workshop One* in these proceedings. There it was recommended that CLECs be required to pay for regeneration costs except in cases where CLECs were denied available collocation locations that would not require regeneration. Here, AT&T also said that in paragraphs 114 through 120 of the *Second Report and Order* the FCC prohibited regeneration charges for the termination of CLEC facilities at their collocation spaces.

The FCC did not make any such prohibition, nor is any appropriate, given the language already recommended in the second report from these workshops. Therefore, the resolution of the similar issue recommended in that report remains applicable here.

General UNE Issues Remaining in Dispute

1. Construction of New UNEs

A number of CLECs argued that CLECs would be denied a meaningful opportunity to compete in the event that Qwest were not required to build facilities to provide CLECs network elements (other than transport) under the same terms and conditions that it would construct for itself or its end users: Qwest could refuse a CLEC request, then build facilities itself to serve the same end user. XO/ELI further argued that a number of provisions of Utah law add to Qwest's obligations in that state, citing provisions : (a) prohibiting unreasonable prejudice or disadvantage to anyone, (b) furnishing facilities necessary for public safety, health, comfort, and convenience, and (c) excluding lack of facilities from cases where Qwest may refuse service to a requesting customer.

Qwest argued that it had no obligation to "build a network for CLECs," citing paragraph 324 of the FCC's *UNE Remand Order* and the Eighth Circuit Court's holding in *Iowa Utilities Bd. V. FCC*. Qwest noted that there was no bottleneck-facilities concern with respect to facilities that did not yet exist. Nevertheless, Qwest did agree to undertake specific construction obligations in its SGAT Sections 9.1.2.1 and 9.1.2.2. The facilities encompassed by this commitment include conditioning, placing a drop, adding a network interface device, adding a card to central office or remote equipment, and adding central office tie pairs and field cross jumpers.

The CLEC requests are inappropriate on several grounds. First, it is unreasonable to require Qwest to make new investments at costs that may exceed UNE rates and without term commitments that will assure cost recovery. There is a clear economic distinction to be made between: (a) allowing access to facilities already built at costs that may not reflect what it took to build them and (b) requiring new investments under less than compensatory terms and conditions. Second, CLECs do not have a general right under the Act or the FCC's rules to make Qwest their construction arm. Qwest must already make its poles, ducts, conduits, and rights of way fully available; given that, Qwest has, at least as a general matter, no bottleneck control over as yet unbuilt facilities. CLECs therefore do have a meaningful opportunity to compete in the case of unbuilt facilities, and there is no discrimination at issue because CLECs have rights to the same underlying occupation rights and linear support facilities as Qwest does.

2. Commingling UNEs and Tariffed Services on the Same Facilities

The FCC has temporarily prohibited the use of the same facilities to provide both tariff services (such as special access services) with UNEs, while it addresses its concerns about whether such combined or commingled use could allow CLECs inappropriately to avoid access charges. XO/ELI argued broadly for the elimination of the Qwest SGAT provisions prohibiting such commingling; AT&T argued somewhat more narrowly that the SGAT language would prohibit CLEC use of UNES in cases far broader than those temporarily banned by the FCC. XO/ELI failed to offer a meaningful description of what, if any, commingled use would be prohibited

under its approach. Therefore, its argument would essentially negate the FCC ban. AT&T correctly argued that the SGAT imposed a broader ban than could be supported under the FCC's requirements. Therefore, the SGAT should be changed to make its restrictions more in line with those requirements.

3. OSS Testing

AT&T objected to what it said was a lack of SGAT language allowing for appropriate testing of OSS interfaces before large-scale market entry by a CLEC. Some of the disagreement was resolved through SGAT language changes proposed by Qwest. One of the remaining AT&T concerns was for the stand-alone test environment. Because the ROC OSS test will include this area, conclusions about its sufficiency should await the results of that test. As to the remainder of the production-testing dispute, AT&T failed to demonstrate the need for such testing now, given the pendency of comprehensive ROC OSS testing, with which AT&T's proposed testing could interfere. However, because such testing could well be appropriate given future CLEC market entry plans, the SGAT should include a new provision allowing for it, following negotiations about the nature of the testing that fits such future conditions.

UNE Platforms and Other Combinations

No UNE Platform or Combination issues remained in dispute; all were resolved during the workshops. However, some disputes that affect combinations are addressed below.

Access to Unbundled Loops - Issues Deferred to Another Workshop

1. Accepting Loop Orders With "Minor" Address Discrepancies

AT&T commented that Qwest was rejecting service orders with minor and immaterial differences between end user information on the LSR and information in Qwest's systems. Qwest objected to accepting LSRs with such problems, arguing that its OSS already contained address validation tools that would allow CLECs to assure that addresses it wanted to enter were correct. During the workshop the parties agreed that AT&T would submit a number of examples of address discrepancies that it could not solve using the address validation tools available through Qwest's OSS. The record made here provided no conclusive evidence that proper use of the address validation tools would have failed to adequately rationalize CLEC and Qwest address information about customers. The record also demonstrated that address errors would be within the scope of the ROC OSS testing now underway. This issue should await resolution until the completion of that testing.

2. Resolving Conflicts Between the SGAT and Parallel Documents

AT&T commented that a number of other documents, including the IRRG, and Qwest Technical Publications, conflict with the SGAT. It was agreed to defer to the subsequent General Terms and Conditions workshop the issue of determining how to resolve conflicts between the SGAT and other documents referred to therein or otherwise used by Qwest in implementing the SGAT.

Access to Unbundled Loops – Issues Remaining in Dispute

1. Standard Loop Provisioning Intervals

AT&T considered the length of the SGAT's standard loop provisioning intervals (the time between orders and in-service dates) 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. Qwest's position was that they were consistent with the intervals used during the ROC's development of the Performance Measures against which the OSS test would be conducted. Qwest also stated that it had offered a very short interval for a basic loop (called "Quick Loop").

The evidence here supports the conclusion that the intervals are generally appropriate. They are in line with what the ROC considered in an open and collaborative process . A preference to have them be shorter is not enough to compel a conclusion that they need to be shorter: CLECs did not present substantial evidence to counter the evidence of record showing that the intervals are at parity with Qwest retail operations or will give CLECs a meaningful opportunity to compete with Qwest for retail business. There may be state intervals that differ; this report recommends that the SGAT's intervals be deemed acceptable if those states with different intervals choose to seek regional consistency. If they do not, then they can consider the particular variances between the SGAT and their particular requirements or guidelines in their individual considerations of this report.

AT&T also objected to repair intervals, citing Wyoming, Utah, and Idaho durations that it could not meet if the SGAT repair intervals were adopted. The record supports a conclusion that the SGAT repair intervals are consistent with repair intervals established in these three states.

2. Loop Provisioning and Repair Intervals - Utah

XO testified generally that the SGAT's installation and service intervals for loops were not consistent with Commission rules at Utah Administrative Code § R746-365-4. The testimony did not cite which specific intervals were inconsistent. The XO/ELI brief argues that many of the SGAT's provisioning intervals exceed Utah limits, but also does not specify which ones. The resolution of the immediately preceding issue adequately addresses the relationship between generally applicable intervals and unique state requirements.

3. Reciprocity of Trouble Isolation Charges

Qwest's frozen SGAT filing changed SGAT Section 9.2.5 trouble isolation charge provisions to respond to AT&T concerns that the charge be made reciprocal. AT&T sought two additional changes: (a) adding language allowing CLEC access to the NID (not just the demarcation point, which Qwest proposed) for testing purposes, and (b) preserving the ability to challenge in subsequent cost proceedings the issue of double recovery of trouble isolation costs. The SGAT should be changed to allow CLECs NID access for testing purposes where access at the demarcation point will not suffice to allow required loop testing. Moreover, nothing in this report

should be viewed as constraining or prejudging the merits of SGAT charges, should they be later raised in cost dockets in the individual states.

4. Delays in the Roll-Out of ADSL and ISDN Capable Loops

Rhythms testified that Qwest was slow to make ADSL and ISDN capable loops available, thus impeding the development of competition in that sector. Qwest responded with evidence that it has since made such loops available; Rhythms did not respond to that evidence, nor did it brief this issue. There is no basis for concluding that Qwest is failing to meet requirements in this specific regard. However, Qwest has been resistant to developing standard SGAT offerings for lower volume CLEC requests, such as these loops have been in the past. The circumstances surrounding this issue warrant a formal expression of Qwest's intent with respect to moving as expeditiously as possible to respond to non-standard offerings. Qwest should do so in its comments to the commissions on this report, including the promptness with which Qwest will be prepared to respond to proper, but nonstandard CLEC requests in the future.

5. Cooperative Testing Problems

Rhythms testified generally that it had experienced a number of problems with cooperative testing on loop installations: (a) failure to perform tests, (b) failure to provide test results, (c) failure to provide notification of test performance, and (d) incorrect test results. Rhythms did not brief this issue. The evidence of record indicates that Qwest has taken actions to address problems in supporting coordinated installations and in adopting measures that will avoid the need for them in some cases.

6. Spectrum Compatibility

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. Rhythms and AT&T raised concerns about spectrum compatibility. Three principal areas of dispute remain: (a) interference due to remote DSL deployment (which has the potential for disrupting competitors' central-office based services), (b) the requirement to remove existing T1s in the short term (T1s are recognized by the FCC as known causes of disturbance and the FCC allows states to take firm measures to eliminate them as they feel appropriate), and (c) the need to provide NC/NCI information (which Qwest says is needed for it to have the information needed to resolve spectral interference issues when a carrier complains).

With respect to **remote DSL deployment**, it is not appropriate to require Qwest to adopt the Rhythms approach, which would anticipate the results of industry-wide efforts (sanctioned by the FCC) that are not yet complete. However, the failure to adopt some short-term solution could give Qwest the ability to foreclose competition from CLEC central-office-based high-speed service configurations, should Qwest use repeaters or remotely deployed DSL arrangements. Therefore, the SGAT should contain a provision that would require Qwest to mitigate interference with such CLEC configurations where a CLEC has established that such configurations exist. With respect to **T1s**, the SGAT should be changed to make clearer what are Qwest's obligations with respect to T1s that cause disturbances. With respect to **providing**

NC/NCI codes, the record supports Qwest's need for the information, for at least so long as the recommended solution to the preceding interference issues remains in place. However, it should be clear that the information provided by CLECs is appropriately limited in its circulation.

7. Conditioning Charge Refund

AT&T first commented that it should be entitled to a refund of any applicable SGAT Section 9.2.2.4 loop conditioning charges if the customer for whom the unloading was done and charged to a CLEC, switches providers within one year. It dropped this request, seeking instead to require refunds when Qwest fails to meet service requirements associated with the service that CLECs seek to offer over loops that have been conditioned to provide xDSL Service. Qwest agreed conceptually to the notion of a credit in cases where it failed to perform conditioning in a workmanlike manner or significantly missed its due date for conditioning.

The better approach is not to hinge responsibility on customer reaction or upon inherently vague definitions of quality or harm. Moreover, it seems reasonably clear that a delayed installation followed by a customer choice to take the CLEC's service does not materially harm the CLEC. On the other hand, for the sake of simplicity and rough equity, it seems reasonable to conclude that a delayed conditioning followed by a customer choice not to take the service is a material factor in that choice. Therefore, the SGAT should include recommended language to incorporate a compromise between the positions of Qwest and AT&T.

8. Pre-Order Mechanized Loop Testing

AT&T wanted Qwest to allow CLECs to perform mechanized loop testing (MLT), in order to provide them with actual loop length and performance information, so that CLECs could verify that the loop can support the services they sought to provide over it. Qwest responded that its representatives cannot perform such tests, and that Qwest performs them only in cases or repairs. Qwest also said that its Loop Qualification Tool already provides MLT information to CLECs. The evidence demonstrates that Qwest does not perform such testing for itself, except in one, broad scale program, the results of which it is willing to make available to CLECs. Thus, Qwest's refusal to allow CLECs to perform MLT is not discriminatory. Beyond that, Qwest has reason to discourage such testing, because it disrupts service when it takes place. The evidence supports the conclusion that Qwest's approach to making loop qualification information available to CLECs does not require allowing MLT in order to provide CLECs nondiscriminatory treatment and with a meaningful opportunity to compete.

9. Access to LFACS and Other Loop Information Databases

It is difficult to unbundle loops that use integrated digital loop carrier (IDLC) technology. AT&T therefore wanted access to special information tools that would help it make broadly based decisions about entry (through acquisition of Qwest unbundled loops) into areas where Qwest makes significant use of IDLC. AT&T asked for access to a database known as LFACs and to other information sources that would allow it to determine in advance of marketing to customers whether there was enough copper in the vicinity to allow a meaningful number of unbundled loops to be made available (assuming that the difficulty in unbundling IDLC loops would make

that approach unsuitable for large scale entry).

Qwest's opposition to this request was rooted in notions of parity, which are not the relevant standard here, because only CLECs, not Qwest, need face the problem of unbundling loops provided with IDLC technology. This need is real and it is legitimate for CLECs to seek the requested information before they begin to submit orders for loops. However, the record also shows that the LFACs database will not serve the purpose for which AT&T seeks access to it. Perhaps significant work could give LFACs this capability, but it is premature to conclude from the record here that this effort is required, because other tools cited by Qwest may well suffice. Therefore, the SGAT should require that Qwest to allow access to information (whether LFACs or not) sufficient to give a reasonably complete identification of the copper facilities available in areas where Qwest has deployed significant amounts of IDLC.

Line Splitting Issues Decided In Earlier Reports

1. Line-At-A-Time Access to Splitters

AT&T commented 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 said that CLECs should be able to gain access to them for a single line or a single shelf. This issue is the same as the first unresolved issue (*Ownership of and Access to Splitters*) under *Line Sharing* in the June 11, 2001 *Third Report – Emerging Services* in these workshops. No new evidence or arguments here would serve to alter the resolution made of that issue, which is therefore equally applicable here.

2. Discontinuing Megabit Service

AT&T objected to Qwest's policy of discontinuing Megabit (high-speed data) service to its own end users when they switch to a CLEC for voice service. AT&T cited the same support for its objections as it made in the emerging services workshop. The treatment of this question as the second unresolved issue (*Tying Qwest Data Service and Voice Service*) under *Line Sharing* in the June 11, 2001 *Third Report – Emerging Services* in these workshops remains valid here. No new evidence or arguments here would serve to alter the resolution made of that issue, which is therefore equally applicable here.

Line Splitting Issues Remaining in Dispute

1. Limiting Line Splitting to UNE-P

The dispute centers around three AT&T requests that Qwest declined to accommodate: (a) requiring a definitive timetable for loop splitting, (b) providing a standard offering for line splitting over EELs, and (c) line splitting over resold loops. With respect to a loop splitting timetable, the evidence supports the conclusion that Qwest has not delayed in addressing the novel issue involved; therefore, provided that it can show in its filing to the FCC substantial progress in defining the specific terms and conditions applicable, it should be deemed to have met its obligations. With respect to a standard offering related to EELs, the evidence shows very

small current demand, and no reported future demand. Therefore, the special-request basis, on which Qwest makes splitting over EELs available, is appropriate. With respect to splitting in the resale context, the evidence shows that the ability of CLECs to acquire the loop as a UNE, which it does not do when it resells Qwest's retail services, is sufficient.

2. Liability for Actions by an Agent

The issue in dispute is responsibility when Qwest agrees that both CLECs splitting a line can contact Qwest to address account, maintenance, repair, and service questions. The parties agreed that Qwest should generally not be held responsible for any harm due to actions by anyone to whom the customer of record has given the identification and security passes that are sufficient to allow such person to gain access to the customer of record's account at Qwest. Only in a very narrow area was there disagreement. The disagreement was whether the third person must have obtained the identification and passes "wrongfully" from the customer of record. Qwest would say "yes." AT&T would say "no." Qwest's position better comports with the circumstances in which the agreed to provision would apply.

NID Issues Remaining in Dispute

1. "NID" Definition and Access to Terminals Where Qwest Owns Facilities in the Direction of the End User

The dispute here appears to raise no issues other than that considered in the first unresolved *Subloop Unbundling* issue (*Subloop Access at MTE Terminals*) from the June 11, 2001 *Third Report - Emerging Services* from these workshops. In essence, AT&T is still seeking to argue that MTE terminals are NIDs, because it believes that winning the definition issue will give it essentially unmediated access to such terminals. Qwest, on the other hand, effectively seeks again victory by defining access at MTEs as subloop access, in the apparent hope that it can impose a set of pre-defined standard FCC collocation arguments. As stated there, what CLECs can and cannot be required to do is not a function semantics, but of the specific field conditions (for example, the service reliability, safety, work efficiency, cost, and engineering and operating practice concerns mentioned in the *Emerging Services* report. In other words, standard collocation requirements could be eased in cases where standard FCC rules do not make sense in terms of those circumstances, just as standard NID access requirements could be restricted for the same reasons.

2. Protector Connections

AT&T's brief, which contained an exhibit bearing on the applicable factual circumstances, requested the ability for CLECs to disconnect Qwest's drops from the Qwest NID where necessary to give CLEC's space to connect their drops to the NID. There is no evidence of record to support a conclusion other than one that safety and reliability concerns preclude allowing CLECs to do so. Even if AT&T's factual support properly admitted, which it was not, it is not clear that it would substantially contradict this conclusion.

3. CLEC Use of Qwest's NID Protector without Payment

AT&T objected to the SGAT Section 9.5.3 requirement that it pay for its use of protectors at Qwest's NID in cases where it has its own protectors. AT&T says that, where it has its own protectors, i.e., it connects to those in its own nearby NID, it may still find it necessary or "convenient" when it cross connects to Qwest's NID to do so in the protector field. AT&T would change the section to say that it does not have to pay for the functionality of the protector field when it has its own and therefore presumably is not using this "functionality." AT&T should pay the full costs of what it secures; neither it nor Qwest should exclude functionalities or capabilities, or begin to subdivide an element on the basis of which functionalities are in actual use.3

Unbundled Transport Issues Decided in Earlier Reports

1. Access to the Facilities of Qwest Affiliates

AT&T's brief argued that the Commissions 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; the report preceding this one addresses that argument fully.4 That argument was addressed under the first unresolved *Dark Fiber* issue (*Affiliate Obligations to Provide Dark Fiber*) in the June 11, 2001 *Third Report – Emerging Services* in these workshops. The resolution recommended there is equally appropriate here.

2. Access to Dark Fiber in Qwest's Joint-Build Arrangements

AT&T also argued, as it did previously, that Qwest is required to allow CLECs to lease dark fiber that exists in "joint build arrangements" with third parties. That argument was addressed under the second unresolved *Dark Fiber* issue (*Access to Dark Fiber in Joint Build Arrangements*) in the June 11, 2001 *Third Report – Emerging Services* in these workshops. The resolution recommended there is equally appropriate here.

Unbundled Transport Issues Remaining in Dispute

1. SONET Add/Drop Multiplexing

AT&T asked that Qwest change SGAT Section 9.6.1.2 to add SONET add/drop multiplexing as a CLEC option. Qwest objected on the basis of its argument that the FCC does not require it to construct new facilities to provide UNEs. Therefore, the resolution of this issue should follow that of the *Construction of New UNEs* issue discussed previously.

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3 AT&T is here actually even using the connectors for which it does not want to pay, arguing that use of them is a convenience, rather than an operating necessity.
4 AT&T Brief at pages 32 through 37.

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 does in fact make transport available as a single element; it distinguishes between UDIT and EUDIT only to reflect its views of the proper costing and charging for transport that uses both. There is no need to alter the SGAT, but it should be noted that this report leaves to later consideration in cost dockets the issue of the basis for and the amount of charges for unbundled transport including UDIT and EUDIT.

AT&T also asked that Qwest be required to provide the electronics on dedicated transport terminating at a CLEC wire center. Qwest is not required by the FCC to provide such electronics and it is clear that CLECs have the same capability that Qwest has to install new or upgraded electronics needed to make a transport element function. Therefore, it is not appropriate to change the SGAT to impose this obligation on Qwest.

3. Commingling UNEs and Interconnection Trunks

AT&T asked that LIS Trunks be excluded from the definition of "finished services" under the SGAT.[5] Qwest agreed in its brief to delete LIS Trunks from the definition of "finished services" and it conceded that LIS trunks could be connected with UNEs, dropping its prior argument that such commingling should be precluded. With Qwest's change to the SGAT and its recognition that there is not SGAT prohibition on commingling UNEs and LIS Trunks in the same facilities, this issue can be considered closed.

4. Applying Local Use Restrictions to Unbundled Transport

AT&T argued that SGAT Section 9.6.2.4 improperly prohibits the use of interoffice transport as a substitute for special or switched access services. After the FCC's *UNE Remand Order* addressed the ability of CLECs to order loop and transport combinations to provide interexchange service without any local-use requirement, the FCC modified paragraph 486 of the order to prohibit CLEC or IXC Conversion of special access to loop/transport combinations, absent a significant amount of local exchange service to a particular customer. However, AT&T claimed that the FCC has not expanded the local use requirement beyond loop/transport combinations; therefore, the requirement does not extend to dedicated transport generally. AT&T would agree to new SGAT language that it said Qwest found acceptable in other jurisdictions. This issue should therefore be considered closed in the basis that such language is agreeable, pending Qwest's comments on this report to the individual commissions.

Issues Remaining in Dispute - EELs

1. Limiting Local Use Requirements to Existing Special Access Circuits

The FCC has imposed a local-use requirement on EELs, out of concern that CLECs could transform special access circuits to EELs, and thereby avoid the access charges applicable to

[5] AT&T Brief at page 39.

special access circuits. ELI argued that application of the local-use requirement should be limited to conversions of existing special access circuits, but should not extend to newly created EELs (i.e., those not using an existing special access circuit). However, it is clear that the FCC's concern about access charges applies equally to newly created EELs. Moreover, there is nothing in the FCC language prohibiting the application of the local-use requirement to newly created EELs. Therefore, the SGAT language applying the restriction is appropriate.

2. Allowing Commingling Where Qwest Refuses to Construct UNEs

AT&T argued that Qwest should not be permitted to refuse commingling UNEs and tariffed services in certain cases where Qwest refuses to construct UNEs. Specifically, AT&T wanted to be able to use a loop secured as a special access circuit to connect with Qwest provided transport. There is substantial merit in allowing commingling where, due to inadequate existing loop facilities and a refusal by Qwest to construct new ones, CLEC options for delivering service are constrained. Moreover, if such commingling is permitted, without allowing ratcheting of rates (i.e., requiring the CLEC to continue to pay the tariff rate for the loop portion and the UNE rate for the transport portion) then the FCC concern about access charge avoidance is mitigated. Therefore, the SGAT should be changed to allow this narrow exception to the rule against commingling.

3. Waiver of Termination Liability Assessments for EELs

AT&T and XO/ELI argued that Qwest failed to provide EELs when required, choosing to wait until extensive litigation about the obligation to provide them ended in a 1999 decision by the U.S. Supreme Court, and subsequent federal court decisions. The evidence supports a conclusion that CLECs have secured special access circuits only to avoid Qwest's refusal to provide them with EELs. The record also demonstrated that CLECs secured special access circuits under reduced rates in exchange for minimum term commitments. Qwest made a generally acceptable proposal for exempting CLECs from termination liabilities in defined cases. With several recommended changes, this proposal would equitably balance the competing interests involved.

4. Waiving Local Use Restrictions on Private Lines Purchases in Lieu of EELs

AT&T argued that CLECs should be exempted from complying with local use restrictions on private line purchases made when Qwest would not allow access to EELs. This argument had more weight in the presence of significant early termination penalties for private lines secured only because EELs were not available. However, the easing of those penalties, as discussed in the previous issue, provides an acceptable avenue for converting private lines to EELs. Therefore, AT&T's recommendation should not be adopted.

5. Counting ISP Traffic Toward Local Use Restrictions

XO and ELI argued that ISP traffic should be counted toward local usage requirements, because it presents no threat of avoiding special access charges, from which ISP traffic continues to be exempt. They argued that it would be discriminatory to require CLECs to purchase significantly more expensive access services to serve ISPs, while Qwest could provide its ISP customers with less expensive local exchange service. The FCC's recent order on reciprocal compensation leaves

little doubt that ISP traffic is interstate in nature and has nothing to do with the provisions of the Telecommunications Act of 1996 as they relate to reciprocal compensation for the exchange of local traffic. Therefore, on its face, ISP traffic cannot count, under any practical application of the FCC's requirements, as local usage. Hopefully, the FCC will address the interplay between commingling issues and the recent *ISP Remand Order*, because XO/ELI have made a credible argument that it does not serve the public interest to require CLECs in some cases to pay tariff prices that include subsidies to serve ISPs, while incumbents can serve them on a basis that conforms more closely to their costs.

Issues Remaining in Dispute - Switching

1. Access to AIN-Provided Features

Special features (e.g., Caller ID) can be provided by the switch or through the development of software-based capabilities through Qwest's AIN. The latter approach can avoid limitations that are built into the switch intelligence that switch vendors provide. The evidence of record establishes that Qwest makes available to CLECs all switch-provided features, whether or not Qwest has activated them in its switches. At issue was whether Qwest must provide access to AIN-provided features or, instead, to AIN feature development capabilities, which would allow CLECs to develop their own competing features. The FCC has said that the latter is sufficient and the record demonstrates that Qwest does provide access to those capabilities. AT&T considered the FCC's consideration of the issue to be inadequate, arguing that CLECs should have access to the AIN-provided features that Qwest has developed. The evidence of record supports the conclusion that giving CLECs access only to the AIN feature-development capabilities (and not the features that Qwest has developed from those capabilities) is sufficient to permit them to compete with Qwest in the provision of relevant services to end users.

2. 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 (the only one relevant in these seven states is in Salt Lake City) to end users with four or more access lines within a wire center. AT&T wanted UNE rates to apply to the first three lines when a customer added additional lines, recognizing that the market-based rates would apply when a customer had more than three lines. This argument is not consistent with the distinction the FCC made between the mass and business markets; the FCC's exclusion should apply to all lines of end users that have more than three.

3. Basis for Line Counts in Applying the Four-Line Exclusion

AT&T argued that neither the FCC nor the SGAT 9.11.2.5 were clear in explaining whether the three-line maximum per customer should be applied on a per-customer or per-location basis: AT&T favored a per-location approach, which it said better reflected the FCC's mass versus business market distinction. A per-customer approach better comports with the FCC's language; therefore, the existing SGAT language is appropriate.

4. Providing Switch Interfaces at the GR-303 and TR-008 Level

Qwest had objected to AT&T's request for such access during the workshops. However, Qwest noted in its brief that it had since incorporated into SGAT Section 9.11.1.1.2 language that it felt would give AT&T the access it sought. This issue should therefore be considered closed, subject to the raising (in AT&T's comments on this report) of any concerns with Qwest's proposed language.

IV. Checklist Item 2 – Access to Unbundled Network Elements

Background - UNEs

Item two of the 271 competitive checklist addresses nondiscriminatory access to unbundled network elements, hereafter referred to as UNEs. The Telecommunications Act of 1996 requires Qwest and other incumbent local exchange companies to provide access to UNEs "on rates, terms and conditions that are just, reasonable and nondiscriminatory." 47 U.S.C. Section 251(c)(3). The checklist item 2 portion of the report first addresses general UNE issues, and then UNE platform, or UNE-P, and other combinations. Qwest's SGAT Section 9 sets forth the general terms that govern access to UNEs.

Issue Deferred to Another Workshop

1. Bona Fide Request Process

Comments were filed about the bona fide request (BFR) process for handling requests for non-standard forms of interconnection or UNEs. The bona fide request process is of general applicability to the SGAT; therefore, it was addressed in the subsequent workshop on General Terms and Conditions.

Issues Resolved During This Workshop – UNEs Generally

1. Definitions

AT&T commented that the UNE-P definition of SGAT Section 4.61 should include all the UNEs that are part of the platform, including the NID (network interface device), tandem switching, dedicated transport, and signaling, for example. AT&T also objected to the "pre-existing" terminology as a qualifier on combinations. Finally, AT&T said that the definition of UNE Combinations included only two specified types; the section should be changed to eliminate any inference that UNE-P and UNE combinations are limited to pre-existing ones or to any particular set of combinations.6 Qwest responded that it had made changes to SGAT Sections 4.6.1 and 4.6.3 in another state's workshops; it reported that these changes were sufficient to close the issue there. This issue was not briefed; it can be considered closed.

2. Changes in Law Regarding Access to UNEs

AT&T objected to SGAT Section 9.1.1, which provided a detailed method for incorporating changes in legal requirements involving access to UNEs.7 Qwest agreed that this section is redundant, given the general change-of-law provision contained in Section 2.2. Qwest therefore

6 AT&T's Comments on Access to Unbundled Network Elements, EELs, and Switching, February 23, 2001 (AT&T UNE Comments) at pages 30 and 31.

7 AT&T UNE Comments at page 15.

agreed to change this section to refer to that section.8 Issues regarding the appropriateness of Section 2.2 were addressed at the subsequent workshop on General Terms and Conditions. Apart from that consideration, the remainder of this issue can be considered closed here.

3. General Obligation to Provide UNE Access

AT&T objected to the SGAT Section 9.1.2 expression of Qwest's statutory obligation to provide UNE access, because it failed to capture the applicable FCC standards and terms. AT&T also sought to add to the section language that would require Qwest to indemnify CLECs in the event that Qwest failed to meet the requirements of the section or of state retail or wholesale service quality requirements.9 Qwest changed the section to track more closely the FCC's terminology.10 Arguments about the indemnity issue were moved to the following workshop on General Terms and Conditions. Therefore, this issue, subject to later consideration of indemnity, can be considered closed.

4. UNE Use Restrictions

AT&T raised a concern about whether SGAT Section 9.1.3 would allow all FCC-permitted uses, and asked that the ancillary services prohibited by this provision be identified.11 Qwest clarified that it would allow all currently permitted FCC uses, and that the ancillary services at issue were identified in SGAT Appendix A. This issue can be considered closed.12

5. UNE Demarcation Points

AT&T objected to the SGAT Section 9.1.4 requirement that it pay for Interconnection Tie Pairs (ITPs), which tie CLEC-purchased UNEs to a designated demarcation point between the networks of Qwest and the purchasing CLEC. AT&T also wanted to add direct connection from the CLEC collocation space to the distribution frame as an additional kind of allowable demarcation point.13 Qwest responded that the costs for ITPs should be considered in cost dockets, and it agreed to change the section to add the requested demarcation point language.14 This issue can be considered closed, subject to later cost docket consideration of the costs of ITPs.

6. UNE Testing

AT&T expressed concern that SGAT Section 9.1.6 failed to obligate Qwest to perform required testing to confirm functionality or to support maintenance and repair. AT&T also expressed concern that the section qualified Qwest's language, and did not unambiguously give CLECs all

8 Seven State Reply Testimony for Checklist Items 2 and 5, Karen A. Stewart, on behalf of Qwest Corporation, March 9, 2001 (Stewart UNE Rebuttal), at page 4.
9 AT&T UNE Comments at page 16.
10 Stewart UNE Rebuttal at page 7.
11 AT&T UNE Comments at page 17.
12 Stewart UNE Rebuttal at page 8.
13 AT&T UNE Comments at page 18.
14 Stewart UNE Rebuttal at page 9.

access necessary to perform end-to-end transmission and circuit functionality.15 Qwest responded in its testimony and further in its frozen SGAT filing with an amendment clarifying its obligations to: (a) perform tests to meet the technical parameters for the UNEs or the UNE combinations provided, (b) cooperate with CLECs in testing requested by CLECs to assist in determining end-to-end transmission and circuit functionality of UNE combinations, and (c) maintain and repair UNEs that it provided to CLECs.16 This issue can be considered closed.

7. UNE Provisioning Intervals

AT&T requested the identification of loop intervals, which SGAT Section 9.1.7 says are contained in SGAT Exhibit C.17 Qwest amended Exhibit C to list intervals for all UNEs.18 This issue can be considered closed with respect to the need to specify all intervals; however, the propriety of intervals for particular UNEs remains in dispute. Treatment of that issue follows later in this report.

8. Notice of Changes Affecting UNE Transmission Parameters

SGAT Section 9.1.9 commits Qwest to conforming to FCC requirements that would affect the interoperability of Qwest and CLEC networks. However, AT&T expressed concerns that Qwest could make changes that do not affect interoperability, but could affect the nature or quality of UNEs or of the conditions governing access to them. AT&T sought to require that such Qwest modifications be made subject to "Existing Rules" as defined in the SGAT, or, alternatively, that such modifications be subjected to a change management provision.19 Qwest responded with examples of the "minor" changes it considered to be contemplated by this SGAT section. Qwest also agreed to amend the section to clarify that, after such changes, it would still meet the transmission parameters of the UNE as ordered by a CLEC.20 This issue can be considered closed.

9. UNE Rates

AT&T noted that UNE rates are to be reviewed in other proceedings; they have not been addressed in this one. 21 This issue can be considered closed in these proceedings, subject to later Commission proceedings to address prices and costs.

10. Miscellaneous Charges

AT&T commented that SGAT Section 9.1.12 "Miscellaneous Charges" needs to specifically identify when such charges apply. AT&T argued that the charges should be just, reasonable, and

15 AT&T UNE Comments at page 18.
16 Stewart UNE Rebuttal at page 10.
17 AT&T UNE Comments at page 19.
18 Stewart UNE Rebuttal at page 11.
19 AT&T UNE Comments at page 19.
20 Stewart UNE Rebuttal at page 11.
21 AT&T UNE Comments at page 20.

nondiscriminatory.22 Qwest agreed to define and identify the circumstances when such charges could be applied, and to address any issues surrounding those charges in the following workshop on General Terms and Conditions. Therefore, the issue of the need to specify when such charges apply can be considered closed, subject to any consideration in the following workshop about the specific terms and conditions to be proposed by Qwest.

11. Construction Charges for Ancillary and Finished Services

AT&T objected to the provisions of SGAT Section 9.19 that would allow Qwest to impose construction charges for ancillary and finished services, in addition to direct charges for UNEs.23 Qwest's frozen SGAT language removes authorization to charge for ancillary or finished services, thereby limiting the charges to those applicable to UNEs. While a dispute remains on the question of Qwest's obligation to build new UNEs (that dispute is addressed below), the issue of charges for ancillary and finished services (but not for UNFs, as discussed below) can be considered closed.

12. Unbundled Customer Controlled Rearrangement Element (UCCRE)

AT&T expressed uncertainty and concern about the element that Qwest identified as UCCRE in SGAT Section 9.9.24 Qwest responded that UCCRE was Qwest's offering to meet the FCC's requirement that CLECs be provided with digital cross connect capabilities in the same manner that incumbents provide it to interexchange carriers. Qwest noted that it does not require the use of UCCRE to gain access to features or functions or to combine UNEs.25 Qwest said that AT&T agreed in another state's workshop that this issue was closed; AT&T did not brief the issue here. This issue can be considered closed.

13. UNE Demarcation Points

AT&T requested a new SGAT Section 9.23.1.10, which would obligate Qwest to provide a UNE demarcation point and adequate CLEC access to it.26 Qwest generally agreed that there should exist a network demarcation point for each UNE, but that certain combinations do not have a demarcation point on the Qwest network (e.g., the UNE-P demarcation point is the end user's premises). Qwest, however, felt that no new SGAT language was required, because Section 9 already dealt adequately with the issue of UNE demarcation points.27 No brief identified this issue as remaining in dispute; it can therefore be considered closed.

14. Access to Newly Available UNEs and UNE Combinations

AT&T wanted to add a new SGAT Section 9.23.17, which would deal with CLEC access to new newly available UNEs or to additional UNEs or combinations that it makes available to itself,

22 AT&T UNE Comments at page 21.
23 AT&T UNE Comments at page 21.
24 AT&T UNE Comments at page 29.
25 Stewart UNE Rebuttal at page 15.
26 AT&T UNE Comments at page 36.
27 Stewart UNE Rebuttal at page 27.

affiliates, or other CLECs.28 Qwest amended SGAT Section 9.23.1.2 to include language which resolved this issue in another state's workshops.29 The language was included in the Qwest SGAT and AT&T did not brief this issue. Therefore, this issue can be considered closed.

15. Information Access When Customers Change Service Providers

AT&T objected to the fact that SGAT Section 9.23.5.6 provided that Qwest would not tell the CLEC the name of the new service provider when that CLEC loses a customer. AT&T considered this provision discriminatory, because the section contained no prohibition on informing Qwest marketing personnel of the change.30 Qwest replied that the Act already addresses the confidentiality of customer-sensitive and proprietary information; therefore, the SGAT need not address this issue. Qwest deleted the sentence that AT&T considered discriminatory.31 This issue can be considered closed.

Issues Decided in Earlier Workshop Reports – UNEs Generally

1. Including LIS in the Definition of Finished Services

There were objections to including Local Interconnection Service (LIS) in the definition of "finished services" in the SGAT. This issue was significant because of the SGAT prohibition against commingling UNEs and finished services in the same trunk group. The principal focus of that issue was commingling special access circuits (which are finished services as well) with UNEs in a manner that could allow CLECs to avoid access charges improperly. Qwest agreed to delete LIS from the definition of "Finished Services" in Section 4.23(a) of the SGAT. With this change, the commingling issue became similar to the third unresolved *Reciprocal Compensation* issue (*Commingling of InterLATA and Local Traffic on the Same Trunk Groups*) of the May 15, 2001 *First Report – Workshop One* in these proceedings. That recommended resolution remains appropriate here.

2. Marketing During Misdirected Calls

As it did in the workshop addressing resale, AT&T asked for a change to SGAT Section 9.23.3.17, in order to provide controls on marketing and sales exchanges in cases where a CLEC customer misdirects a service, maintenance, or repair call to Qwest.32 This issue presents no new issues, assertions, or support different from those addressed in the second unresolved *Resale* issue (*Marketing During Misdirected Calls*) of the May 15, 2001 *Second Report – Workshop One* from these workshops. That resolution remains appropriate here. Therefore, Qwest should be required to make changes to SGAT Section 9.23.3.17 that correspond to those recommended in the *Workshop One* report.

28 AT&T UNE Comments at page 35
29 Qwest UNE Rebuttal at page 14.
30 AT&T UNE Comments at page 49.
31 Simpson UNE Rebuttal at page 6.
32 AT&T Loops filed at pages 12 and 13

3. Regeneration Charges

AT&T objected to the SGAT Section 9.1.10 channel regeneration charges where distances from the ILEC frame to a CLEC's collocation space would require regeneration.33 AT&T argued that Qwest should be required to provide the signal as ordered by a CLEC at the CLEC's collocation point, without any charges for any necessary regeneration. AT&T argued that such charges were improper because Qwest has the power to determine collocation locations. The location of the CLEC's facilities is a controlling factor in whether or not regeneration is necessary. It would discriminate among CLEC's if some of them had to pay and some did not, based solely on where Qwest chose to locate them. AT&T also said that in paragraphs 114 through 120 of the *Second Report and Order* the FCC prohibited regeneration charges for the termination of CLEC facilities at their collocation spaces.

This issue is essentially the same as the tenth unresolved *Collocation* issue (*Channel Regeneration Charges*) of the May 15, 2001 *Second Report – Workshop One* in these proceedings. AT&T's challenge here to that report's resolution of the issue is misplaced. First, the FCC report and order cited dealt with special access by interexchange carriers; the FCC was not discussing local services that CLECs take from incumbents. Second, the issue at hand there was the inclusion of repeater (regeneration) costs in tariff rates for all cross connections, despite the fact that the evidence demonstrated that repeaters were only necessary in rare cases where distances were beyond certain lengths. In other words, the issue there was whether repeater costs should be built into the charges for all collocations. For example, in commenting on Bell Atlantic's assertion that repeaters were necessary, the FCC said (at paragraph 119 of the order) that:

> *Bell Atlantic does not explain why it is necessary to add repeaters to circuits without regard to the length of the cable between the interconnector's facilities and the LEC's facilities. We find, therefore, that Bell Atlantic fails to justify including a repeater on every interconnection circuit.*

The FCC went on to require that repeater costs be excluded from tariff rates. The issue here is not the inclusion of repeater or regeneration costs in all collocation instances. It is acknowledged that the cost will apply only when regeneration is necessary and only where there is no alternative location. This is not the issue that the FCC had before it. If regeneration is required through no fault of Qwest's, then the reasonable costs of providing it should be recovered from the CLEC who benefits from regeneration. The reasons supporting this conclusion were fully addressed in the third round of the *Second Report – Workshop One*. The argument that AT&T made here about the FCC report and order considering interconnection in the interstate context (and that was made in the first workshop) is not persuasive.

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33 AT&T (M) Comments at page 20.

In Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection through Collocation for Special Access and Switched Transport, CC Docket No. 93-162, Second Report and Order, FCC 97-208 (rel. June 13, 1997).

Issues Remaining in Dispute – UNEs Generally

1. Construction of New UNEs

ELI proposed that SGAT Section 9.19 should be amended to require Qwest to construct unbundled loops under similar terms and conditions to those that apply when Qwest must construct its own loops to provide service to its own customers. ELI also requested that the phrase "provided that facilities are available" be deleted from SGAT Sections 9.23.1.4-6, in order to expand the obligation to construct UNEs and UNE combinations.35 Qwest responded that its obligation to build UNEs should be limited to cases where it has a legal obligation to build for its own end users, citing paragraph 451 of the First Report and Order, which limits the unbundling of facilities to "existing incumbent LEC facilities."36

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. AT&T argued that Qwest should not have to perform such construction at cost based prices, which presumably mean TELRIC costs, not the actual costs of construction of the particular UNE involved. AT&T said the obligation to provide UNEs on terms that are just and reasonable and equal to the terms and conditions under which an incumbent provides facilities to itself. AT&T said that nowhere did the FCC relieve incumbents of the responsibility to construct new facilities to provide UNEs, except in the case of unbundled transport.37

AT&T argued that CLECs would be denied a meaningful opportunity to compete in the event that Qwest were not required to build facilities to provide CLEC's network elements (other than transport) under the same terms and conditions that it would construct for itself or its end users; Qwest could refuse a CLEC request, then build facilities itself to serve the same end user.38

ELI objected to the SGAT Section 9.23.1.4, Section 9.23.1.5, Section 9.23.1.6, and Section 9.23.1.9.1.3.3, which limit Qwest's obligation to provide EELs to existing and available facilities. Qwest responded that paragraph 451 of the *First Report and Order* limits the provision of unbundled interoffice transport to "existing" Qwest facilities.40

WorldCom 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. Nevertheless, XO/ELI assert that Qwest subjects CLEC requests for new facilities to different standards.41

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35 Workshop 7 Response Summary of Issues #1 Prices on behalf of Electric Lightwave, Inc., February 23, 2001 ("ELI Response Summary"), at page 13.
36 Qwest's SGAT Exhibit A, at page 15.
37 AT&T's Brief on Issues from Supplemental Checklist Items 2, 5, and 6 ("AT&T UNE Brief"), May 30, 2001, at page 9, citing Local Competition Order paragraph 315 and 47 C.F.R. § 315(b).
38 AT&T UNE Brief, at page 9.
39 ELI Response Summary, at pages 14 and 15.
40 Qwest's Exhibit A, at page 15.
41 WorldCom's Brief, at page 3.

Sprint also argued that the MSA Section 9.2.4.3.1.2.4 should not allow Qwest to reject a CLEC order for unbuilt loops for lack of facilities, unless Qwest was entitled to reject a similar order from one of its end users. Sprint wanted to change the language to provide for parity between CLECs and Qwest's end user.[42]

Sprint argued that the Supreme Court's holding that CLECs are not entitled to a "yet unbuilt superior" network was not intended to deny an obligation to build, but was set forth in the limited context of denying a CLEC right to service that is superior in quality to what ILECs were providing after unbundling.[43] These two participants also asserted that paragraph 451 of the *First Report and Order* did not exempt incumbents generally from an obligation to construct, but rather concerned only the impact of the FCC's rules on small CLECs (which do not include Qwest).[44]

AT&T further argued that a number of provisions of Utah law add to Qwest's obligations in this area, citing provisions (a) prohibiting unreasonable prejudice or disadvantage to anyone, (b) requiring facilities necessary for public safety, health, comfort, and convenience, and (c) excluding lack of facilities from cases where Qwest may refuse service to a requesting customer.[45]

Qwest argued that it has no obligation to "build a network for CLECs," citing paragraph 324 of the FCC's *UNE Remand Order*, which said that:

> In the Local Competition First Report and Order, *the Commission limited an incumbent LEC's prospect unbundling obligation to existing facilities and did not require incumbent LECs to construct facilities.*

Qwest also cited the Eighth Circuit Court's holding in *Iowa Utilities Bd.v. FCC* that:

> *We also agree with petitioner that subsection 251(c)(3) implicitly requires access to only an incumbent LEC's existing network, -- not to a yet unbuilt superior one.*[46]

Qwest noted that there was no bottleneck-facilities concern with respect to facilities that did not yet exist. Despite this argument, Qwest did agree to undertake specific construction obligations in the MSA at Sections 9.1.2.1 and 9.1.2.2. The facilities encompassed by this commitment include conditioning, placing a drop, adding a network interface device, adding a card to central office or remote equipment, and adding central office tie pairs and field cross jumpers. AT&T argued that the offer from Qwest to build network elements to the extent that it has an obligation to build under its "current of last resort" obligations is not sufficient, because it extends only to DS0 loops and higher capacity ones.[47]

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[42] Sprint's Testimony at page 11
[43] Sprint's Brief at page 3, citing *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *reversed in part and remanded on other grounds, AT&T v. Iowa Utils Bd.*, 119 S. Ct. 721 (1999).
[44] Sprint's Brief at page 5
[45] Sprint's Brief at pages 3 and 4
[46] Qwest's Legal Brief Regarding Disputed Issues, Checklist Items 2 (UNEs), 5 (Transport), and 6 (Switching) ("Qwest Legal Brief"), May 11, 2001, at pages 10 and 11
[47] AT&T's Post Brief at page 7

AT&T's concerns extend to transport as well. Qwest specifically declined to add electronics for dedicated transport UNEs, citing paragraph 324 of the *UNE Remand Order*.48 AT&T objected to Qwest's refusal to accept an obligation either to: (a) place electronics on dark fiber in order to make it available as dedicated transport, or (b) replace electronics to expand existing capacity of the fiber. AT&T argued that UNE rates would compensate Qwest for the cost of installing electronics. AT&T also said that the duty to modify facilities to provide UNE access (under *Local Competition Order* paragraphs 198 and 202) support a requirement to add electronics to dark fiber.49

Proposed Issue Resolution: Qwest's reliance upon the Eighth Circuit Court opinion is strained. The context of the statement about an unbuilt network does not clearly relate to the issue of an incumbent's obligation to construct specific UNEs, as opposed to the issue of the kinds of presumptions about an incumbent's network that are appropriate for addressing broad questions about prices or service quality under the Telecommunications Act of 1996. Quite simply, the precise question at issue here has not been addressed explicitly, either in the Act or in the orders and rules of the FCC.

Looking to the Act's purposes, however, is helpful in narrowing the issue. So is Qwest's commitment in SGAT Sections 9.1.2.1 and 9.1.2.2 to provide for CLECs' new facilities that Qwest would provide under its carrier-of-last-resort obligations. Under this commitment Qwest would only charge CLECs what a Qwest retail customer would have to pay under analogous circumstances. This commitment narrows the issue to one of determining whether, even where Qwest has no retail obligation to build, there should nevertheless be a requirement that it undertake construction of new facilities to provide UNEs and whether such construction should be at TELRIC prices.

In deciding the question, we should begin by addressing several points that can cloud the real issue. First, there is a substantial risk that Qwest will not recover actual costs in the event that AT&T's proposal is accepted. AT&T is not correct in arguing that UNE rates are compensatory for the installation of new or enhanced electronics on dark fiber. UNE rates are monthly in nature and generally without minimum term commitments. They can be said to compensate Qwest for investments that it has already made for its own purposes; at least that is a conceptual underpinning of the FCC's pricing approach for UNEs. However, a CLEC that requires a new investment altogether should have more than an obligation to pay month-to-month. Absent a term commitment, Qwest could be significantly under-compensated in cases where CLECs abandon UNEs before new investment is recovered.

In essence, asking that Qwest be required to provide new construction is tantamount to requiring Qwest to take investment risk 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. Moreover, AT&T has proposed no language that would mitigate this risk to Qwest. Instead, AT&T proposes merely to move the obligation to Qwest, which actually would encourage AT&T

48 Qwest UNE Brief at page 11.
49 AT&T UNE Brief at page 8.

to require Qwest to make investments in situations where neither AT&T nor any other rational competitor would risk its own resources on the chance that customer use would continue for long enough to provide investment recovery. It is wholly inconsistent with the promotion of effective competition to sever connections between risk/reward by transferring all of the former to a competitor.

Second, we should not accept on faith that, with respect to new facilities, Qwest holds the same advantages of incumbency that apply to its existing facilities. It is clear that Qwest would gain material advantage by being able to exploit existing facilities, which it gained before the onset of facilities-based competition. However, there is just as clearly no presumption that it will indefinitely continue to have advantage as to new facilities. If the case were otherwise, then Congress and the FCC could be said to have started a meaningless pursuit of facilities-based competition. Otherwise we must ask how such competition can be expected to develop if incumbents have natural and compelling advantages out into the future. A key premise of the Act and of the FCC's implementing actions with respect to it is the development of facilities-based competition. For existing facilities, it is correct to place the burden on Qwest to show why access to them is not appropriate. For new facilities, the burden should be on Qwest's competitors to show why access to them is appropriate.

There is no evidence of record to support any claim that Qwest has a monopoly position with respect to new facilities. In fact, circumstances would suggest that all carriers competent enough to have a future in the business have the capability either to construct new facilities themselves, or to contract with third party construction experts (much as incumbents do themselves on occasion) who do. Space on or in poles, ducts, conduits, or rights of way may prove scarce, but competitors have access to Qwest's facilities and rights in this regard. Certainly, AT&T did not produce any evidence indicating that Qwest has any, let alone an unnatural, advantage in the costs of constructing new facilities. Moreover, AT&T presented no evidence to indicate that the access it is entitled to with respect to Qwest's poles, ducts, conduits, and rights of way is insufficient to allow it the same ability that Qwest has to construct new facilities where access rights are scarce.

Thus, there is not a clear basis for concluding that the failure to require Qwest to undertake the obligation to construct new facilities will significantly hinder fulfillment of the Act's general objectives, let alone its specific requirements. Even were there some demonstrated basis to so conclude, one would have to consider the goal of promoting facilities-based competition. Requiring Qwest to serve indefinitely and ubiquitously as both a financing arm (by taking investment risk under month-to-month UNE leases to CLECs) and as a construction contractor (by being forced to perform the installations required) is not appropriate. Not only will it not promote the goal, it may well hinder it. If CLECs can transfer the economic risks of new construction to Qwest, there is little reason to expect that they will have an incentive to take facilities risks or develop efficient installation capabilities.

There is, of course, a balance to be drawn in seeking to serve this goal and the goal of assuring that Qwest does not secure undue advantage through its incumbency in the local exchange market. However, where, as here, that incumbency cannot be shown to give particular advantage,

the decision is clear – Qwest should not generally be required to construct new facilities to provide CLECs with UNEs.

AT&T's brief expressly argued that failing to require Qwest to install electronics to light dark fiber would allow Qwest to retain the fiber solely for its own use. This argument ignores the self-evident point that AT&T can gain access to the dark fiber, and install its own electronics, using its rights of access to Qwest's poles, ducts, conduits, and rights of way. There is not any evidence in this record to counter the notion that CLEC's have the financial and operational wherewithal to perform such installations. Even if Qwest were more efficient in making such installations (another question on which no evidence was submitted and which is, by no means, without doubt), there is no basis for concluding that CLECs cannot make such installations in a way that gives them a meaningful opportunity to compete with Qwest.

AT&T's argument that Qwest's duty to modify facilities to accommodate interconnection or UNE access actually undercuts the argument that the FCC has supported the notion that incumbents must install new facilities to provide UNEs. Modification is different from new installations. If it were held otherwise, we would create a slippery slope down which would slide many types of installation work. Probably nobody would argue that removing bridge taps or load coils constitute a modification that makes a facility serviceable as a UNE. However, if the term modification were given a broad meaning, then it would also support the claim that Qwest should have to take out a smaller switch and install a newer one (or replace a smaller capacity line with a higher one) if there were capacity limits constraining the particular use anticipated by a CLEC for the existing facility as a UNE. In that case, the distinction between modification and new installation would become hopelessly blurred. If the FCC had intended that result, it is difficult to comprehend why it spoke in terms of modification at all.

The AT&T argument about preferential treatment misses a central point of the Act. Throughout its brief, AT&T cites the general proposition that Qwest cannot discriminate in favor of itself. Quite to the contrary, except where prohibited, Qwest has the same rights as any other business or person to discriminate in favor of itself. The normal standard of behavior among competitors is that they may exploit any peculiar asset to gain advantage over their rivals. Only where such discrimination is prohibited should there be concern. There is nothing inherently evil or malicious about using one's assets to serve one's own interests at the expense of competitors; in fact, it would be naïve to believe that any of the carriers participating in these workshops thinks otherwise.

We must be careful not to cross an important conceptual line here. We are not addressing discrimination in a social or constitutional sense; it should not be considered bad per se, or even suspect. Rather, it should be prohibited where it is inconsistent with the goals and the specific requirements of the Telecommunications Act of 1996, and that is all. Thus, general assertions of discrimination are not persuasive; context is critical in resolving issues where that claim has been made.

The Act does not preclude all preferential treatment by an incumbent in favor of itself. For example, an incumbent is perfectly free to favor itself by not making its vehicle fleet available for

lease by CLECs. Nothing in the Act prohibits it, even though one of the clear advantages of incumbency is the existence of a mature, readily available fleet that draws significant economy of scale advantage, as compared with the existing resources of at least some CLECs. Discrimination is only prohibited in cases where the FCC has decided that CLECs are entitled to equal availability of facilities or services. Thus, that an ILEC favors itself does not itself give rise to a right of equal treatment; that right must come from some other, independent place in the law or in the pronouncements of the FCC. Quite simply, neither the law nor the FCC has granted it explicitly, nor is there reason evident from this record why that right should be determined by the participating commissions to be necessary to give CLECs a meaningful opportunity to compete or otherwise to satisfy the public interest.

2. Commingling UNEs and Tariffed Services on the Same Facilities

ELI argued for the elimination of SGAT Section 9.23.3.7.2.7, Section 9.23.3.7.2.10, and Section 9.23.3.13 restrictions on providing UNEs and tariff services on the same facilities.50 XO/ELI argued that Qwest took an incorrect interpretation of the FCC's "commingling" term. They noted that the FCC concern here was to avoid bypass of special access services. XO/ELI contended that using the same facility to provide UNEs and special access services neither combines UNEs and tariff services nor does it allow a bypass of special access services. Holding otherwise, according to XO/ELI would also produce economic waste. Such a holding would require a CLEC that purchased a DS-3 facility under tariff to pay for an entirely new DS-3 facility for local traffic, even if there were enough currently unused capacity in the tariffed DS-3 facility to meet all the local service needs. XO/ELI considered it particularly egregious that Qwest would not even allow the same multiplexer to be used for UNEs and tariffed services. XO/ELI also cited added grooming costs and service disruptions, should Qwest's limitations stand. Therefore, they recommended allowing multiple use and proration of rates according to the percentage of the facility used for UNEs and for special access.51

Qwest countered that paragraph 22 of the *Supplemental Order Clarification* provides that:

> *This option* [for establishing a significant amount of local exchange service] *does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services.*

Qwest's brief also cited language from paragraph 28 of the order:

> *We further reject the suggestion that we eliminate the prohibition on "co-mingling" (i.e. combining loops or loop-transport combinations with tariffed special access services)...We are not persuaded on this record that removing this prohibition would not lead to the use of unbundled network elements by IXCs solely or primarily to bypass special access services. We emphasize that the co-mingling determinations that we make in this order do not prejudge any final resolution on whether unbundled network elements may be combined with tariffed services. We will seek further information on this issue in the Public Notice that we will issue in early 2001.*

50 Peters Testimony at pages 17 and 18.

51 XO/ELI Brief at pages 4 through 6 and Peters Testimony at pages 8 and 9.

AT&T raised a concern different from the problem that XO/ELI had with commingling. AT&T proposed an SGAT Section numbered 9.23.1.9, which would allow CLECs to combine Qwest-provided UNEs with other unbundled elements or services.52 Qwest addressed such further combinations in its proposed SGAT Section 9.23.1.2.2, which, unlike AT&T's language, precluded directly connecting UNE combinations with Qwest finished services in most cases. 53

AT&T argued that the broad commingling prohibition of SGAT Section 9.23.1.2.2 is not supported by any FCC rule or order. Rather, AT&T said, 47 C.F.R. § 51.307(a) precludes restrictions on the use of UNEs. AT&T also argued that Qwest's prohibition against commingling is wasteful, and raises a barrier to meaningful competition with Qwest, because it requires the construction of separate networks where one would serve.54

AT&T acknowledged the existing FCC restriction against commingling either EELs or loops with special access circuits on the same facilities, pending a review of the matter. However, AT&T noted, there were no prohibitions extending beyond these specific ones. Accordingly, AT&T sought a change to SGAT Sections 9.6.2.1 and 9.23.1.2.2 to make it clear that the SGAT ban on connecting UNEs and "finished" services would not extend beyond cases specifically prohibited by the FCC.55

In supporting the SGAT sections prohibiting commingling, Qwest relied upon the same FCC determinations acknowledged by AT&T. 56 Qwest did mention the FCC ruling on commingling of interconnection facilities and special access circuits (resolved as the third unresolved issue, *Commingling of InterLATA and Local Traffic on the Same Trunk Groups*, under *Reciprocal Compensation* in the May 15, 2001 *Second Report – Workshop One* in these workshops). However, Qwest provided no argument or support for a commingling ban involving UNEs beyond what was specifically required by the FCC in connection with loops or loop transport combinations.

Proposed Issue Resolution: The FCC used the terms "connecting," "combining," and "co-mingling" of loops and loop-transport combinations to describe what it is that CLECs cannot do pending its determination of whether its access-charge regime would be compromised thereby. The most fundamental problem with the XO/ELI argument is that it does not say what these three terms mean, if they do not mean segregating UNEs and special access circuits into separate facilities at least as a general matter. Nor is any other interpretation apparent. In the absence of a clear alternative that will serve the FCC's goal, which is an important one, Qwest's interpretation of the requirement should be adopted as consistent with the language and the purpose of the FCC's temporary prohibition.

The dispute between AT&T and Qwest is much narrower: AT&T has not contested the ability of

52 AT&T UNE Comments at page 36.
53 Stewart UNE Rebuttal at page 14.
54 AT&T Loops Brief at page 11.
55 AT&T Loops Brief at page 12.
56 That resolution remains appropriate and is in no way intended to be changed here.

Qwest to deny (pending current consideration of the ban by the FCC) CLECs the ability to commingle loops and loop-transport combinations and special access circuits on the same facilities. However, Qwest's language does not limit the prohibition to these cases. Nor did Qwest provide any support for the proposition that the FCC has otherwise retreated from its broad restriction under 47 C.F.R. § 51.309(a) against incumbent:

> *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.*

Therefore, Qwest should not be permitted to impose restrictions broader than those specifically addressed in its brief. Accordingly, the next-to-last sentence of SGAT Section 9.23.1.2.2 should be amended to read as follows:

> *Where specifically prohibited by applicable federal or state requirements, 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.*

3. OSS Testing

AT&T raised concerns about the 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. Qwest responded by proposing SGAT Section 12.2.9.3 in Exhibit WS3-QWE-KAS-7. AT&T proposed changes to make that language more comprehensive.[57]

One aspect of AT&T's concern is the existence of a stand-alone test environment to test new OSS releases. AT&T noted that Qwest has recently proposed to make the environment available prior to seeking Section 271 approval and to submit a proposal to the ROC for testing that environment. AT&T argued that the stand-alone test environment should be tested as part of the ROC third-party OSS test before a finding of compliance with checklist item 2.[58]

The second major aspect of AT&T's concern was the lack of a provision for comprehensive production testing. AT&T argued that Qwest's language for Section 12.2.9.3 did not provide for testing in volumes that would confirm the suitability of Qwest's OSS for "large-scale market entry." AT&T said that all of the testing provided for by Qwest operated on a small scale or required the use of "friendlies" (CLEC customers willing to risk their telephone service to participate in the test). AT&T's proposal, which it said was consistent with its interconnection agreement in Minnesota and its dealings with Verizon and Bell South, would install 1,000 lines to test equipment and billing. AT&T considered the OSS test (which would not test AT&T's particular interfaces) inadequate to meet the FCC's finding that carrier-to-carrier testing is also

57 AT&T Loops Brief at pages 15 and 16, referring to its Exhibit WS3-ATT-MFH-2.
58 AT&T Loops Brief at pages 17 and 18.

relevant.59

Qwest objected to AT&T's detailed proposal for comprehensive production testing as: (a) generally unnecessary in light of the other forms of testing contemplated by the SGAT, (b) duplicative of the testing to be performed as part of the ROC third-party OSS test now underway, and (c) particularly unnecessary for a company with AT&T's reported entry strategy of market entry that does not make substantial use of Qwest's loops. Qwest objected to being obliged to undertake extensive testing on the unilateral request of a CLEC, but did indicate a willingness to negotiate a specific comprehensive test procedure based upon particular circumstances.60

Qwest objected to a number of AT&T's other changes to SGAT Section 12.2.9.3.1 through 12.2.9.3.4:

- AT&T's addition at various places of the phrase "CORBA and other application-to-application interfaces" should not be accepted because Qwest is reluctant to make commitments regarding non-standard or unidentified interfaces. Qwest considered its agreement to AT&T's last sentence in proposed Section 12.2.9.3.1 adequate to address connectivity-testing needs for new interfaces.

- The added AT&T sentences in Section 12.2.9.3.2 and 12.2.9.3.3 (those beginning with "While separate...") that require testing and production results to be "identical." Qwest considered that standard vague and perhaps impossible to meet.

- The AT&T requirement that test "pre-order inquiries" be subject to the same edits as production orders. Qwest said that this was not possible, because the edits based on real customer data in Qwest's systems had no application to the fictional customers used for purposes of this test.

- AT&T's 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 believed that its language in Section 12.2.9.4.1 and 12.2.9.4.2 of the SGAT attached to its brief already adequately addressed new software releases and upgrades.

Proposed Issue Resolution: Qwest's brief did not address AT&T's concern about evaluation of the stand-alone test environment in at least the general context of 271 approval activities. Given Qwest's reported goal of conducting an evaluation in the immediate term, therefore, this issue will be deferred until state commission consideration of the results of the current ROC third-party OSS test.

AT&T's proposed language for SGAT Section 12.2.9.3.5 would adopt a prescriptive approach to comprehensive testing that would not allow for negotiation between Qwest and CLECs with

59 AT&T Loops Brief at pages 19 and 20.
60 Qwest Loops Brief at pages 5 and 6.

respect to test scope, conditions, or payment responsibility. It also contains no provision for dealing with requested tests that duplicate other test activities. Moreover, adopting that language now could prove disruptive to the OSS test procedures now underway. There was no disagreement on the record with the following propositions: (a) the ROC third-party test will comprehensively address the ability of Qwest's OSS to serve CLEC needs, including the ability to handle commercial volumes of transactions, (b) the test has been designed with input from all stakeholders, including CLECs, who had an opportunity to identify any test activity considered material to Section 271 compliance, and (c) the stated objective of AT&T in conducting the test was to test its particular side of the interface with Qwest's OSS (which does not seek to evaluate the functionality of any CLECs operations or systems). Moreover, AT&T presented no argument or evidence that its near-term market-entry plans require any such test to be performed immediately.

However, it should be recognized that, in the future, there could well be circumstances where a CLEC has a particular need for testing beyond what is already contemplated by the SGAT, for example because of a major CLEC product or service roll-out or a change in the systems that a CLEC will use to manage its customer relationships, including its interface with Qwest's OSS. There should be a provision to allow for testing that is appropriate to such circumstances. While it is proper to expect Qwest and the CLEC involved to work out the details of such a test, it is not reasonable to require that they ultimately agree, which would be tantamount to giving Qwest a veto power over the conduct of such a test. Therefore, the following language should be included in the SGAT, in lieu of AT&T's proposed Section 12.2.9.3.5:

> *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.*

Moreover, given the importance and the significant resource consumption required by the current ROC third-party OSS test, this procedure should not be available for use until completion of that test and after the first consideration by the FCC of the results thereof.

Finally, there remain Qwest's specific objections (itemized above) to other portions of the AT&T changes to SGAT Section 12.2.9.3. Those objections are well founded. Therefore, none of the AT&T additions subject to those objections is appropriate. However, subject to the revised Section 12.2.9.3.5 proposed above and subject to the acceptance of Qwest's specific objections to AT&T's changes, AT&T's other requested changes to Section 12.9.2.3 and its subparts (as shown in WS3-ATT-MFH-2) should be incorporated into the SGAT.

Issues Resolved During This Workshop – UNE Platform and Other Combinations

1. Availability of Switch Features with UNE-Platforms

AT&T commented that the SGAT Section addressing UNE-P POTS was unclear; it suggested that Qwest could withhold some switch features from this option.61 Qwest responded that it did not intend for the language to create that suggestion; Qwest offered various amendments to portions of SGAT Sections 9.23.3.2 to address AT&T's concern.62 This issue can be considered closed.

2. Features Available with UNE-P-PBX, UNE-P-DSS, and UNE-P-ISDN

AT&T commented that SGAT Section should list all of the features that can and cannot be ordered with the UNE-P-PBX.63 Qwest made changes to SGAT Sections 9.23.3.3, 9.23.3.4, and 9.23.3.5 to provide more detail about the features of these offerings.64 This issue can be considered closed.

3. Migrating from Centrex Services to UNE-P

AT&T said that SGAT Section 9.23.3.6 did not make clear what Centrex-type UNE combinations Qwest was making available. The features available were not clearly stated and the section did not oblige Qwest to make available all necessary administrative controls.65 Qwest changed the Section to provide the additions requested by AT&T.66 This issue can be considered closed.

4. High Speed Data with UNE-P-POTs and UNE-P-ISDN

AT&T said that CLECs should be able to order these offerings with xDSL, which would require the addition of unbundled packet switching.67 Qwest responded that this issue was to be addressed in the workshop that addressed line splitting. It saw no need here to make SGAT changes separate from those identified there.68 AT&T did not brief this issue; it can be considered closed.

5. Converting From Resale to UNE-P

AT&T wanted to change SGAT Section 9.23.3.13 to apply the UNE-P rate (when it is converting from serving a customer by reselling Qwest retail services to the use of a Qwest-provided UNE-

61 AT&T UNE Comments at page 39.
62 Simpson UNE Rebuttal at pages 3 and 4.
63 AT&T UNE Comments at page 40.
64 Simpson UNE Rebuttal at page 4.
65 AT&T UNE Comments at page 41.
66 Simpson UNE Rebuttal at page 4.
67 AT&T UNE Comments at page 46.
68 Simpson UNE Rebuttal at page 7.

P1 at the later of the due date requested by the CLEC or the standard interval. AT&T noted that there should be no reason for delay in the conversion, because no new facilities are required in such cases.69 Qwest agreed to change the section to accommodate AT&T's request, except where delay is caused by the requesting CLEC.70 This issue can be considered closed.

6. Definition of Access

AT&T noted that SGAT Sections 9.23.1 and 9.23.2 were phrased to allow "access" to UNE combinations, but did not make the combinations themselves available to CLECs.71 The phrasing of Section 9.23.2 in Qwest's frozen SGAT filing makes it clear that Qwest offers the combinations, not just access to them. This issue can be considered closed.

7. Restrictions on UNE Combinations

AT&T considered previous SGAT Section 9.23.2 language to have placed restrictions under language that did not track FCC orders, but noted that the current language offered by Qwest reflected acceptable changes.72 This issue can be considered closed.

8. Use Restrictions

AT&T sought a provision in SGAT Section 9.23.1.2.1 that would prohibit Qwest from imposing use restrictions or other limiting conditions on UNE combinations, consistent with 47 C.F.R. § 51.315(d).73 Qwest agreed here to language that AT&T found acceptable in another state's workshop.74 This issue can be considered closed.

9. Combining Qwest Provided UNEs With Other Elements or Services

AT&T sought a provision that would explicitly allow it to combine Qwest-provided UNEs or combinations with other elements or services provided by Qwest, the CLEC or third parties.75 Qwest agreed, except for combinations with other services, which it considered broader than what the FCC required. Qwest proposed SGAT Section 9.23.1.2.2 language to accommodate AT&T's request in part.76 This issue can be considered closed insofar as it concerns combinations with other Qwest UNEs or network components provided by the CLEC itself or third parties. However, there remains a dispute, which is addressed elsewhere in this report, about combinations with "finished" Qwest services.

10. Non-Separation of Combined Elements

AT&T proposed an addition to Qwest's SGAT Section 9.23.1.3 language prohibiting Qwest,

69 AT&T UNE Comments at page 47.
70 *Simpson UNE Rebuttal* at page 5.
71 AT&T UNE Comments at page 31.
72 AT&T UNE Comments at page 32.
73 AT&T UNE Comments at page 33.
74 Stewart UNE Rebuttal at page 21.
75 AT&T UNE Comments at page 33.
76 Stewart UNE Rebuttal at page 23.

except upon CLEC request, from disconnecting or separating CLEC-requested elements that are already combined in Qwest's network. AT&T's addition provided more detail about separation or disconnection, and it addressed non-recurring charges for the transition from existing services to UNE combinations.77 Qwest noted that SGAT Section 9.23.4 already addressed the transitioning costs, which would make inclusion of similar language here redundant.78 No brief identified this provision as remaining in dispute; this issue can therefore be considered closed.

11. "Glue" Charges for Combinations

AT&T wanted to add SGAT Section 9.23.1.11, which would generally preclude Qwest for charging for the linkages between UNEs secured in combination or separately if Qwest is providing its own customers with service through direct connections between the elements involved.79 Qwest agreed to limit its non-recurring element-combination costs to its costs, which are addressed in SGAT Section 9.23.4.1.2.80 This issue can be considered closed.

12. Ordering Equipment Ancillary to UNE Combinations

AT&T wanted to add SGAT Section 9.23.1.12, which would allow CLECs to order the ancillary equipment (citing the example of a multiplexer when a CLEC wants to convert a circuit from DS0 to DS1) that is required to connect or provide an interface between UNEs in a combination.81 Qwest responded that: (a) it already allows access to multiplexing, (b) it does not know what other ancillary equipment exists, and (c) UNE engineering requirements can already by specified. Therefore, it proposed no change to the SGAT.82 This issue was not briefed: therefore, it can be considered closed.

13. Restricting Available UNE Combinations

AT&T expressed concern that the SGAT Section 9.23.2 list of standard UNE combinations might be read to prohibit other types of combinations. It sought a change that would make it clear that Qwest could only disallow combinations if the elements were not normally combined in Qwest's network and if the requested combinations were not technically feasible.83 Qwest's response cited SGAT Section 9.23.1.4 and 9.23.1.5 provisions that do obligate Qwest to provide other combinations if they are technically feasible and if they would not impair other CLEC access or interconnection or Qwest's own use of its network. Qwest said that it would allow combinations other than those of Section 9.23.2 under its special request process.84 This issue was not briefed. It can be considered closed with respect to the issue of whether UNE combinations are limited to those expressly allowed in the SGAT. However, general issues regarding the use of the SGAT's special request process, which extends beyond UNE

77 AT&T UNE Comments at page 34.
78 Stewart UNE Rebuttal at page 24.
79 AT&T UNE Comments at page 36.
80 Stewart UNE Rebuttal at page 28.
81 AT&T UNE Comments at page 37.
82 Stewart UNE Rebuttal at pages 29 and 30.
83 AT&T UNE Comments at page 37.
84 Stewart UNE Rebuttal at pages 30 and 31.

combinations, was held over for consideration in the subsequent workshop.

14. Loop and Multiplexing Combinations

ELI requested that Qwest make loop and multiplexing combinations (which it now secures from Qwest as a tariffed service) available without the need for use of the special request process.85 Qwest responded that adding DS1 loops to a multiplexer was already contemplated with multiplexed EELs. It considered other multiplexer/loop issues to be part of subloop unbundling.86 This issue was not briefed; it can be considered closed.

15. CLEC Loop Terminations

AT&T wanted to add a switch port and shared transport combination.87 Qwest responded that this arrangement is already permitted, because shared transport must be ordered with unbundled switching.88 This issue can be considered closed.

16. UNE Combination Forecasts

AT&T wanted to remove SGAT Section 9.23.3.14 language addressing forecasts; ELI wanted to eliminate forecasts as a condition for accepting UNE combination orders. Qwest agreed to remove the language.89 This issue can be considered closed.

17. Nonrecurring Charges

ELI expressed concern about the reference to "Existing Rules" in the language regarding nonrecurring charges for UNE combinations. In particular, ELI sought review either here or in a cost docket of the question of whether Qwest's nonrecurring charges exceed the amount necessary to recover actual costs incurred.90 These workshops have not included evidence in support of any particular charges; consideration of pricing issues has been generally deferred to separate cost dockets.

18. Delays From Loading CLEC Billing Rates into Qwest's Systems

ELI expressed concern that SGAT Section 9.23.5.1 could require delays from causes such as the need to execute and SGAT amendment, or the time it takes Qwest to load Commission-approved rates into its billing systems.91 The frozen SGAT streamlines the ordering process. Qwest also said that it had to enter rates for individual CLECs, each of which may have uniquerates. Qwest testified that it was working to reduce the time required to load rates.92 ELI did not brief this

85 Peters Testimony at page 16.
86 Stewart UNE Rebuttal at page 31.
87 AT&T UNE Comments at page 46.
88 Qwest UNE Rebuttal at page 32.
89 AT&T UNE Comments at page 48; Peters Testimony at page 18; Stewart UNE Rebuttal at page 32.
90 Peters Testimony at page 18.
91 Peters Testimony at page 19.
92 Stewart UNE Rebuttal at page 38.

issue, it can be considered closed.

V. Checklist Item 4 – Access to Unbundled Loops

Background – Loops

Item 4 of the competitive checklist requires that Qwest and other incumbent local exchange companies provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services." 47 U.S.C Section 271(c)(2)(B)(iv). The FCC further 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."93 The *UNE Remand Order* modified this definition 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."94

Also treated under this topic are two subsidiary issues:

- Line Splitting – Line splitting refers to the situation where two different CLECs provide both the voice and data service over a single loop, which Qwest provides.
- NID – The NID is defined as "any means of interconnection of end-user premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device used for that purpose."95 Qwest is required to unbundle subloop elements and NIDs.

Issues Deferred to Another Workshop

1. Accepting Loop Orders With "Minor" Address Discrepancies

AT&T commented that Qwest was rejecting service orders with minor and immaterial differences between end user information on the LSR and information in Qwest's systems. AT&T asked for the addition of the following SGAT language to address this concern:96

> *Qwest will accept CLEC orders as accurate when there are small and immaterial differences between the end user address on the CLEC order and the end user address in Qwest's records. When the end user combines a change in service to the CLEC with a change in address, Qwest will provide an ordering process that accomplishes this transition in an efficient and accurate manner.*

Qwest objected to accepting LSRs with such problems, arguing that its OSS already contained address validation tools that would allow CLECs to assure that addresses it wanted to enter were correct.97

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93 *Local Competition First Report and Order*, para. 380.
94 *UNE Remand Order*, paragraph 167.
95 *UNE Remand Order*, paragraph 233.
96 AT&T Loop Comments at page 29.
97 Qwest Rebuttal at page 54.

During the workshop the parties agreed that AT&T would submit a number of examples of address discrepancies that it could not solve using the address validation tools available through Qwest's OSS. The examples were provided and testimony was taken from Qwest and AT&T witnesses. After that testimony, the participants had the opportunity to raise and support any arguments on the issue through briefs. None chose to do so. In addition, the record made provided no conclusive evidence that proper use of the address validation tools would have failed to adequately reconcile CLEC and Qwest address information about customers. Finally, the record demonstrated that address errors would be within the scope of the OSS testing being performed under the multi-state OSS testing now in progress. Therefore, this issue should await resolution with the completion of that testing.

3. Resolving Conflicts Between the SGAT and Parallel Documents

AT&T contended that a number of other documents, including the IRRG, and Qwest Technical Publications, conflict with the SGAT. AT&T's principal concern was that such parallel documents could be read to impose additional or inconsistent terms beyond those required by the SGAT. As it was agreed to defer to the subsequent General Terms and Conditions workshop the issue of determining how to resolve conflicts between the SGAT and other documents referred to therein or otherwise used by Qwest in implementing the SGAT.

Issues Resolved During This Workshop - Loops

1. Definition of Loop Demarcation Point

AT&T requested changes to SGAT Sections 4.34 and 9.2.1 to clarify the demarcation point where unbundled loops end at the customer premises. AT&T also wanted to add a definition of inside wire.99 Qwest made the demarcation point language change requested by AT&T, but said that the inside wire did not need to be identified for the purposes of determining where unbundled loops end.100 AT&T did not brief this inside wire language addition; this issue can be considered closed.

AT&T also requested a change to SGAT Section 9.2.2.1 to clarify that the loop is unbundled from switching and transport.101 Qwest changed the language to address this comment.102 This issue can be considered closed.

2. Digital versus Digital-Capable Loops

AT&T contended that Qwest should be required not only to provide loops capable of being equipped to provide digital service, but also loops already having the ISDN equipment installed.

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99 AT&T Loop Comments at page 29.
100 AT&T's Comments on Loops, Line Splitting and NID(AT&T Loop Comments), March 23, 2001, at page 10.
101 Rebuttal Testimony of Jean M. Liston, Qwest Corporation, Checklist Item 4 Unbundled Loops (Liston Rebuttal), April 16, 2001, at page 12.
102 AT&T Loop Comments at page 11.
103 Liston Rebuttal at page 11.

AT&T recommended an SGAT Section 9.2.1 language change to define loop type (ii) as including "Digital and Digital Capable" loops.103 AT&T made a similar request in connection with ISDN loops (SGAT Section 9.2.2.6), 104 DS1 and DS3 loops (SGAT Section 9.2.2.6),105 and digital loops (SGAT Section 9.2.2.7).106

Qwest added SGAT provisions containing definitions of what "capable" and "compatible" mean, in order to respond to this comment. Qwest noted that these changes proved satisfactory to AT&T's in workshops in other states.107 AT&T did not brief this issue; it can be considered closed.

3. Parity in Providing Unbundled Loops

AT&T requested language that would require Qwest to provision CLEC unbundled loops in the same time and manner as Qwest provides service to its own end users.108 XO wanted to change the word comparative quality standard from "substantially the same" to "at least equal to."109 AT&T made a similar comment. Qwest's frozen SGAT filing accommodates the AT&T request and obligates Qwest to meet the specific performance requirements that are set forth SGAT in Exhibit C and Section 20. This issue can be considered closed.

4. Limiting Available Analog Loop Frequency

AT&T objected to Section 9.2.2.2 language that limited analog loops to the frequency "within the analog voice frequency range." AT&T said that CLECs should have access to whatever bandwidth is available on a loop. AT&T also requested another detail change in the section.110 Qwest changed the section to respond to the AT&T recommendations.111 This issue can be considered closed.

5. Method for Providing Unbundled IDLC Loops

AT&T said that Qwest should be more specific about providing unbundled loops where it used IDLC.112 Qwest added SGAT Section 9.2.2.2.1 to provide a description of how it will do so.113 This issue can be considered closed.

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102 AT&T Loop Comments at page 11.
103 AT&T Loop Comments at page 15.
104 AT&T Loop Comments at page 16.
105 AT&T Loop Comments at page 17.
106 Exhibit Schmid at page 18.
107 AT&T Loop Comments at page 11.
108 Exhibit 3 Additional Response Testimony of David LaFrance (LaFrance Testimony), March 23, 2001, at page 6.
109 AT&T Loop Comments at page 12.
110 Exhibit Schmid at page 19.
111 AT&T Loop Comments at page 13.
112 Exhibit Schmid at page 21.

6. Choosing Loop Technology Types

AT&T said that a CLEC should be able to choose between available technologies for providing the type of digital loop requested, when more than one type is available.114 Qwest responded that its practice for itself is to select the first suitable alternative identified by its mechanized systems. Qwest agreed to change SGAT Section 9.2.2.3 to provide that it would choose loops for CLECs in the same manner that it chose them for its own end users. Qwest indicated that this resolution proved satisfactory to AT&T in another state's workshop.115 This issue can be considered closed.

7. CLEC Authorization for Conditioning Charges

Staff wanted to clarify that SGAT Section 9.2.2.3 charges would require CLEC request.116 Qwest changed the Section to provide that clarification.117 This issue can be considered closed.

8. Access to Loop Features, Functions, and Capabilities

AT&T expressed concern that SGAT Section 9.2.2.3 did not specifically commit Qwest to providing all the features, functions, and capabilities that a loop and its electronics can provide.118 Qwest responded that the loop specifications set forth in SGAT Sections 4.34 and 9.2.1 are sufficient, and need not be repeated in later SGAT sections.119 AT&T did not brief this issue, it can be considered closed.

9. Offering High Capacity and Fiber Loops on an Individual Case Basis

AT&T commented that SGAT Section 9.2.2.3.1, which offered high capacity and fiber loops on an Individual Case Basis, violated Qwest's obligation to make such facilities available on nondiscriminatory the same basis as it provides them for its own end users.120 XO said that Utah's service quality rules R746-365-4 contemplate the provisioning of high capacity loops, which therefore should be subject to specific terms and conditions.121

Qwest said that it would provide high capacity loops, but that there had been insufficient demand for them to justify the creation of standard terms and conditions. Qwest noted that 12 of its 14 states provide ICB pricing for OC3 loops, and that the FCC had approved a number of SBC 271 applications in cases where ICB pricing applied to high capacity loops. Qwest did agree that it would meet the Utah-specific requirement to provision OC3 loops within 15 days, but said that Utah rules allow negotiated due dates for OC4 and above.122 AT&T agreed that its objections to

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114 AT&T Loop Comments at page 13.
115 Simpson Rebuttal at page 22.
116 LaFrance Testimony at page 6.
117 Liston Rebuttal at page 21.
118 AT&T Loop Comments at page 13.
119 Liston Rebuttal at page 22.
120 AT&T Loop Comments at pages 13 and 14.
121 LaFrance Testimony at page 7.
122 Liston Rebuttal at pages 23 and 24.

the ICB process could be raised at the subsequent workshop, where ICB issues would be addressed generally.123 This issue can generally be considered closed, except to the extent that any ICB concerns remain open following the workshop addressing them and except to the extent that they bear on resolution a general XO/ELI objection regarding the general adequacy of the SGAT's provisioning and repair intervals and Utah-specific rules. Standard provisioning intervals for loops with specific durations also remain in dispute; this issue is addressed below.

10. Charges for Unloading Loops

Load coils are examples of those devices used to support the provisioning of voice service that are incompatible with providing data service over loops. Such devices have to be removed or "unloaded" in order to allow a CLEC to provide data services over the loops affected. AT&T objected to the SGAT Section 9.2.2.4 and 9.2.2.5 requirement that CLECs pay the costs of unloading for loops of less than 18,000 feet in length, arguing that loops of less than that length should not have had such devices in the first place. AT&T also objected to paying for the removal of bridge taps, which it said Qwest should have removed when it eliminated party-line service.124

Qwest responded that the FCC has already explicitly determined in the *UNE Remand Order* that incumbents can charge for conditioning loops of less than 18,000 feet, even though networks built today would not ordinarily have load coils on such loops. Qwest also said that a recent federal court case reached the same conclusion. 125

AT&T did not brief this issue. Given the clarity of the FCC's order, the reference to an applicable federal court decision, and the lack of briefs, this issue can be considered closed. Moreover, should it remain in dispute, it is clear that there has been no evidence presented to demonstrate that the installation of load coils and bridge taps was imprudent or that leaving them in place was imprudent. Thus, the cost of removing them is a legitimate cost of doing business and these costs should be paid by the party for whom unloading or conditioning is performed.

11. Extension Technology to Give Loops ISDN Functionality

AT&T questioned what charges would apply under SGAT Section 9.2.2.5 for loop extension technology when Qwest had to dispatch technicians to make the changes necessary to allow a loop to provide ISDN service. AT&T also questioned what technical standards would apply.126 In response, Qwest changed the section to specify that charges would be in accord with SGAT Appendix A and to address technical aspects of extension technology. This issue can be considered closed, subject to the open issue (to be addressed in the subsequent workshop on General Terms and Conditions) relating to the effect of cited technical documents that may

123 AT&T Loops Brief at page 9.
124 AT&T Loop Comments at page 14.
125 Qwest Rebuttal at page 25, citing *U S WEST Communications, Inc. v. Hix*, Civil Action No. 97-D-152 (consolidated), Order at 10 (D. Colo. June 23, 2000).
126 AT&T Loop Comments at page 15.

conflict with SGAT requirements.

12. DS1 and DS3 Loop Specifications

AT&T asked that Qwest address the specifications of these loop types, which SGAT Section 9.2.2.6 covers.127 Qwest provided to AT&T the addresses of the Qwest web sites that discussed these specifications.128 AT&T did not brief this issue; it can be considered closed.

13. Access to Digital Loops Where Available

AT&T expressed concern that SGAT Section 9.2.2.7 could be read as allowing Qwest to deny access to available digital loops in areas where "any" loop (as opposed to all loops) was being provided on facilities that could not support digital loops.129 Qwest made a change, which it said satisfied AT&T in another state's workshop; it would exempt Qwest from providing digital loops only in areas that were "exclusively" served on facilities that could not support digital loops.130

14. Loop Installation Process

SGAT Sections 9.2.2.9.1 and 9.2.2.9.2 describe basic loop installation. AT&T asked that Qwest describe more fully in the SGAT the Qwest installation processes, and that Qwest provide its operations manuals for review. AT&T said that it was experiencing facility problems with almost one third of Qwest installations of DS-1 loops.131 Qwest responded that a number of exhibits it had filed in these workshops provided descriptions of its loop installation processes.132

15. Coordinated Installation

AT&T sought language that it felt would improve Qwest' processes for coordinating the cutover of loops with number porting, in order to address customer service problems and even service outages that AT&T said it was experiencing. AT&T proposed the following language for SGAT Section 9.2.2.9: 133

> *Qwest will assure that loop cutovers are closely coordinated with number portability on both simple and complex orders. On complex orders, Qwest will assure that all facilities are in place and tested before translations are removed from the Qwest switch and before the switch is actually disconnected from the customer loop. When loop cutover dates are changed, whether due to the CLEC, Qwest, or end user-initiated changes, Qwest will assure that all number portability activity is coordinated.*

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127 AT&T Loop Comments at page 16.
128 Lumm Rebuttal at page 30.
129 AT&T Loop Comments at page 17.
130 Lumm Rebuttal at page 31.
131 AT&T Loop Comments at page 19.
132 Lumm Rebuttal at page 34.
133 AT&T Loop Comments at page 20.

AT&T also felt that SGAT Sections 9.2.2.9.3 and 9.2.2.9.4, dealing with coordinated installation, required changes. First, AT&T sought an explanation of the process for cutovers. Second, AT&T wanted a specification of the time frames within which CLECs could delay loop cutovers without fear of service disruptions. Third, AT&T wanted to assure that Qwest was obligated to perform tests sufficient to determine a cutover loop's digital service capability. Fourth, AT&T wanted charge-waiver and rescheduling provisions to deal with cases where Qwest was unable to meet appointment dates.134

Qwest responded to three of these four requests. First, it agreed to provide process flow descriptions for cutovers. Second, Qwest did not respond to the cutover postponement requests. Third, Qwest's frozen 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 fourth, Qwest agreed to waive nonrecurring charges when it failed to meet appointments and to specify in the SGAT its rescheduling obligations.135 This issue can be considered closed.

16. Limits on Loop Testing Costs

XO argued that Qwest should not have the unilateral right under SGAT Section 9.2.2.9.4 to decide what types of testing would entail separate, added charges to CLECs. XO also sought the addition of language addressing the basis on which such charges would be calculated.136 XO did not brief this issue. Qwest's frozen SGAT language for Section 9.2.2.9.4 limits the ability of Qwest to charge for testing. This section of the SGAT does not specify that Qwest's charges shall be limited to its actual and reasonable costs for performing the test, but, as that is the core standard generally applicable to nonrecurring charges, it can be presumed to apply here unless and until any participant raises the issue in a cost docket. On that basis, this issue can be considered closed.

17. Obtaining Multiplexing for Unbundled Loops

XO testified that SGAT Section 9.2.2.9.10 should be expanded to address how CLECs could obtain from Qwest multiplexing associated with unbundled loops also acquired from Qwest.137 Qwest proposed the following language to address XO's concern:

> *9.2.2.10. Multiplexing. CLEC may order multiplexing for Unbundled Loops under the terms and rates for multiplexing of unbundled dedicated interoffice transport (UDIT), in the UDIT Section of this Agreement.*

Qwest also agreed to include Sections 9.6.2.2 and Section 9.23.3.7.1 language clarifying Qwest's multiplexing offering.138 This issue can be considered closed.

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135 AT&T Loop Comments at pages 20 and 21.
136 Listen Rebuttal at pages 35 and 36.
137 LaFrance Testimony at page 7.
138 LaFrance Testimony at page 8.
139 Listen Rebuttal at pages 36 and 37.

18. Transmission Parameters

AT&T expressed concern that the language of SGAT Section 9.2.2.9.11 could be read as freeing Qwest of the responsibility to add repeaters to assure that DS1 loops could provide service even at longer lengths. Reacting to the SGAT statement that transmission parameters could change, AT&T also requested that Qwest explain the type of changes that might occur, that were occurring now, or that might occur over the next several years. AT&T also wanted Qwest to provide examples that would demonstrate the kinds of transmission parameter changes that would require prior notice to CLECs.139

Qwest agreed, as it had in a previous workshop, to delete the phrase that raised concerns about long digital loops. Qwest also provided a number of examples of minor changes that could result from routine network maintenance or upgrade activities.140 AT&T did not brief this issue; it can be considered closed.

19. CLEC/End User Disagreements about Disconnecting or Connecting Loops

SGAT Section 9.2.2.9.12 addressed what Qwest would do if an end user provided Qwest with a position about the end users' service that was inconsistent with an order that a CLEC had placed with Qwest for an unbundled loop (e.g., a dispute about whether an end user actually wants service from a CLEC that has placed with Qwest an unbundled loop in order to serve that user). XO objected to the portions of the section entitling Qwest (after first advising the end user to contact the CLEC and after Qwest also informed the CLEC) to act in accord with the express instructions of the end user.141

Qwest agreed to delete the portions of the section that entitled it to make loop order cancellation and nonrecurring charge decisions on the basis of direction from the end user. As a result the section now merely requires that Qwest: (a) refer the end user to the CLEC and (b) initiate contact with the CLEC itself.142

This issue can be considered closed.

20. Qwest Access to Qwest Facilities on CLEC Customer Premises

SGAT Section 9.2.2.13 gave Qwest rights of access for network management purposes to Qwest facilities that are located on the premises of a CLEC customer. AT&T expressed concern about the application of this section in cases where a CLEC had no independent right of access to the customer's premises, but derived all of its rights solely through the acquisition of unbundled elements from Qwest (in which case, AT&T argues, all the existing rights of access are those that Qwest acquired in the first place.)143

139 AT&T Loop Comments at pages 20 and 21.
140 Liston Rebuttal at page 37.
141 LaFonce Testimony at page 8.
142 Liston Rebuttal at page 38.
143 AT&T Loop Comments at pages 22 and 23.

Qwest revised the section to make two points clearer: (a) that the intent was not to ask CLECs to make available to Qwest rights of access to customer premises that AT&T itself did not have, and (b) that the intent was to oblige CLECs not to inhibit Qwest's entry for listed testing, inspection, repair, and maintenance of Qwest's own facilities for which it has continuing responsibility.144 This issue can be considered closed.

21. Points of CLEC Access to Unbundled Loops

AT&T commented that SGAT Section 9.2.2.9.13 should be amended to allow CLECs access to loops at all "appropriate subloop locations."145 Qwest objected to addressing the issue here, arguing that SGAT Section 9.3 already addresses subloop access. Qwest also noted that the FCC clearly had not required or endorsed CLEC access to unbundled loops at midpoints along their course, and that doing so would raise significant network security issues.146 AT&T did not brief this issue, nor is it apparent how its request for access at subloop demarcation points is relevant here, where the entire loop, but not particular subloop portions, have been secured by a CLEC. Therefore, this issue can be considered closed.

22. Relinquishing Loops on Loss of End Use Customers

AT&T questioned the purpose of SGAT Section 9.2.2.9.15, which dealt with "Loss Alerts," and required CLECs to make disconnect orders when loops serving their end users were relinquished and were required by others.147

Qwest responded that it had not worded the section accurately. It made comprehensive revisions, which followed national standards in addressing how information among service providers should flow when a CLEC loses an end user it serves through unbundled loops, and which specified the flow of activities that should occur in the event that another carrier, whether Qwest or someone else, has need of the loops that the customer-losing CLEC had been securing from Qwest.

XO testified that this section needed to be more specific and that Qwest should similarly have to relinquish facilities before it could claim lack of facilities as grounds for refusing to make available to CLECs the same loops that Qwest used to serve the end user before losing that end user to the requesting CLEC.148 Qwest testified that its policy is always to reuse its loops as unbundled loops where the CLEC is seeking to provide to the end user services compatible with the capabilities of those loops. Qwest also said that this policy is incorporated into SGAT Section 9.2.2.9.149 XO did not further pursue this issue in briefs.

The issues raised by AT&T and XO can be considered closed.

144 Liston Rebuttal at page 39.
145 AT&T Loop Comments at page 23.
146 Liston Rebuttal at pages 39 and 40.
147 AT&T Loop Comments at page 23.
148 LaFrance Testimony at page 9.
149 Liston Rebuttal at page 42.

23. CLEC Right to Select From Available Loop Technologies

AT&T wanted to change SGAT Section 9.2.3.3, which addresses rate elements, in order to specify that CLECs, rather than Qwest, can choose the technology through which a loop is to be provided, if alternatives are available.150 Qwest agreed to strike from this section, all the non-price language, which includes that to which AT&T objected, given that its purpose is to address prices.151 Therefore, this issue can be considered closed.

24. Miscellaneous Charges

AT&T commented that SGAT Section 9.2.3.6 should specifically address the circumstances under which miscellaneous charges could be applied. AT&T also noted that the reasonableness of any miscellaneous charges should be addressed in cost proceedings.152 XO also raised concerns about the lack of SGAT specificity on when such charges would apply and how would be calculated.153 Qwest responded by defining Miscellaneous Charges in SGAT Section 4 and Section 9.1.12.154 Qwest's language additions specify that such charges are contained in SGAT Attachment A and that no miscellaneous charges other than those allowed by the SGAT would apply. This issue can be considered closed.

25. Installation Hours

AT&T commented that SGAT Sections 9.2.3.7.1 and 10.2.10.3 established inconsistent lists of normal business hours for purposes of determining when coordination of loop cutovers and number porting would be available for CLECs. 155 Qwest responded that the first of these sections dealt with installation work, whose SGAT hours mirror those available for its own end users. In contrast, Qwest said Section 10.2.10.3 dealt with hours for number portability, not installation. Therefore, the fact that normal hours for number portability were longer did not mean that they were inconsistent.156

AT&T responded in its brief that the hours definition question had narrowed to one involving how and where time would be defined (e.g., local time at the customer's location), which could be addressed in the subsequent general terms and conditions workshop.157 Therefore, the issue of consistency between loop installation and number portability business hours can be considered closed.

150 AT&T Loop Comments at page 24.
151 Liston Rebuttal at page 43.
152 AT&T Loop Comments at page 24.
153 LaFrance Testimony at page 9.
154 Liston Rebuttal at page 43.
155 AT&T Loop Comments at page 25.
156 Liston Rebuttal at pages 43 and 44.
157 AT&T Loops Brief at page 21.

26. Unforecasted Out-of-Hours Coordinated Loop Installations

XO objected to the SGAT Section 9.2.3.7.2 provision that conditioned Qwest's obligation to make out-of-hours installations on the receipt of forecasts for such installations.158 Qwest agreed to remove this condition.159 This issue can be considered closed.

27. Overtime for Out-of-Hours Installations

AT&T objected to the SGAT Section 9.2.3.7.5 application of overtime rates to all out-of-hours installations, 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 Attachment A for such charges.160 XO made a similar comment.161 Qwest made a change to the section to address this concern.162 This issue can be considered closed.

28. Proofs of Authorization

AT&T expressed a concern that SGAT Section 9.2.4.2 language requiring CLECs to have customer proofs of authorization before ordering unbundled loops to serve them did not reflect new FCC guidelines.163 XO expressed similar concerns.164 This issue was addressed as the 32nd resolved *Resale* issue, titled *Proofs of Authorization to Change Providers*, in the May 15, 2001 *Second Report – Workshop One* in these workshops. That report noted that Qwest had agreed to expand the language of the SGAT to allow all forms of customer authorization required by the FCC. Therefore, this issue can be considered closed.

29. ICB Intervals for Large Loop Orders

AT&T objected to the requirement that intervals for loop orders for 25 or more loops at an individual address be determined on a case-by-case basis.165 Qwest responded that this provision of SGAT 9.2.4.4 provided CLECs with the same treatment as Qwest offers to its own end users that make similar orders. Qwest agreed to change the section to make its intent clearer, asserting that AT&T found the same change satisfactory in workshops in another state.166 AT&T did not brief this issue; it can be considered closed.

30. Firm Order Confirmations

AT&T commented that it was having difficulty in receiving firm order commitment dates (FOCs) in cases where Qwest had facility shortages. Particularly, AT&T said that Qwest's estimated FOCs tended to vary widely from actual completion dates, with insufficient Qwest

158 LaFrance Testimony at page 9.
159 Liston Rebuttal at page 44.
160 AT&T Loop Comments at page 25.
161 LaFrance Testimony at page 10.
162 Liston Rebuttal at page 44.
163 AT&T Loop Comments at page 26.
164 LaFrance Testimony at page 10.
165 AT&T Loop Comments at page 26.
166 Liston Rebuttal at page 45.

communication in the interim to keep AT&T adequately informed about status. AT&T sought new SGAT language that would require Qwest to: (a) provide loop order completion commitment dates, (b) give prompt notice to the CLEC when Qwest found that it had to change the completion date, (c) provide the CLEC with reasons for the change, and (d) impose no requirement on CLECs to issue supplements to CLEC loop orders due to Qwest problems in filling them.167

Qwest testified that it had conducted an analysis to address the FOC performance that gave rise to much of AT&T's concerns. Specifically, Qwest conducted a two-month trial in Colorado, beginning in March 2001. The trial was designed to determine if the use of defined processes would lead to meaningful FOCs from Qwest and to routine meeting of the commitment dates included in those FOCs. Qwest reported that the trial had shown positive results.168

Qwest also added SGAT Section 9.2.4.4.1, which added the requirements sought by AT&T.169 This issue can be considered closed.

31. Conditions Excusing Compliance With Loop Installation Intervals

XO testified that the SGAT's general force majeure clause was already sufficient to detail when Qwest's obligations to install facilities on time could be excused; therefore it asked for the elimination of Section 9.2.4.5.170 Qwest testified that it changed the SGAT to specify the conditions where it could apply an ICB approach, rather than adhering to the standard intervals, to loop intervals. The specified circumstances in the revised section included central office conversions, system outages, severe weather, and emergency preparedness instances.171 This issue can be considered closed.

32. Maintenance and Repair Parity

Rhythms testified that it could not get the same repair intervals or availability of DSL repair service that Qwest was making available to its own end users.172 Qwest responded that Rhythms appeared to have confused the hours available for reporting troubles with the lesser hours during which repairs could actually be performed. Qwest also testified that: (a) repair availability hours for its own end users and CLECs were the same, and (b) its performance information under ROC Performance Measures MR-3, MR-4, and MR-6 showed that the trouble clearing rates for its own end users and for CLECs were comparable.173 Having received Qwest's explanation, Rhythms chose not to include this issue in its brief on loops. Therefore, this issue can be considered closed.

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167 AT&T Loop Comments at pages 27 and 28.
168 Liston Rebuttal at page 59.
169 Liston Rebuttal at page 48.
170 LaFrance Testimony at page 11.
171 Liston Rebuttal at page 49.
172 Affidavit of Valerie Kendrick, Rhythms Links, Inc. (Kendrick Testimony), March 23, 2001, at page 5.
173 Liston Rebuttal at pages 49 and 50.

33. Specifying Repair Intervals in the SGAT

XO testified that the SGAT should specify unbundled loop repair intervals.174 Qwest responded that 1.0(h) and 1.0(l) of SGAT Exhibit C already did include repair intervals.175 This issue can be considered closed, except for the dispute about consistency between SGAT intervals and the requirements of Utah regulations, which is addressed below.

34. Responsibility for Repair Costs

XO agreed that CLECs should be responsible for repair problems on its facilities, but raised two concerns about SGAT Section 9.2.5.2: (a) that Qwest should be responsible for cabling or cross-connects at collocations, and (b) the SGAT should specify how trouble isolation charges (incurred to determined where the source of a customer trouble is) would be calculated.176 Qwest agreed that the location of the demarcation point would be used to determine cost responsibility for cabling and cross-connect repairs. Thus, the owner, whether Qwest or the CLEC, would be responsible for the costs of repairing trouble-causing facilities. Qwest also said that the basis for calculating trouble isolation charges would be appropriate for determination by each state in its own cost dockets.177

Issues Remaining in Dispute - Loops

1. Standard Loop Provisioning Intervals

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.178

Qwest argued that Exhibit C's intervals are consistent with considerations of the ROC in adopting performance measures to gauge Qwest's performance in serving CLECs. Qwest said that the ROC initially used parity with retail services to set the basis for measuring Qwest's performance in measuring loop installation performance, but decided later to adopt specific benchmarks. Qwest cited testimony by ROC's project manager as evidencing the fact that the standards for Performance Measure OP-3 (percent of installations completed on the due date) and for OP-4 (number of days to complete installation) were formed on the basis of Qwest's Standard Interval Guides (reflected in Exhibit C). Arguing that the parties to the ROC process, which included broad participation, including AT&T and other CLECs, had reached consensus on specific performance measures that generally reflect what is in Exhibit C, Qwest urged that AT&T not be permitted to succeed here in undoing that consensus. Qwest further argued that AT&T failed to present evidence to support a conclusion either that Qwest could or should install

174 LaFrance Testimony at page 12.
175 Liston Rebuttal at page 51.
176 LaFrance Testimony at pages 11 and 12.
177 Liston Rebuttal at pages 51 and 52.
178 AT&T'S Supplemental Post Workshop Brief On Loops (AT&T Supplemental Loops Brief) at page 3.

loops in intervals shorter than those set forth in Exhibit C.179

Qwest also testified that it has recently added (via SGAT Section 9.2.2.9.1.3) an offering that will allow CLECs to secure access to certain two-wire unbundled loops within a shorter interval. These so-called "Quick Loops" are available when converting existing loops where coordination and testing are not required. Quick loops have a three-day installation interval, which shortens the standard loop interval.180

AT&T responded that the evidence showed that Qwest's Standard Interval Guide, or SIG, (and by extension, SGAT Exhibit C) was not presented to the SIG, nor did the ROC ever formally approve any of the Exhibit C standard intervals. AT&T said that it was never foreclosed from arguing in a later 271 context that Qwest's standard intervals were too long.181 It then went on to urge the adoption of shorter installation intervals for a variety of loop types (including analog, unloaded, ISDN, ASDL, and DS1). AT&T also wanted to shorten the repair interval benchmark from 24 to 12 hours.182

AT&T said that the Quick Loops proposal responded to a portion of its concern, provided that it be extended, which Qwest is considering, to loops that include number portability. AT&T focused particular attention on DS1 loops, arguing that Qwest had, until recently, been willing to accept AT&T's proposed interval, even though Qwest did not appear to be succeeding in meeting it in practice.183 In support of its proposed repair intervals, AT&T's brief cited 10 hours as Qwest's reported mean time to restore retail service and 4 hours as the reported mean time to restore wholesale service.

Finally, AT&T cited Utah and New Mexico DS1 installation intervals of 5 days as being inconsistent with Exhibit C. AT&T also said that a 24-hour repair interval would leave AT&T unable to meet Utah and Idaho rules requiring CLECs to restore service within 24 hours of a trouble report and Wyoming rules requiring 90 percent of all out-of-service trouble reports during any three-month period to be cleared within 24 hours.184

Proposed Issue Resolution: The evidence demonstrates conclusively that the ROC established its loop installation interval related performance measures (OP-3 and OP-4) through an open and collaborative process that benefited from full, open, and substantial participation by the CLEC community. The evidence also established that the discussion of those intervals (which measure percent of intervals on time and average durations) centered upon and were integrally related to the intervals of Qwest's Service Interval Guide, which forms the basis of the installation intervals set forth in SGAT Exhibit C.

179Qwest's Supplemental Legal Brief Regarding Loop Issue 1(D) (Loop Intervals) Following Workshop 3, Session 7 (Qwest Supplemental Loops Brief) at pages 1 and 2.
180 Liston Rebuttal at page 64.
181 AT&T Supplemental Loops Brief at page 8.
182 AT&T Supplemental Loops Brief at pages 5 and 6.
183 AT&T Supplemental Loops Brief at page 7.
184 AT&T Supplemental Loops Brief at page 9.

AT&T correctly argues that there is now no bar to urging the creation of different intervals from the ones that played this role in setting the applicable ROC performance measures. However, the more central point here is what weight should be given to those intervals, as compared with the different ones urged here. Substantial weight should be placed upon them. They were set on the basis of presentations and dialogues by and among the participants, which clearly considered the issues relevant under the Act e.g., competitive opportunity, parity with retail operations, incremental CLEC needs that might add time (before a customer could first be served) to any interval applicable to Qwest provisioning activities, and differences between average and maximum intervals.

Therefore, the intervals of Exhibit C come before these workshops already entitled to very substantial weight. This does not mean that evidence showing their inapplicability to a particular state, or in particular circumstances, or (for that matter) even to generally applicable circumstances and conditions, cannot be considered. However, AT&T has cited no evidence that would demonstrate that the installation intervals do not give it a meaningful opportunity to compete. It did say that another state had a shorter interval for DS1 loops, but there are other loop types at issue as well; Qwest presented evidence that intervals for some of its other loop types compared favorably. Overall, there is no basis for concluding that a comparative analysis with other RBOCs (assuming that to be a more relevant criterion than how intervals relate to needs and circumstances in these seven states) would show that Qwest's loop installation intervals are too long. Certainly it would be unreasonable on its face to argue that Qwest fails to offer a meaningful opportunity to compete unless its intervals for each and every loop it offers are equal to or better than the next best interval any company anywhere offers for that type.

Similarly, it is not persuasive to argue that Qwest has lengthened a standard interval for a particular type, particularly where it was not being met in the first place. The proper standard is not equal to or better than what was done before. The standard, where parity with retail operations is not determined to be appropriate, is a meaningful opportunity to compete. We have the benefit of the ROC's deliberations to tell us that Exhibit C's intervals do that; we have no evidence of what competitive disadvantage will accrue to CLECs, should we fail to adopt AT&T's proposed intervals.

Therefore, the record in these workshops supports a conclusion that the loop installation intervals of Exhibit C are generally appropriate to meet the applicable standard.

With respect to repair intervals, AT&T's argument centers on inconsistency with state standards and the risk to which an inconsistency would expose AT&T (which, it says, is subject to the those standards). It must first be observed that a 24-hour maximum duration is not evidently inconsistent with the Wyoming standard. That standard allows 10 percent of outages to exceed 24 hours. Requiring all outages to be restored within 24 hours (as the SGAT does) may be perfectly consistent with a standard of 90 percent within 24 hours. Determining whether there is consistency would require a somewhat sophisticated mathematical analysis of actual outage information. Such an analysis would have to consider the full range of outage durations and the numbers that fall both beneath and above 90 percent. AT&T has provided no such analysis. It has, however, provided evidence that mean times to restore are a small fraction of the amount

for wholesale customers (even the retail average time is comfortably below 24 hours). If anything, these mean times suggest (but do not prove) that the numbers of troubles cleared within 24 hours are likely to meet or exceed 90 percent. These numbers are at least sufficient to place on AT&T the burden to have done more than it did to show that it is at substantial risk in Wyoming.

There is theoretically more likelihood that AT&T is at risk in Idaho and Utah, which, in effect, appear to require 100 percent of interruptions to be restored within 24 hours. AT&T noted that it could not meet a 24-hour total interval if time for its activities had to be added to 24 hours already consumed by Qwest. However, as Qwest's brief noted, AT&T could not when requested identify how long it would take to perform its work. Moreover, as Qwest has maintenance and repair responsibilities for Loop UNEs, it is not clear that AT&T will have time consuming responsibilities in many cases.185 Thus, there is a basis for concluding that the 24-hour Exhibit C standard is not materially different from a 24-hour retail standard.

AT&T's more interesting claim here is that the 24-hour standard is much longer than both Qwest's average retail and wholesale performance. It would be curious to see a benchmark standard coexist long term where it varies so much from an applicable retail and wholesale analog. However, in at least the short run, the fact that measurements show wholesale performance besting retail performance is comforting, particularly in an area like this one where (as Qwest's brief concedes) there is in fact a retail analog. This fact indicates that there is not a need for immediate resolution of the gap: CLECs have a meaningful opportunity to compete and they have more than parity pending ROC reconsideration of this measure, should AT&T or any other entity request it.

In any event, the issue of unique state requirements of this type may be better dealt with in comments before these two states, which will allow two things not present in the record here: (a) a fuller description and discussion of the applicability of their rules and any material exclusions that may exist, and (b) consideration of state-specific circumstances that may ultimately justify a different standard there, as compared with the general provisions of SGAT Exhibit C.

This report should not be read as a criticism of any state standards different from those set forth in Exhibit C. The two reasons set forth above, probably among others, indicate why. However, in assessing the issue of whether to apply their regulations or requirements despite differences with Exhibit C, this report should be read as a recommendation 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.

2. Loop Provisioning and Repair Intervals - Utah

XO testified generally that the SGAT's installation and service intervals for loops were not consistent with Commission rules at Utah Administrative Code § R746-365-4. The testimony did not cite which specific intervals were inconsistent.186 The XO/ELI brief argued that many of the

185 Qwest Supplemental Loops Brief at page 15.
186 LaFrance Testimony at page 11.

SGAT's provisioning intervals exceed Utah limits, but also does not specify which ones.187

Qwest testified that the SGAT intervals did meet Utah requirements, except for the quantities of lines (on an individual order) that trigger differing intervals.188 Qwest's brief argued that the Utah intervals serve as guidelines, not requirements: therefore, strict adherence to them is not required. Qwest also argued that the guidelines were intended only to be interim ones, which are now appropriate for change, given that the ROC has given consideration to the issue of intervals in establishing performance indicators specifically applicable to loop provisioning intervals.189 Qwest also testified that the Utah-specific repair intervals applied "unless other repair intervals have been agreed to," which Qwest says has been accomplished through the ROC's approval of specific repair intervals.

Proposed Issue Resolution: The resolution of the immediately preceding issue adequately addresses the relationship between generally applicable intervals and unique state requirements. If Utah is inclined to change its guidelines to provide for regional uniformity, then the SGAT's intervals would serve adequately to accomplish this purpose. However, until such time as existing state rules are changed, the current state rules should take precedence.

3. Reciprocity of Trouble Isolation Charges

SGAT Sections 9.2.5.2 and 9.2.5.3 require CLECs to pay Qwest's costs of isolating the source of network troubles when it is determined that the problem's source is on the CLEC's side of the demarcation point between its and Qwest's facilities. AT&T objected to the lack of a similar ability to charge Qwest for its own trouble isolation activities in those cases where the problem turns out to be on Qwest's side of the demarcation point. AT&T also commented that CLECs should not be charged separately for trouble isolation work that identifies customer wiring or equipment as the source of a reported trouble, asserting that Qwest has already built such costs into its unbundled loop prices.190 Qwest initially objected to a change, arguing that CLECs could themselves seek to isolate troubles to Qwest's network before asking that Qwest undertake the burden first. Qwest also disputed the claim that its unbundled loop prices included trouble isolation charges.191

However, Qwest's frozen SGAT filing made changes to the SGAT Section 9.2.5 trouble isolation charge provisions. AT&T found them acceptable, with two exceptions: (a) AT&T wanted to add language allowing CLEC access to the NID (not just the demarcation point, which Qwest proposed) for testing purposes, and (b) AT&T wanted to preserve the ability to challenge in subsequent cost proceedings the issue of double recovery of trouble isolation costs.192

Proposed Issue Resolution: It is reasonable to allow CLECs NID access for testing purposes in

187 ELI/XO Brief at pages 12 and 13.
188 Liston Rebuttal at pages 46 and 47.
189 Qwest Loops Brief at page 8.
190 AT&T Loop Comments at page 28.
191 Liston Rebuttal at pages 52 and 53.
192 AT&T Loops Brief at pages 21 and 22.

those cases where access at the demarcation point will not suffice to allow required loop testing. The SGAT should therefore contain a clause providing that:

> *Qwest shall allow access to the NID for testing purposes where access at the demarcation point is not adequate to allow testing sufficient to isolate troubles; in the event that Qwest chooses not to allow such access, it shall waive any trouble isolation charges that may otherwise be applicable.*

Moreover, as has been the custom with respect to other issues whose resolution requires consideration of underlying cost studies, nothing in this report should be viewed as constraining or prejudging their merits, should they be later raised in cost dockets in the individual states.

4. Delays in the Roll-Out of ADSL and ISDN Capable Loops

Rhythms testified that Qwest was slow to make ADSL and ISDN capable loops available, thus impeding the development of competition in that sector. Rhythms said that Qwest did not agree until 1999 that it had a responsibility to unbundle such loops for CLECs. Rhythms said that it discovered in 1999 that Qwest did make ADSL and ISDN available to its end users. Rhythms testified that it was not immediately available to secure access to Qwest's facilities to provide comparable services to end users, but had to wait until Qwest developed "wholesale products" that would give CLECs access to the necessary types of unbundled loops. Rhythms said that it took a year of delay and the filing of a complaint before the Colorado PUC before it could get access to loops needed to provide service that Qwest had been providing to its end users.193

Qwest responded that it introduced ISDN service in 1997 and ADSL service in the last quarter of 1999. Qwest conceded that it did not offer ADSL until 2000, but noted that there were only 82 orders for such loops in the year 2000. Qwest also provided data showing that there were 909 ISDN BRI capable loops in 2000.194

Proposed Issue Resolution: Rhythms did not brief this issue. However, Qwest's testimony did not dispute the facts about delay. Instead, Qwest responded to the claim by noting that there was low demand. The existence of low demand may justify the lack of pre-defined offerings, but it should not excuse delay in responding to requests when they are made. 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. However, 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

193 Rhythms Testimony at pages 3 and 4
194 Qwest Rebuttal at page 68

requests in the future.

5. Cooperative Testing Problems

Rhythms testified generally that it had experienced a number of problems with cooperative testing on loop installations: (a) failure to perform tests, (b) failure to provide test results, (c) failure to provide notification of test performance, and (d) incorrect test results. Rhythms said that it had stopped ordering loops with such testing because of the problems.195 Qwest responded by saying that had not received any customer-specific data that would allow it to validate the specific concerns of Rhythms. However, Qwest also noted that it had undertaken a number of activities to improve its performance in coordinated installations. It cited: (a) identification of personnel training needs based on review of results under Performance Measure OP-13, which deals with coordinated loop installations, (b) a new coordination center dedicated to assisting in coordinated installations, and (c) measures that would avoid the need for coordinated installations.196

Proposed Issue Resolution: Rhythms did not brief this issue. The evidence of record indicates that Qwest has taken actions to address problems in supporting coordinated installations and in adopting measures that will avoid the need for them in some cases.

6. Spectrum Compatibility

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.197 Rhythms cited FCC Rule 51.232 as requiring competitive neutrality and support for innovative approaches in the area of spectral interference. Rhythms said that SGAT Section 9.2.2.7 is not consistent with FCC requirements, because it gives Qwest the power to segregate traffic based on Qwest's own needs.198 Qwest responded by replacing that section with a new Section 9.2.6, which it said met FCC requirements and provided for nondiscriminatory treatment of CLECs.199

Rhythms' brief said that the principal difference between it and Qwest on this issue was that Qwest would give preference to pre-existing sources of interference (primarily T1 lines), while Rhythms would create a level playing field for newly deployed services, regardless of whether they had the advantage of being the first located on the common facility. Rhythms noted that T1s are a particularly disruptive source of interference to advanced services. Rhythms said that, as a "known disturber," T1s must be treated differently, either by segregating them into separate binder groups within a cable, or by eliminating them entirely. Rhythms said that the FCC has empowered states to adopt either approach, citing paragraph 281 of the *Third Advanced Services Order*.200

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195 Kendrick Testimony at page 6.
196 Liston Rebuttal at page 66.
197 *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 96-98, 99-355, December 9, 1999.
198 Kendrick Testimony at page 4.
199 Liston Rebuttal at page 17.
200 Rhythms Loops Brief at pages 2 and 3.

Rhythms stated that Qwest's SGAT does not address the elimination of existing disturbers, and, moreover, its method for managing interference is not in compliance with FCC requirements. The result, Rhythms argued, is that Qwest neither manages interferences as required, nor does it address the obligation to eliminate disturbers (e.g., by replacing T1 facilities with newer, less disruptive ones), thereby posing intractable problems for the deployment of newer technologies.201 Rhythms said that the FCC has countenanced sunsetting existing T1s and prohibiting the deployment of new ones; Rhythms offered, however, an alternative that it considered less drastic in its impacts on Qwest. Rhythms would allow new deployment of T1s, but would require them to be replaced when they cause disruption, a requirement that Rhythms says is already consistent with Qwest's stated practice. Rhythms would further require that the replacement be according to the so-called T1.417 standard, in order to assure that the replacement technology is not itself disruptive.

Rhythms also argued that the SGAT should contain language particularly protecting against disturbances through the remote deployment of HDSL, ADSL, or VDSL. Specifically, its brief cited examples of how the use of sub-optimal (from a spectrum compatibility perspective) practices by Qwest (one example was to use repeaters, rather than to employ an available, spectrally compatible technology) could obliterate a CLEC DSL signal coming from a central office much farther away. Rhythms said that the danger to the marketplace is that any such deployment by Qwest will foreclose competition; the only choice customers will have is to take service from Qwest. Rhythms testified that it has experienced loss of service to its high-speed customers already, sometimes finding that the source of the problem is the introduction of repeaters by Qwest.

Rhythms also said that it has sometimes taken long periods of time to trace the source of the problem, thus causing Rhythms to risk losing customers, as their impatience grows.202 Rhythms expressed a lack of confidence that an acceptable set of standards would result from consideration by industry bodies, such as NRIC, which Rhythms considers to be under the control of incumbents, and which Rhythms feels may never recommend standards in this area.203

Rhythms also objected to being required to report NC/NCI codes on every service order, commenting that this requirement would give Qwest, its competitor, exact knowledge on a daily basis of the kind of services Rhythms was offering and where. Rhythms said that its proposal would obviate the need for reporting this information, because it would require each carrier to assume a potential spectral conflict in the adjacent binder and to deploy its facilities in a manner that precluded interference.204

AT&T's initial comments requested removal of or changes to the last sentence of SGAT Section 9.2.2.7, for the purposes of assuring non-discrimination by Qwest in spectrum management.

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201 Rhythms Loops Brief at page 4.
202 Rhythms Brief at page 7 citing May 1, 2001 transcript at page 278.
203 Rhythms Brief at page 7
204 Rhythms Brief at page 11

AT&T's change would require Qwest to: (a) treat CLECs as it does itself and its affiliates, and (b) apply the guidelines "recommended" by any industry forum convened to address spectrum management.205 AT&T's brief adopted Rhythms approach to resolving this issue, citing its consistency with the objectives of competitive neutrality and of meeting the Act's Section 706 goal of encouraging the deployment of advanced telecommunications capabilities. AT&T explained that the FCC has specifically decided that the advanced services goal of the Act justifies an exception to the ordinary "first-in-time" rule where T1s are concerned, citing the following provision of paragraph 54 of the *Line Sharing Order*:

> *With respect to known disturbers, we sought to ensure that "noisier" technologies that are at or near the end of their useful life cycles do not perpetually preclude deployment of newer, more efficient and spectrally compatible technologies.*

AT&T's brief then observed that the FCC has left to state commissions decisions on how to phase out known disturbers, such as T1s, after declining to adopt a prescriptive national approach.206 AT&T said that Rhythms approach is neither prescriptive nor immediate, requiring only that T1s be replaced where they cause interference. AT&T argued that allowing Qwest to seek a waiver of the T1 removal requirement on a showing that Qwest has no available alternative in a particular case could solve the dispute between Rhythms and Qwest about whether T1s could always be replaced.

Beyond removal of existing T1s, AT&T argued that there should be restrictions on their future placement, noting that the Rhythms language would preclude the deployment of "known disturbers in binder groups that could cause interference" by requiring all carriers, including Qwest to follow spectrum management guidelines.207 AT&T noted that the adoption of the Rhythms language would also avoid the need for carriers to provide NC/NCI codes to Qwest. AT&T argued that these codes provide Qwest with competitive information about what services CLECs are offering. AT&T also said that Qwest was acting anticompetitively and contrary to the goals of Section 706 by failing to accept the obligation to follow spectrum management practices in remotely deploying DSL facilities that interfere with other carriers' DSL services.208

Qwest's brief responded to the three principal areas of dispute: (a) interference due to remote DSL deployment, (b) the requirement to remove existing T1s in the short term, and (c) the need to provide NC/NCI information.

With respect to remote DSL deployment, Qwest noted that the FCC has agreed that the matter should be dealt with in industry forums. Specifically, the FCC asked in the *Line Sharing Order* that NRIC advise it and that NRIC submit a report by January 2002.209 Qwest said that it would be counterproductive to adopt requirements in these workshops while deliberations continue at the national level. Moreover, Qwest said that concern about the effects of any remote DSL

205 AT&T Loop Comments at page 17.
206 AT&T Loops Brief at pages 23 and 24.
207 AT&T Loops Brief at page 25.
208 AT&T Loops Brief at page 26.
209 Qwest Loops Brief at page 43.

deployment is not valid. Qwest said that it would only remotely deploy DSL at locations far from central offices, in locations where CLEC central-office based DSL will not even function. Therefore, CLEC central-office based DSL will not even be in existence to be interfered with in cases where Qwest has made remote deployment. Qwest also agreed to include in SGAT Section 9.2.6.1 a commitment to implement the final NRIC recommendation on remote deployment of DSL.210

With respect to "sunsetting" existing T1s, Qwest first noted that one of the FCC-endorsed means for state treatment of known disturbers was to provide for segregating them, which Qwest says that it does. Qwest's brief referred to testimony demonstrating that, in its larger binder groups, Qwest minimizes T1 disturbances by locating such facilities in outer binder groups, and by placing the send and receive portions on opposite sides. Moreover, Qwest said that, when such management efforts fail, it has committed in SGAT Section 9.2.6.5 to change a disturbing T1 to an HDSL facility wherever possible.211

With respect to providing competitive information, Qwest described the Rhythms/AT&T approach to precluding the need for providing Qwest with NC/NCI codes for spectrum management as assuming that all carriers will act in accord with accepted practices, which assumption is not prudent.212 Qwest says that the FCC has rejected this approach in paragraph 204 of the *Line Sharing Order* and in 47 C.F.R. § 51.231(b) and (c):

> *we agree that competitive LECs must provide to incumbent LECs information on the type of technology that they seek to deploy, including Spectrum Class information where a competitive LEC asserts that the technology it seeks to deploy fits within a generic PSD mask. We further agree that competitive LECs must provide this information in notifying the incumbent LEC of any proposed change in advanced services technology that the carrier uses on the loop, so that the incumbent LEC can correct its records and anticipate the effect that the change may have on other services in the same or adjacent binder groups.*

That same paragraph addresses the competitive information issue by requiring that incumbents limit the use of the NC/NCI code information to network management purposes.

Proposed Issue Resolution: There are three issues to resolve: (a) treatment of T1s, (b) remote DSL and repeater deployment, and (c) provision of NC/NCI codes on LSRs.

Treatment of T1s

There is no doubt that states have the power to subject T1s to control or elimination requirements that ignore whether they came first to the facilities where interference is occurring. At the same time, however, it is clear that, if there is a universal set of rules fairly applicable toT1s, the FCC has not found it. Its decision to leave the treatment of T1s to the states makes clear that the circumstances applicable in these states should be the foundation for deciding what to do about

210 Qwest Loops Brief at page 44.
211 Qwest Loops Brief at page 47.
212 Qwest Loops Brief at page 39.

them.

The approach taken by SGAT Section 9.2.6.4 is circular. As set forth in the frozen SGAT it provides:

> *Qwest recognizes that the analog T1 service traditionally used within its network is a "known disturber" as designated by the FCC. 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.*

This section says that Qwest will handle known disturbers as required by FCC rules, which in turn, in the case of T1s, invite state adoption of such rules. With respect to T1s, the section provides further that it will manage them in accord with its "spectrum policy." However, that policy is not otherwise defined or explained in the SGAT Spectrum Management Section 9.2.6 as even including two specific requirements with which Qwest appears to agree: (a) to place T1s in binder groups that minimize interference possibilities and (b) to replace T1s that are causing disturbances with another technology, wherever possible. The record supports the adoption of these two requirements as reasonable and practical means of addressing interference from T1s. In order to make Qwest's obligations reasonably concrete, SGAT Section 9.6.2.4 should be changed to read:

> *Qwest recognizes that the analog T1 service traditionally used within its network is a "known disturber" as designated by the FCC. Qwest will place such T1s, by whomever employed, within binder groups in a manner that minimizes interference. Where such placement is insufficient to eliminate interference that disrupts other services being provided, Qwest shall, whenever it is technically feasible, replace its T1s with a technology that will eliminate undue interference problems. Qwest also agrees that any future "known disturber" defined by the FCC or the Commission will be managed as required by FCC rules.*

This change will address a significant portion of Rhythms' concerns about T1s. It does not adopt Rhythms' all-carrier solution. Making Qwest, through the SGAT, the party responsible for resolving disputes that do not involve its own facilities (other than the provision regarding placement of T1s in minimally interfering binder groups) is not appropriate. The SGAT already provides an adequate remedy for resolution of disputes involving only non-Qwest facilities.

Remote DSL Deployment

Rhythms and AT&T have not shown good reason to act in advance of the NRIC report that the FCC expects. The FCC has essentially said that it wants to be informed by that report before it acts. There is certainly no basis for concluding that, on the record before us, we should step in where that angel fears to tread. There is also no basis for deciding at this point that concerns about the bias or the pace of the NRIC should give us less confidence than the FCC has shown in its ability to make a constructive contribution on matters of great technical complexity. Therefore, it would not be appropriate to move to incorporate into the SGAT the T1.417

technical standards proposed by Rhythms and AT&T.

However, there is the immediate question of how actions by Qwest in the meantime could serve to give it undue advantage in capturing market share in the advanced services market. It is not reasonable to defer taking appropriate actions that will mitigate Qwest deployment decisions whose effect would be to render competitors unable to effectively use existing methods to deliver advanced services in competition with Qwest. Two such Qwest deployment methods were identified on the record: (a) remote DSL deployment and (b) use of repeaters. Qwest agreed temporarily to limit its remote DSL deployment to cases where there can be no interference with CLEC central-office based DSL services, but that commitment is not explicitly incorporated into Section 9.6.2. Qwest did not, however, address at all the question of repeaters.

Rhythms and AT&T begin from a conceptual position that, while reflecting the economic interests of competitors seeking to serve the advanced services segment of the market, ignores an important reality the public service commissions face routinely. That question is how to ensure that service across the range spectrum of customers is provided economically. In particular for rural states, broad-level standards about network design may prove difficult to reconcile with the benefits of promoting new technology that allows added kinds of services to be delivered across a network historically dedicated largely to voice traffic. Where distances are long and customer densities are low, strict enforcement of newer standards may come at a particularly high cost in rural areas. While one should not abandon the goals of provisions like Section 706 in such cases, one should similarly not forget that the cost of achieving those goals could vary widely from what looks to be the case in denser markets that are more likely to be the prime focuses of interest for many competitors.

What the dispute about repeaters and remote DSL essentially comes down to is who should pay for the costs of removing them when they inhibit the introduction of competitors' advanced services. What Rhythms and AT&T essentially argue is that they do not want to tell Qwest what services they are providing for fear that Qwest will use the information for competitive purposes (presumably even if there are disclosure limitations, because such limitations are standard for other competitive information required to be provided under the SGAT). Instead, they would like Qwest to deploy its network on the assumption that CLECs are making uses that are inconsistent with how Qwest would like to serve its own customer needs with respect to that network. Moreover, they would like Qwest to bear the incremental costs of doing so at the expense of other Qwest end use customers or of other CLECs who would like to use UNEs secured from Qwest to provide voice service. Finally, Rhythms and AT&T ask all this without making any commitment that they will actually make a significant entry into the markets where they have asked Qwest in effect to pre-groom the facilities.

It may be that the NRIC, the FCC, or someone else with expertise or authority will adopt standards that decree repeaters or Qwest's particular methods of remotely deploying DSL contrary to what should happen in all cases, be they dense or sparse, or urban or rural. That certainly has not happened yet, nor is there any reason for assuming, from the perspective of these seven states that it will. Moreover, even if it does happen, it is not at all clear that states like these seven will be forced to or should agree that such standards should require Qwest to change

its practices at the expense of those customers who will not be taking advantage of advanced services.

There is no evidence on this record to show that repeaters, or any particular Qwest method of remotely deploying DSL, inherently constitute bad design or operating practice in these seven states, or anywhere for that matter. Therefore, it would be against public policy to adopt blanket requirements that may have the effect of forcing Qwest to adopt more expensive means of designing and operating its network to optimize it for a certain segment of customers, rather than for all customers. As important as the goal of promoting advanced services is, there is no evident reason to conclude that serving it should come at significant expense to other sectors of the local exchange market. This conclusion is underscored by two facts that are clear from the record: (a) there are no demonstrated CLEC commitments to bring such services to the seven states and (b) there is no offer by the providers of advanced services to bear any portion of the incremental costs that Qwest might have to spend to change its approaches to deployment of facilities to serve all customer types and needs, so that competitors have the theoretical ability to make advanced services available to a segment of those customers.

Thus, meeting the goal of promoting the development of advanced services, as well as the goal of making Qwest's network available to CLECs under the other provisions of the Act, should take another direction. It would be reasonable to require Qwest, pending further deliberations at the national level, to respond to actual CLEC deployments that can be disrupted by Qwest network actions, such as the use of repeaters. However, to respond, Qwest must know where CLEC facilities of the types affected are being installed, which AT&T and Rhythms are reluctant to provide. Pending further consideration of the spectrum issues at the national level, it is reasonable to give CLECs the choice of refusing dialogue with Qwest about their facilities or having the right to accommodation of those facilities in Qwest's network – but not both.

Accordingly, this issue should be resolved by providing that Qwest is obligated to 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. If CLECs place a higher interest in confidentiality under these circumstances, then theirs should be the risk that Qwest's proper use of its own network will cause conflicts. It should be emphasized that the use of repeaters and the remote deployment of DSL (beyond the distance limits of central office based DSL) by Qwest remain, at least for the present, legitimate and proper uses. The evidence does not now show otherwise; even if such uses might cause conflict with CLEC facilities as discussed above, denying Qwest the right to make network decisions considering all customers and what costs various configurations will cause, is not justified. The addition of the following additional subsection to SGAT Section 9.2.6 would accomplish this purpose:

> *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. Upon 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.

This 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.

NCI/NCI Codes on LSRs

A primary foundation of the Rhythms and AT&T argument was that adoption of Rhythms' overall approach would essentially moot the need for this information to be supplied to Qwest. That foundation does not exist, given the previous matters addressed under this issue. Under these circumstances, Qwest has a legitimate need for the information. Moreover, it is difficult to envision an effective means, other than LSRs, as proposed by Qwest, to provide it. The information has value when there is a dispute or uncertainty about the source of interference. As Rhythms argued, and properly so, if such disputes drag out, CLECs risk customer loss. Qwest, therefore, must be expected to provide promptly and to all concerned, specific information about what facilities are involved and who may be using them.

Use of the LSR to provide the information will provide a sound linkage to the systems that Qwest would presumably use if it had a need for prompt identification of the relevant information. No other suitable means of providing it to Qwest is apparent. Therefore, 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.

7. Conditioning Charge Refund

AT&T argued that it should be entitled to a refund of any applicable SGAT Section 9.2.2.4 loop conditioning charges if the customer for whom the unloading was done and charged to a CLEC switches providers within one year.213 Qwest responded that it is entitled to recover its legitimate costs for unloading, regardless of whether the CLEC requesting them suffers an eventual loss because a customer transfers away from it. Qwest further noted that after the customer loss, there might no longer even remain a need for the loops involved to have been conditioned. Qwest objected to refunding conditioning charges.214 AT&T's brief dropped its request to change Section 9.2.2.4 as it had originally proposed.215 AT&T made a different proposal at the workshops. It would require refunds when Qwest fails to meet service

213 AT&T Loop Comments at page 14.
214 Liston Rebuttal at pages 26 and 27.
215 AT&T's Loops Brief at page 14.

requirements associated with the service that CLECs seek to offer over loops that have been conditioned to provide xDSL Service. AT&T' s proposal was for a new SGAT section that would provide:

> *9.2.2.4.1 If CLEC's end user customer, for which CLEC has ordered xDSL capable Unbundled Loops from Qwest, (i) never receives xDSL service from CLEC, (ii) suffers unreasonable delay in provisioning, or (iii) experiences poor quality of service, in any case due to Qwest's fault, Qwest shall refund or credit to CLEC the conditioning charges associated with the service requested. This refund or credit is in addition to any other remedy available to CLEC.*

AT&T supported this refund proposal by asserting that CLEC's will lose revenue and suffer reputation damage, because customers cannot be expected to distinguish between CLEC and Qwest responsibility for no service or for bad service. AT&T considered this provision to constitute a proper incentive to compensate CLECs and to induce Qwest to perform according to SGAT requirements and expectations.216

Qwest's brief argued that it must bear conditioning expenses whether or not an end user ever takes service from a CLEC; therefore, its cost recovery should not be so conditioned. Its fundamental problem with AT&T's proposal, however, was that there must be, by definition, some prior method for assessing "fault," which can prove hard to establish, depending on what type of advanced service a CLEC might be seeking to provide. Qwest also argued that terms such as "poor quality" or "unreasonable delay" were too vague to provide reasonable commercial expectations. Qwest did agree conceptually to the notion of a credit in cases where it failed to perform conditioning in a workmanlike manner or significantly missed its due date for conditioning, but considered the issue more properly addressable in the context of a billing dispute, rather than a specific SGAT section here.217

Proposed Issue Resolution: AT&T's second two refund qualifying conditions are vague, but Qwest's willingness to accept responsibility in cases of non-workmanlike performance or significant due date misses does not provide substantially greater objectivity. Rather that willingness reflects the fact that the harm done due to poor or late conditioning is hard to pin down, primarily because such harm results from inherently unpredictable customer reactions to delays or poor service quality. It would also be difficult to determine with a high degree of confidence whether a CLEC customer abandoned the CLEC for these reasons, other reasons, or a combination of both. In other words, the circumstances here fall within one of the classic reasons why commercial contracts provide for liquidated damages; i.e., expected difficulty in sorting out fault or the magnitude of economic consequences flowing from fault.

This fact, and Qwest's conceptual agreement to bearing a refund liability in some circumstances argue for uniquely treating the issue here in the context of conditioning, rather than consigning it to more general SGAT sections, such as those addressing billing disputes. In doing so, the better approach is not to hinge responsibility on customer reaction or upon inherently vague definitions

216 AT&T Loops Brief at page 15.
217 Qwest's Loops Brief at page 23.

of quality or harm, particularly in recognition of the fact that CLECs may be offering a wide variety of services through a wide variety of connected facilities or end user devices. Moreover, it seems reasonably clear that a delayed installation followed by a customer choice to take the CLEC's service does not materially harm the CLEC. On the other hand, for the sake of simplicity and rough equity, it seems reasonable to conclude that a delayed conditioning followed by a customer choice not to take the service is a material factor in that choice. Therefore, the following language should be added to the SGAT:

> *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.*

8. Pre-Order Mechanized Loop Testing

AT&T wants Qwest to allow CLECs to perform mechanized loop testing (MLT), in order to provide the CLECs with actual loop length and performance information. AT&T said that such testing is needed before provisioning to verify that the loop can support the services that the CLEC wishes to provide. AT&T concedes that a momentary outage of the current customer's service would be required. However, it said that the fact that Qwest has had to do such tests to populate its own databases shows that such interruptions are acceptable.218 AT&T's brief noted that the FCC has cited Verizon in Massachusetts as offering mechanized loop testing on a pre-order basis. AT&T also said that Qwest performs mechanized loop testing to determine loop capabilities for its own Megabit service; refusing to allow it for CLECs would constitute disallowed discrimination under paragraph 427 of the *UNE Remand Order*.219

Qwest responded that its representatives cannot perform such tests, and that Qwest performs them only in cases of repairs. Qwest also said that its Loop Qualification Tool already provides MLT information (the previous testing to which AT&T alluded) to CLECs. Qwest conceded that it is not sufficient under the *UNE Remand Order* for it to digest its information for a CLEC or to pre-qualify the loop for the CLEC. Qwest must provide access to the underlying information about the loop's makeup, including at least "the same underlying information that the incumbent LEC has in any of its own databases or other internal records."220

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218 AT&T Loops Brief at page 17.
219 AT&T Loops Brief at page 18.
220 Qwest Loops Brief at page 25, citing the *UNE Remand Order* at ¶ 427.

Qwest cited the following as examples of what incumbents must provide and what Qwest's Loop Qualification Tool provides to CLECs:

- The loop's material, e.g., fiber or copper
- The location and type of any electronic or other equipment on the loop, e.g., digital loop carrier, feeder-distribution interfaces, bridge taps, load coils, and pair-gain devices
- The loop's length segmented by transmission media type
- Wire gauges
- Electrical parameters.

Qwest argued that it does provide CLECs access to the same information and in the same manner that its retail personnel have, citing testimony that Qwest does not use MLTs on a pre-order basis, but only as part of the repair process. In fact, Qwest said that CLECs have more information available, because Qwest offers them access to the Raw Loop Data Tool (which its own service representatives do not have), which contains the loop information gained from the system-wide mechanized loop testing it did on a one-time basis to populate that tool. Qwest also said that the ROC OSS test will provide verification of whether the information available to CLEC and to Qwest retail personnel is available in the same manner, at the same time, and from the same sources. Qwest also claimed that such testing is invasive, because it would disconnect any call in progress when the test occurred. Qwest noted that it would be improper to give CLECs free access to a capability that would disrupt service to customers being served by others.221

Proposed Issue Resolution: There is sufficient evidence of record from which to conclude that Qwest does not generate pre-order information through mechanized loop testing in serving its own end users. However, it does clearly have the capability to do so. AT&T has not presented any evidence to rebut the Qwest testimony that it provides CLECs with the same information, from the same sources, and in the same manner as is available to its own personnel in the pre-order context. That Qwest has done the test on a comprehensive basis in the past does not demonstrate discrimination; Qwest makes the results of that test at least equally available to CLECs for pre-order use. The results of that prior testing thus do Qwest no better in terms of assessing loop capabilities than what CLECs can get from having access to it.

That other ILECs may allow the conduct of such testing for CLECs is not determinative. The record does not address the issue of whether they conduct such testing for themselves on a pre-order basis. If they do, then the issue differs from the one in question here, because a question of discrimination arises there. Moreover, under the facts made clear here, CLECs already have access to the results of a one-time system wide program that Qwest conducted to provide a tool that would set forth the information involved. Given its availability to CLECs, given the potential disruption to the service of end users of other carriers (whether Qwest's or another CLEC's) and given a sound basis for concluding that Qwest satisfies applicable non-discrimination requirements, Qwest should not be required to make mechanized line testing available for CLECs for so long as Qwest continues not to perform it for itself or its affiliates.

221 Qwest's Loops Brief at pages 27 and 28.

9. Access to LFACs and Other Loop Information Databases

AT&T said that recognized problems with unbundling IDLC loops for CLEC use as UNEs created a particular need for detailed information about where in Qwest's loop plant a CLEC might be able to find enough spare copper facilities (both whole loops and fragments) to make up loops. AT&T noted that Qwest itself testified to the difficulty and time consumption involved in unbundling IDLC loops. AT&T further said that, even when unbundled, such loops could not be used by a CLEC to provide xDSL services. AT&T said that these difficulties posed area-wide problems that must be addressed before a CLEC creates customer expectations through marketing efforts, only to find that it cannot deliver services because Qwest is using IDLC and there are not enough copper facilities to provide CLECs with unbundled loops. AT&T therefore sought access to a system called LFACs because the company thought it might contain such information. However, AT&T's request, given its state of knowledge at the time of the workshops, would be better described as seeking access to whatever information Qwest could provide (whether inclusive of LFACs or not) to give it access to a reasonably complete inventory of spare Qwest copper facilities in areas where Qwest serves end users through significant amounts of IDLC.222

Qwest's primary response was that parity with its own retail operations did not require granting access to LFACs, because Qwest's retail personnel did not use it in the pre-ordering process.223 AT&T responded that parity is not the test here, because Qwest does not have to unbundle IDLC loops to serve its own end users. Rather, said AT&T, the proper question to ask is whether CLECs, which have the unique need to deal with IDLC unbundling issues, have a meaningful opportunity to compete in the absence of access to information that will allow them, on a pre-order basis, to see if an area has sufficient copper facilities available to get around the unbundling and xDSL constraints imposed by the presence of substantial amounts of IDLC in an area it might wish to serve.224

Qwest went on to address a number of other concerns about making access to LFACs available to CLECs. First, it said that LFACs did not have an existing search capability; Qwest said that it has designed and uses LFACs to assign facilities to fit the specifications of a specific order. Because LFACs stops hunting for facilities when it finds a single set fitting the input parameters, according to Qwest, significant work (presumably programming) would be required to make LFACs useable to look for a broad range of facilities. Qwest also raised confidentiality concerns, arguing that LFACs contains confidential information about the unbundled loops of Qwest and all other CLECs using Qwest's network.225

Qwest also argued that it had agreed to make available to CLECs other tools that would provide the kind of information that AT&T was seeking. One was "Facility Check," which Qwest said was the same tool it used to search for spare facilities. Qwest also said that it was scheduled by

222 AT&T Loops Brief at page 19.
223 Qwest Loops Brief at pages 30 and 31.
224 AT&T Loops Brief at pages 19 and 20
225 Qwest Loops Brief at pages 31 and 32.

December of this year to be able to provide spare facility information through IMA-GUI and IMA-EDI RLD on an individual facility basis. Since the Seven State workshop, Qwest has determined that this update will be implemented no later than December 2001. Qwest also testified that its ADSL tool displays spare facility information.

Proposed Issue Resolution: Parity with Qwest's retail operations is not the material standard in deciding this issue. Qwest obviously does not have the need to address the problem that CLECs do here. Moreover, access to information about IDLC deployment is also not the issue. The issue assumes that CLECs know where IDLC has been deployed; what AT&T wants to know is, where there is IDLC in an area, are there enough available copper facilities to allow them to be able to serve customers. Finally, ordering information is not the issue; the argument made is that AT&T cannot make an informed decision about whether to market to an IDLC intensive area without first knowing whether there is enough available copper to allow it to serve customers using elements consisting of facilities other than IDLC.

Having narrowed the issue, we can address the validity of AT&T's basic claim and assess whether, if it is valid, there are means for filling CLEC needs. There is sufficient evidence of record to conclude that significant Qwest deployment of IDLC in an area justifies CLEC concern about the ability to provision loops with copper, particularly where it seeks to provide data services. Giving CLECs a meaningful opportunity to compete in this case includes giving them access to tools necessary to provide a reasonably complete identification of spare copper facilities, whether they are entire loops or fragments, if such access can be provided in a manner that is consistent with other concerns and limitations.

Protection of competitive information is one of those other concerns, but not an overriding one, as protection of such information is a need common to many areas of the SGAT. The need for protection could be considered greater here, because of the breadth of information about the numbers and locations of Qwest and CLEC end users and their service types that is theoretically attainable from LFACs. Another key issue is what systems, whether or not they include LFACs, will provide the needed information and what it would cost to allow them to provide it.

We can first conclude that the evidence shows that LFACs does not have the capability to provide the information that AT&T seeks, but that it does contain a very broad range of information that is both very sensitive and hard to exclude from unmediated access. If other tools exist to provide what AT&T wants, it seems reasonably clear that the time and effort to modify LFACs to enable it to perform the proper queries and to provide basic data protections are not warranted. Certainly, it would be proper, if such efforts were required, to assign the costs involved to CLECs who seek access to it for purposes and in manners for which it is not designed.

Qwest has cited a number of other available tools that appear better suited to AT&T's needs. Given that potential, the preferable course at this time is to assure AT&T access to them, in order to determine if they will serve. Therefore, the SGAT should contain a language providing that:

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. CLEC shall be responsible for Qwest's incremental costs to provide such information or access mediation.

Issues Resolved During This Workshop – Line Splitting

1. Presumptions About the "Lead" CLEC

AT&T commented that the SGAT appears to presume that a CLEC providing voice service would take the lead in managing the relationship with Qwest on a split loop.226 Qwest agreed to language changes in SGAT Section 9.21 to clarify that either CLEC could serve as the "customer of record," provided that only one could perform this role.227 This issue can be considered closed, subject to the disagreement in the fourth unresolved issue discussed below.

2. Pre-Provisioning of the Splitter in the End User's Central Office

AT&T objected to the SGAT Section 9.21.2.1.2 requirement that a splitter be previously provisioned in the end user's central office before a CLEC could order line splitting.228 Qwest agreed to delete the requirement.229 This issue can be considered closed.

3. Limits on Uses of the High- and Low-Frequency Loop Portions

AT&T suggested a language change that would incorporate a more expansive definition of permitted uses.230 Qwest made an alternative SGAT Section 9.21.2.1.3 change that would address AT&T's concern.231 This issue can be considered closed.

4. Charges for OSS Modifications

AT&T asked that Qwest explain the OSS modification charge discussed in SGAT Section 9.21.3.1.2.232 Qwest responded that it would incur expenses to modify its OSS to allow for the ordering and provisioning of line splitting. It agreed that the review of the reasonableness of any costs proposed should await future consideration in cost dockets.233 This issue can be considered closed.

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226 AT&T Loop Comments at page 38.
227 Liston Rebuttal at page 92.
228 AT&T Loop Comments at page 39.
229 Liston Rebuttal at page 93.
230 AT&T Loop Comments at page 39.
231 Liston Rebuttal at page 94.
232 AT&T Loop Comments at page 40.
233 Liston Rebuttal at page 94.

Issues Decided in Earlier Workshops – Line Splitting

1. Line-At-A-Time Access to Splitters

AT&T commented 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 said that CLECs should be able to gain access to them for a single line or a single shelf.234

This issue is the same as the first unresolved issue (*Ownership of and Access to Splitters*) under *Line Sharing* in the June 11, 2001 *Third Report – Emerging Services* in these workshops. No new evidence or arguments here would serve to alter the resolution made of that issue, which is therefore equally applicable here.

2. Discontinuing Megabit Service

AT&T objected to Qwest's policy of discontinuing Megabit (high-speed data) service to its own end users when they switch to a CLEC for voice service. AT&T cited the same support for its objections as it made in the emerging services workshop. The treatment of this question as the second unresolved issue (*Tying Qwest Data Service and Voice Service*) under *Line Sharing* in the June 11, 2001 *Third Report – Emerging Services* in these workshops remains valid here. No new evidence or arguments here would serve to alter the resolution made of that issue, which is therefore equally applicable here.

Issues Remaining in Dispute – Line Splitting

1. Limiting Line Sharing to UNE-P

AT&T commented that SGAT Section 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).235

With respect to loop splitting, AT&T's brief acknowledged that Qwest had agreed to expand line sharing to loops by adding a new SGAT Section 9.24 to address loop splitting. However, AT&T remained concerned about the lack of a commitment date by which CLECs will be allowed to use line splitting on UNE loops.236 Qwest noted that, while it had agreed to loop splitting, it did not recognize an obligation to do so, nor was it aware of any other ILEC that was providing it. Qwest argued also that it would have a very limited role in loop splitting, which would operate largely under agreement between the two CLECs involved (one providing voice services and the other providing data services). Qwest testified that there remained issues to be resolved, e.g., authority to repeat troubles.237

234 AT&T Loop Comments at page 36.
235 AT&T Loop Comments at page 13.
236 AT&T Loops Brief at page 29.
237 Loom Rebuttal at pages 90 and 91 and Qwest Loops Brief at page 10.

Access to line splitting over EELs was also disputed. AT&T also expressed concern about Qwest's proposal to limit line splitting in the EEL context to the Special Request Process. Qwest cited very low demand for EELs, stating that only seven existed in all of the seven states (and all of them in Utah). It objected to undertaking the development work necessary to create a standard offering. Qwest said that such an offering would require it to define methods, to create ordering functions within its OSS, and to define the LSR information that can flow through Qwest's databases and onto billing statements. Qwest agreed to do so in the event that future demand grew enough to justify it, but it argued against providing EEL splitting, except on a special request basis at present.238 AT&T's concerns about this approach included the lack of a defined and expeditious timetable for resolving special requests. AT&T also argued that the lack of demand for EELs was at least in part a function of the lack of a readily available "product."239 AT&T wanted EEL splitting to be a standard offering subject to specified terms and conditions under the SGAT.

Qwest objected to providing splitting in the resale context. Qwest noted that AT&T conceded in the workshops that this alternative was "virtually identical" to splitting over UNE-P. Qwest objected to adding an obligation that it said did not now exist under FCC requirements.240

Rhythms also testified generally that Qwest's specific SGAT obligations with respect to line splitting were not sufficiently defined and concrete.241

Proposed Issue Resolution: AT&T's objection to the lack of a definitive timetable for making loop splitting available is not well founded. No issue was taken with the need for addressing issues associated with loop splitting, in order to assure that Qwest is not inappropriately asked to resolve problems or take responsibility for matters of potential disagreement between the two CLECs who will be using such a loop. Nor was there any evidence that Qwest has failed adequately to pursue resolution of those issues. On the other hand, no evidence was presented to demonstrate that such problems require consideration by industry forums. 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.

AT&T also failed to demonstrate that crafting a specific offering for EEL splitting is appropriate at present. Qwest's evidence showed that there is a remarkably small current demand for EELs at all, let alone for splitting them. Faced with specific evidence from Qwest about actual demand, no CLEC chose to counter with its own evidence of its likely demand for split EELs, either qualitatively or quantitatively. Rather, the only argument provided was an essentially hypothetical discussion of the reasons why demand was at the levels testified to by Qwest. It is reasonable to rely upon the special request process in cases, such as the one at issue here, where it will avoid, at least for some time, development expenses out of character with the benefits that

238 Qwest Loops Brief at page 11.
239 AT&T Loops Brief at page 32.
240 Qwest Loops Brief at page 12.
241 Kerstnick Testimony at page 6.

will flow from incurring them. Therefore, should Qwest remain willing to make split EELs available on a special request basis now, and to develop a 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.

Finally, splitting resold lines is an anomalous concept. CLECs can acquire the underlying facilities as UNEs or they can resell a service. They cannot buy a service for resale, yet claim that they have secured any rights to the underlying facilities. Loops are split; services are not. In the resale context, there is no CLEC loop to split. Some CLECs must secure a loop as a UNE before a loop can be split. As Qwest's brief and AT&T's witness suggest, there is at least one solution to line splitting under a resale situation, which is first to substitute UNE-P for resold services, then to pursue the splitting options made available by that substitution.

2. Liability for Actions By an Agent

Qwest required that a single party be responsible as the "Customer of Record" for split lines. While not objecting to the concept, AT&T raised concerns that both CLECs involved (i.e., splitting the line) might have separate needs for contacting Qwest for ordering or for maintenance and repair purposes. It could be cumbersome to require the other CLEC to have to contact the customer of record who would then have to contact Qwest, merely to relay matters of more direct concern of the other CLEC. AT&T and Qwest worked out nearly all of the language required to allow the CLEC who was not the customer of record to be authorized to make ordering, maintenance, and repair contacts to Qwest.242

The agreed to solution would require that the CLEC who was not the customer of record to have access to all the identification and security passes of the other CLEC, in order to allow Qwest to recognize the contact as a legitimate one with respect to the loops at issue. The parties also agreed that Qwest should generally not be held responsible for any harm due to actions by anyone to whom the customer of record has given the identification and security passes that are sufficient to allow such person to gain access to the customer of record's account at Qwest. Only in a very narrow area was there disagreement. The disagreement was whether the third person must have obtained the identification and passes "wrongfully" from the customer of record. Qwest would say "yes;" AT&T would say "no."

Proposed Issue Resolution: AT&T's brief focused on wrongful "use" of the access gaining information by the third party.243 However, the provision at issue (Section 9.2.1.7.3 from Qwest's frozen SGAT filing) does not concern itself with the use of the information but with how it was obtained. Moreover, the limitation on Qwest's liability applies only in cases of access to the information from the customer of record (i.e., one of the two CLECs); it is significant here to bear in mind that Qwest's liability is not limited in cases where Qwest provides the information to the third party. Thus, by definition, the section should limit itself to information wrongfully secured by a third party from the CLEC who is the customer of record. If a CLEC gives out information to another CLEC that can be used to make commitments with respect to its

242 AT&T Loops Brief at pages 34 and 35; Qwest Loops Brief at pages 14 and 15.
243 AT&T Loops Brief at page 35.

account, it should be clear that the CLEC, rather than Qwest, should be responsible for misuse of that information. Otherwise, Qwest, rather than the CLEC, becomes responsible for managing the conduct of the CLEC's representatives or agents, should they choose to act counter to or beyond the instructions that the CLEC has given them.

There is no apparent reason why Qwest should bear any responsibility, even if some negligence theory could be supported, for harm to a CLEC from the CLEC's agent's or representative's use of such information that the CLEC intentionally and "rightfully" gave to the person in question. Only where the CLEC or agent has "wrongfully" obtained the information, and only where it obtained it through negligent or willful conduct, is it proper to hold Qwest responsible for claims resulting from a concession that Qwest has made to its normal customer of record procedures for the administrative convenience of CLEC customers.

Issues Resolved During This Workshop – NID

1. Access to All NID Features

AT&T commented that SGAT Section 9.5.1 described the NID inappropriately in two respects. First, AT&T said that the section described it in relation to Qwest's "Loop Facility," thus limiting CLEC NID access to cases where a CLEC has secured an unbundled loop from Qwest. Second, the definition failed to provide CLECs with access to all of the features of the NID.244 As Qwest pointed out, the definition critiqued by AT&T was dated; the current version had stricken the "Loop Facility" language, and had explicitly included in the NID definition all of its "features, functions, and capabilities."245 WYCAS made similar points in its brief, but added that it "...will leave it to the competitive intervenors to address the extent to which the new NID language resolves their concerns with the NID provisions of the SGAT."246 This issue can be considered closed.

2. Smart and MTE NIDs

AT&T asked that the NID definition be expanded to include "Smart NIDs," which AT&T described as allowing some monitoring of maintenance on PBX trunks and DS1 loops.247 Qwest's frozen SGAT Section 9.5.1.2 language includes such NIDs. As requested by AT&T, Qwest also changed the SGAT to include a reference to NIDs at MTEs. This issue can be considered closed.

3. Availability of NIDs When CLEC Provides Loop Distribution

AT&T commented that SGAT Section 9.5.2.1 required CLECs to provide their own NIDs when they provided their own loop distribution to serve an end user. AT&T cited paragraph 232 of the

244 AT&T Loop Comments at page 42.
245 Liston Rebuttal at page 75.
246 Post-workshop Brief of the Consumer Advocate Staff on Issues Relating to UNEs, Arising Out of Workshop Session 5 and Workshop Session 6.
247 AT&T Loop Comments at page 42.

UNE Remand Order as prohibiting such a requirement.248 Qwest responded that nothing in the section imposed such a requirement, and that CLECs could gain access to Qwest's NID in such cases.249 AT&T did not brief this issue and there is nothing evident in the section that would impose such a requirement. This issue can be considered closed.

4. Other Kinds of Permissible NID Access

AT&T suggested the addition to SGAT Section 9.2.1 of a number of other types of allowed NID access.250 Qwest responded that it had already changed the SGAT to permit most of the types of access sought by AT&T.251 AT&T did not dispute those omitted, nor did it brief this issue. The issue can therefore be considered closed.

5. NID Ownership

AT&T objected to the SGAT Section 9.5.2.2 statement that Qwest retains ownership of the NID and its "contents on Qwest's side" as denying CLECs access to NID functions and capabilities.252 Qwest responded that access to and leases of UNEs is what is required; nowhere does the FCC require an incumbent to cede ownership of any facilities that CLECs use as UNEs.253 AT&T did not brief this issue. Moreover, it is not clear why ownership is required to give CLECs access to a NID's functions and capabilities. Nor is it clear why NIDs should be distinguished from all other UNEs in terms of requiring Qwest to transfer ownership to CLECs. It is presumed that this issue is closed.

6. Rates for Other Than Single-Tenant NIDs

AT&T commented that SGAT Section 9.5.3.2 refers only to single tenant NID rates; rates for other NIDs should be included.254 Qwest agreed, and it changed the section accordingly.255 This issue can be considered closed.

7. NID Ordering Documents

AT&T commented that the SGAT Section 9.5.4 requirement for LSR use in ordering NIDs was cumbersome, because it required a loop order as well.256 Qwest responded that it was working to streamline NID ordering by providing a standalone NID order process. In the meantime, however, it was necessary for CLECs to use the remarks section of the LSR to isolate a NID order.257 This issue can be considered closed, but Qwest should provide, should CLECs request it, a report of status in designing and implementing the new NID ordering process.

248 AT&T Loop Comments at page 44.
249 Liston Rebuttal at page 79.
250 AT&T Loop Comments at page 45.
251 Liston Rebuttal at page 80.
252 AT&T Loop Comments at page 46.
253 Liston Rebuttal at page 81.
254 AT&T Loop Comments at page 46.
255 Liston Rebuttal at page 82.
256 AT&T Loop Comments at page 46.
257 Liston Rebuttal at page 82.

Issues Remaining in Dispute - NID

1. "NID" Definition and Access to Terminals Where Qwest Owns Facilities in the Direction of the End User

While both Qwest and AT&T expounded on this subject at great length, the discussion appears to raise no issues other than that considered in the first unresolved *Subloop Unbundling* issue (*Subloop Access at MTE Terminals*) from the June 11, 2001 *Third Report – Emerging Services* from these workshops. In essence, AT&T is still seeking to argue that MTE terminals are NIDs, because it believes that winning the definition issue will give it essentially unmediated access to such terminals. Qwest, on the other hand, again effectively seeks victory by defining access at MTEs as subloop access, in the apparent hope that it can impose a set of pre-defined standard FCC collocation arguments. The only new light shed on the issue is how the matter of how access to the functionality of the NID, versus access to its physical attributes plays into the argument. It is helpful to clarify that nuance, because the parties' heated debate on that distinction heretofore had created the impression that something much larger and more significant was at stake.

Basically, the difference between them in that regard appears to boil down to this question: what the FCC meant when it distinguished between the physical NID and the functional (one might say the metaphysical without too great a stretch) NID in the *UNE Remand Order*. AT&T said that that the FCC meant that it could get access to an MTE terminal's NID functionality without the extra burdens of meeting collocation requirements. Qwest said that the FCC in fact was only saying that when a CLEC gets access to a Qwest subloop at an MTE it also gets along with it the functionality of the NID that is downstream from the MTE (of course meaning that the CLECs do have to go through the collocation burdens, which are required under the FCC's subloop access provisions).

Proposed Issue Resolution: These arguments bring us right back to the point of the *Subloop Access at MTE Terminals* issue noted above. Qwest's interpretation of what the FCC meant better accords with the context and construct of the language. Of course, as the previous resolution of the issue demonstrated, being on the right side of that question is not worth much in resolving the issue. As stated there, what CLECs can and cannot be required to do is not a function of who wins a semantic issue (which it is not even clear was part of what the FCC had in mind in crafting the language that each parses so carefully). Rather, it is a function of the other circumstances at play (for example, the service reliability, safety, work efficiency, cost, and engineering and operating practice concerns mentioned in the *Emerging Services* report). In other words, standard collocation requirements could be eased in cases where standard FCC rules do not make sense in terms of those circumstances, just as standard NID access requirements could be restricted for the same reasons.

We dealt with the one set of specific circumstances that the parties chose to expose in that earlier workshop. That resolution remains 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.

2. Protector Connections

AT&T commented 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 said that this policy would deny CLECs access to the NID's features and functions, which contravenes the *UNE Remand Order*.258 Qwest responded that nothing in the FCC's rules would oblige it to remove its connections and that doing so would violate the National Electric Code and the National Electric Safety Code.259 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.

AT&T asked in its brief that SGAT Section 9.5.2.1 be amended to add the underlined provisions shown below:

> *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."*

The AT&T brief cited no evidence of record to support this amendment; instead it relied upon a technical document that it submitted in these workshops for the first time in its brief. AT&T's brief called this document "Bell system policies."

Proposed Issue Resolution: There was no brief from Qwest on this issue; Qwest had reason to conclude from the workshop record that the matter was not in issue. The document attached to the AT&T brief has not been authenticated; no witness has testified to its applicability generally or with specific reference to all of the relevant configurations at issue here. The document is described as a Bell system document even though it bears an AT&T identification from 1989. Its significance here and the requirements associated with its implementation (assuming without a substantial basis therefore that it was ever applicable anywhere by anybody and similarly assuming, if it was, that it remains applicable somewhere today) are by no means clear. In fact, the most directly relevant section of the document, again under the above assumptions, appears to be Section 2, which talks about what to do with a drop wire where a connection block (assuming that a connection block is what is now referred to as a NID) is left in place at the customer location. That section says, "Where station protector or connecting block is not to be removed, do not connect the outside drop at the customer building." Moreover, AT&T's proposed language addition would entitle another carrier to go wherever else in the loop facilities of Qwest it had to perform the function of "capping off," which is a term not explained by AT&T.

258 AT&T Loop Comments at page 44.
259 Liston Rebuttal at page 80.

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.

3. CLEC Use of Qwest's NID Protector Without Payment

AT&T raised this issue for the first time in its brief. AT&T objected to the SGAT Section 9.5.3 requirement that it pay for its use of protectors at Qwest's NID in cases where it has its own protectors. AT&T says that, where it has its own protectors, i.e., it connects to those in its own nearby NID, it may still find it necessary or "convenient" when it cross connects to Qwest's NID to do so in the protector field there. AT&T would change the section to say that it does not have to pay for the functionality of the protector field when it has its own protectors and therefore presumably is not using this "functionality."

Proposed Issue Resolution: Apart from being raised in a manner that allowed no effective response and apart from having no factual foundation, the argument that UNE prices should be based on the functionalities actually used is curious. The general rule is that a CLEC gets access to all the functionalities and capabilities that a UNE presents to it. If a CLEC has access to all those functionalities and capabilities, it stands to reason that it should be responsible for the proper costs that go into providing all those functionalities and capabilities. Moreover, it would craft a slippery slope to establish the principle that CLECs can argue for reductions from standard UNE prices where they self declare (or even prove, for that matter) that they are using only part of the capability of a UNE. The precedent established in the case of loops would seem to argue for sub-NID unbundling, presuming that AT&T's core argument has merit. Clearly, the record here, which is essentially none, does not begin to take on the dimensions that would suit an inquiry of that type.

VI. Checklist Item 5 – Access to Unbundled Local Transport

Background – Transport

Checklist Item 5 of the Section 271 checklist of the Telecommunications Act addresses access to unbundled local transport. Qwest is required to provide local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services. 47 U.S.C. Section 271(c)(2)(B)(v).

Also addressed in this section are Enhanced Extended Links or EELs. In the *UNE Remand Order*, EELs were defined as being "comprised of unbundled loops, multiplexing/concentrating equipment, and dedicated transport…".

Issues Resolved During This Workshop – Transport

1. Available Dedicated Transport Routes

AT&T commented that SGAT Section 9.6.1 did not allow connections between all the facilities that the FCC requires (e.g., between CLEC wire centers or switches). Qwest agreed to change SGAT Section 9.6.1.1 to address the full range of routes required by the FCC. 260 This issue can be considered closed.

2. Requiring Multiplexers for Access to Transport

AT&T expressed concern about whether the SGAT Section 9.6.1.2 reference to an unbundled multiplexer as a stand-alone element meant that CLECs would have to acquire it to get transport as a UNE. AT&T argued that making it a requirement, rather than a CLEC option, would violate prohibitions against limiting the facilities to which transport as a UNE could be attached.261 Qwest changed the section to clarify that such mulitplexers were at the option of CLECs. Qwest also stated that, consistent with the failure of the FCC to identify them as UNEs, Qwest was not offering them as such, but as an optional feature of the UDIT UNE.262

3. Cross Connecting UDIT and EUDIT

Further addressing its concern about not separating UDIT (Unbundled Dedicated Interoffice Transport) and EUDIT (Extended UDIT) (an unresolved issue that is addressed below), AT&T objected to the requirement of SGAT 9.6.2.1 that CLECs pay for the costs of cross connecting UDIT and EUDIT when they are in fact a single element. AT&T was particularly concerned that such cross connections would require the substantial expenses associated with collocation where the cross connects had to be made in a Qwest central office.263

260 Stewart XX Rebuttal at pages 5 and 6.
261 AT&T Emerging Services Comments at page 6.
262 Stewart XX Rebuttal at page 6.
263 AT&T Emerging Services Comments at page 7.

Qwest objected to a general change that would require it to make all cross connections between elements, but did agree to change the section to add a provision stating that:

> *To the extent that CLEC is ordering access to a UNE Combination, Qwest will perform requested and necessary cross-connections between UNEs in the same manner that it would perform such cross-connections for its end user customers.*

This issue can be considered closed.

Issues Decided in Earlier Workshop Reports – Transport

1. Access to the Facilities of Qwest Affiliates

AT&T's brief argued that the Commissions should require the addition of SGAT language obligating QCI and its affiliates to unbundle dedicated transport, along with other in-region facilities. AT&T argued that such a requirement is consistent with the goals of the Act, and is necessary to prevent Qwest and its affiliates from avoiding its Section 251(c) obligations. This is the same argument that AT&T made in the context of dark fiber; the report preceding this one addresses that argument fully.264 That argument was addressed under the first unresolved *Dark Fiber* issue *(Affiliate Obligations to Provide Dark Fiber)* in the June 11, 2001 *Third Report – Emerging Services* in these workshops. The resolution recommended there is equally appropriate here.

2. Access to Dark Fiber in Qwest's Joint-Build Arrangements

AT&T also argued, as it did previously, that Qwest is required to allow CLECs to lease dark fiber that exists in "joint build arrangements" with third parties. That argument was addressed under the second unresolved *Dark Fiber* issue *(Access to Dark Fiber in Joint Build Arrangements)* in the June 11, 2001 *Third Report – Emerging Services* in these workshops. The resolution recommended there is equally appropriate here.

Issues Remaining in Dispute – Transport

1. SONET Add/Drop Multiplexing

AT&T asked that Qwest change SGAT Section 9.6.1.2 to add SONET add/drop multiplexing as a CLEC option. AT&T commented that CLECs commonly would need to go from OCn to DS3, and would therefore benefit if Qwest were to make such multiplexing available.265

Qwest refused, on the basis of paragraph 324 of the *UNE Remand Order*, which states that in establishing transport unbundling obligations:

> *The Commission limited an incumbent LEC's transport unbundling obligation to*

264 AT&T Brief at pages 32 through 37.
265 AT&T Emerging Services Comments at page 6.

> *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.*

Therefore, Qwest was not willing to offer this additional equipment as a standard offering under the SGAT.266

Proposed Issue Resolution: This issue is similar to the general treatment of the *Construction of New UNEs* issue above. It should be resolved in the same manner.

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.267 AT&T cited the FCC statement that: 268

> *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.*

Qwest offers UDIT for dedicated transport routes between Qwest's wire centers. Where one end of a transport trunk is not at a Qwest wire center, however, (e.g., where a CLEC wants dedicated transport from its wire center or an interexchange carrier seeks dedicated transport from its POP), Qwest requires the use of EUDIT. UDIT is priced on a distance-sensitive basis, while the pricing for EUDIT is not distance sensitive. AT&T claimed that both UDIT and EUDIT should be priced on a distance-sensitive basis, and that Qwest should not be permitted to carry over from the access world the average pricing reflected in non-distance-sensitive EUDIT pricing. AT&T asserted that such pricing is not cost based, is discriminatory, and discourages CLECs from mid-span meets in EUDIT situations (because the CLEC will pay the same for EUDIT whether or not it builds much of the way toward the point of interconnection).

AT&T also argued that Qwest could not provide EUDIT without the electronics necessary to permit the transmission of signals. AT&T said that the FCC definition of transport clearly

266 Stewart XX Rebuttal at page 37.
267 AT&T Brief at page 41.
268 *Local Competition Order*, ¶ 440; 47 C.F.R. § 51.319(d)(1)(A).

requires that dedicated transport include the electronics:269

> *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.*

Therefore, AT&T asked for elimination of the EUDIT/UDIT distinction, and that Qwest be required to provide dedicated transport between all locations on a flat rate, distance-sensitive basis. AT&T also asked that Qwest be required to provide the electronics on dedicated transport terminating at a CLEC wire center.270

Qwest's brief confirmed that it made the distinction between UDIT and EUDIT as a way to preserve the historical pricing differences between the two. Qwest agreed that acceptance of this distinction is not sought here; it is willing to allow the question of the costs for these facilities to be decided in cost dockets before the individual commissions.

Qwest objected to the requirement that it install new electronics or upgrade existing electronics at a CLEC wire center for the purpose of allowing existing fiber facilities to function as transport elements. Qwest cited paragraph 324 of the *UNE Remand Order*, which provides:

> *[W]e do not require incumbent LEC 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.*

Qwest construed the installation of new or upgraded electronics as new construction. Qwest also cited the availability of dark fiber as a UNE, and noted that footnote 292 of the same order makes clear that the CLEC must install its own electronics on such fiber.271

Proposed Issue Resolution: Whether the historical method of pricing entrance facilities continues to be appropriate in the context of providing interoffice transport is a legitimate issue. However, deciding questions about the way costs are incurred, what those costs are, and how they should be translated into UNE prices is best done on the basis of the detailed cost information that is typical of cases that address such prices. That information is not present here; we have only generalized assertions about cost incurrence and we have no information at all about what the costs are. Therefore, 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.

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269 *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).
270 AT&T Brief at page 44.
271 Qwest UNE Brief at page 13.

There remains the question of Qwest's obligation to provide electronics in association with providing a transport UNE. The FCC authority that AT&T cited does not address the obligation to construct or augment capabilities or functions. It addresses the threshold issue of whether a CLEC is entitled or not entitled to all the functions and capabilities of elements that it secures from an incumbent. Whether those functions or capabilities must be provided where they do not presently exist is more directly addressed by the provision cited by Qwest. That provision makes it clear that Qwest does not have an obligation to install new transport facilities.

There is also the related question of whether the obligation to modify existing facilities does or does not contemplate new or upgraded electronics. First, there appears to be no reason for distinguishing between new or upgraded electronics in this instance. Upgrading would appear generally to require replacement of existing equipment with new equipment; there is nothing in the record to support a contrary conclusion. Second, there is no reason for believing that electronics costs are small relative to fiber costs. Third, AT&T has presented no evidence to counter the intuitively supportable conclusion that it, like Qwest, is equally capable of installing necessary electronics, which appears to be what is contemplated by the making of dark fiber available to CLECs as a UNE. Fourth, by definition, dark fiber is not presently in active use in any network. Thus, the issue is not modifying because its current configuration for use by Qwest makes it unsuitable for use as a UNE by or to provide interconnection for a particular CLEC. The issue is providing the electronics that either Qwest or the CLEC would need to add to make it functional for use by either. Therefore, modification is not an apt term to address what AT&T seeks to have done in these circumstances.

Accordingly, AT&T's request is neither consistent with the general rule applicable to building new UNEs (discussed in more detail earlier in this report), nor does it fall within a reasonable interpretation of Qwest's obligation to modify facilities. Finally, requiring CLECs to install their own electronics does not discriminate against them or deny them a reasonable opportunity to compete to the extent that they have the same ability to light fiber as Qwest does.

3. Commingling UNEs and Interconnection Trunks

AT&T's brief argued that Qwest's SGAT applies a definition of "finished services" and uses it to preclude CLECs from connecting UNEs to trunks used for interconnection (called LIS Trunks). AT&T argued that this restriction finds no support from the FCC, which does not use this term, but uses "tariff services" in imposing restrictions on commingling with UNEs. AT&T asked that LIS Trunks be excluded from the definition of "finished services" under the SGAT.272 Qwest agreed in its brief to delete LIS Trunks from the definition of "finished services" and it conceded that LIS trunks could be connected with UNEs, dropping its prior argument that such commingling should be precluded.273

Proposed Issue Resolution: With Qwest's change to the SGAT and its recognition that there is not SGAT prohibition on commingling UNEs and LIS Trunks in the same facilities, this issue can be considered closed.

272 AT&T Brief at page 39.
273 Qwest UNE Brief at page 19.

4. Applying Local Use Restrictions to Unbundled Transport

AT&T argued that SGAT Section 9.6.2.4 improperly prohibits the use of interoffice transport as a substitute for special or switched access services.274 After the FCC's *UNE Remand Order* addressed the ability of CLECs to order loop and transport combinations to provide interexchange service without any local-use requirement, the FCC modified paragraph 486 of the order to prohibit CLEC or IXC conversion of special access to loop/transport combinations, absent a significant amount of local exchange service to a particular customer.275 However, AT&T claimed that the FCC has not expanded the local use requirement beyond loop/transport combinations; therefore, the requirement does not extend to dedicated transport generally.

AT&T did acknowledge, however, that the *UNE Remand Order* did leave open the question of how the requirement might apply in the "discrete situation" of dedicated transport between the incumbent LEC's SWC and an IXC switch or POP. The FCC decided to take comments on the use of dedicated transport in this case.276 Later, the FCC suggested that the *UNE Remand Order* placed a "temporary constraint" on CLEC use of dedicated transport from the IXCs POP to the ILEC's SWC as a substitute for special access.277 However, AT&T argued that the SGAT language went beyond any permissible temporary constraint, because it imposed local use restrictions on dedicated transport from and to all permissible locations. AT&T would agree to language that Qwest proposed in other jurisdictions. That language is:

> *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*

Qwest did not respond to this particular aspect of the commingling issue. For the present, it is presumed that Qwest continues to agree with the language offered by AT&T, but Qwest may address any opposition to or clarification of the language in the comments to this report that it may file with the individual commissions.

Issues Resolved During This Workshop - EELs

1. Waiver of Local Use Requirements for Particular EELs

The FCC requires a CLEC to certify that EELs it secures from an incumbent be used to provide a significant amount of local exchange traffic. AT&T questioned whether the waiver language of SGAT Section 9.23.3.7 could be read to require an FCC waiver specific to a particular EEL.278 However, the language of the section, as set forth in the frozen SGAT requires only that the

274 AT&T Brief at pages 44 through 46.
275 *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*").
276 *UNE Remand Order* at ¶¶ 489 and 492 through 496.
277 *Supplemental Order*, ¶¶ 4, n. 5 and 8 and 9; *Supplemental Order Clarification*, ¶ 3, n. 9.
278 AT&T UNE Comments at page 42.

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278 AT&T UNE Comments at page 42.

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terms of any waiver secured be applicable to the EEL for which a CLEC seeks to avoid the local use requirements. Therefore, a general waiver could clearly apply to a later identified EEL, provided that such EEL met the terms of the waiver. AT&T did not brief this issue; it can be considered closed.

2. Ways of Meeting the Local Use Requirements

AT&T observed that the SGAT Section 9.23.7.2 language addressing the three ways that EELs can meet the local use requirements did not precisely track the language of paragraph 22 of the FCC's *Supplemental Order Clarification*. AT&T reserved the right to inquire about the wording of the section at workshops, in order to satisfy itself that Qwest's EEL offering met all applicable requirements.279 AT&T did not brief this issue; it can be considered closed.

3. Audits of Local Use Certifications

AT&T wanted to change SGAT Section 9.23.3.7.2.6 to limit the frequency of Qwest audits. AT&T also wanted to clarify that Qwest's other SGAT audit rights could not be used for this purpose, nor could such audits be made a prerequisite to the provisioning of UNE combinations for CLECs. Qwest changed the SGAT to address AT&T's concerns.

ELI testified that the special audit provisions for local use certifications were unnecessary and expensive, duplicating the other SGAT audit provisions.280 Qwest responded that its audit language, which was modified to address CLEC concerns in another state's workshop, was adequately tailored to the specific nature of the FCC's requirements about local use certification. ELI did not brief this issue.

This issue can be considered closed.

Issues Remaining in Dispute - EELs

1. Limiting Local Use Requirements to Existing Special Access Circuits

ELI commented that Utah arbitration orders and the FCC have limited local use certification requirements to existing special access circuits; therefore, SGAT Section 9.23.3.7.1 impermissibly extends those requirements to UNE combinations to be newly acquired by a CLEC.281 ELI made the same objection to SGAT Section 9.23.3.7.2.12.2. Qwest responded that paragraph 21 of the *Supplemental Order Clarification* clearly apply to new combinations, as well as the conversion of special access facilities.

The XO/ELI brief argued that the language of the *Supplemental Order* and the *Supplemental Order Clarification* both explicitly referred to the "conversion" of existing special access

279 AT&T UNE Comments at page 43.
280 Peters Testimony at page 16.
281 Peters Testimony at page 16.

circuits, and nothing more.282 Moreover, XO/ELI argued, a CLEC cannot possibly meet the obligation to certify existing local use on facilities it is not yet using at all: therefore making it impossible to meet such a requirement in any case.

Qwest's brief pointed out that paragraph 21 of the *Supplemental Order Clarification* held that:

> *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.*

Qwest asserted that the use of the word "obtain" applies on its face to all combinations, not just those being converted.283 Qwest also argued that the *Supplemental Order* paragraph 8 prohibition against substituting EELs for special access could not be logically construed to intend a difference between conversions and new EELs. Finally, Qwest argued that limiting the temporary prohibition to conversions would not accomplish the FCC goal "to maintain the status quo."284

Proposed Issue Resolution: This issue presents the same question that was decided in the third unresolved "Dark Fiber" issue, which was addressed in the June 11, 2001 *Third Report – Emerging Services*. It was decided in that report that the following FCC language was determinative:285

> *IXCs may not substitute an incumbent LEC's unbundled loop-transport combinations for special access services unless they provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.*

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. Ultimately, it must be concluded that there is not a sound reason for distinguishing between the circumvention of access charges on converted UNEs versus new UNEs. The impact is the same; preservation of the status quo pending final FCC decision therefore requires that each be treated similarly.

The XO/ELI argument that a CLEC cannot make a certification about future use is puzzling. As

282 XO/ELI Brief, citing *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-370, Supplemental Order ¶ 2 & 4-5 (Nov. 24, 1999) ("*Supplemental Order*") and *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 ¶ 6 (June 2, 2000) ("*Supplemental Clarification Order*").
283 Qwest Loops Brief at page 25.
284 Qwest Brief at page 26.
285 *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) ¶8.

the user of the facility, a CLEC can clearly make representations about its future use. It certainly can make no representation about current use, because there is none; however, it is not apparent why XO/ELI consider a representation about the use it commits to making over a facility that it will control is different from what the FCC had in mind in adopting the certification requirement.

2. Allowing Commingling Where Qwest Refuses to Construct UNEs

AT&T argued that Qwest should not be permitted to refuse commingling UNEs and tariffed services in certain cases where Qwest refuses to construct UNEs. The specific situation of concern to AT&T is the case where there are no DS1 loops available as UNEs and Qwest refuses to construct facilities to provide an unbundled DS1 loop. An option for securing such a loop, according to AT&T, is to acquire it under a retail tariff.286

What AT&T would like to do in this case is to allow that DS1 to be multiplexed onto the same dedicated transport facilities that AT&T has acquired from Qwest as a UNE. If the DS1 in question had been acquired from Qwest as a UNE, there would be no question about the right to connect it to transport acquired as a UNE; the resulting combination would constitute an EEL, which CLECs can secure from Qwest. The problem in AT&T's postulated case, however, is that the DS1 loop was not secured as a UNE, but as tariffed service, and was only acquired in that fashion because a loop was not available. Because the DS1 loop was acquired as a tariffed service, Qwest would not allow it to be connected to a transport UNE, because Qwest would construe that connection as violating the commingling restrictions imposed by the FCC. That commingling issue is addressed elsewhere. AT&T said that this policy causes it unnecessary expense, because it must find different facilities to which it can connect the DS1 loop; Qwest will not permit it to take advantage of existing capability on the transport UNE that AT&T has acquired from Qwest.287

Qwest only briefly addressed this aspect of the commingling issue, which it discussed more fully in a general context that was not EEL-specific. The Qwest brief specifically responds to the EEL commingling issue by reciting paragraph 28 of the *Supplemental Order Clarification*, in which the FCC explicitly said that it would not eliminate the commingling prohibition, which it defined there as "combining loops or loop-transport combinations with tariffed special access services."

Proposed Issue Resolution: The reason why the FCC has expressed concern and placed temporary restrictions on commingling were not in disagreement. All participants who argued this issue seemed to acknowledge that concern about avoiding access charges is the central matter. Here it seems reasonably clear that the goal of a CLEC is not at all to avoid access charges, but rather to find a way to secure a service through a facility that would normally be available as a UNE, were adequate facilities available, or were Qwest willing to construct them where they were not. More particularly, the CLEC here wants to replace a UNE with an equivalent functionality without having to experience substantially greater limits on its use than would have been the case had it secured the functionality through a UNE.

286 AT&T UNE Brief at page 50.
287 AT&T UNE Brief at page 52.

In fact, not only is it clear that avoiding access charges is not the CLEC's goal; the CLEC will actually be paying access charges that would have been avoided had it secured a UNE. Thus, it does not appear that this situation falls within the zone of interests that the FCC was seeking to protect in the *Supplemental Order Clarification*. Nevertheless, if what AT&T would like to do here is expressly and plainly prohibited by an FCC rule, regulation, or order, it might prove very difficult to find a way to grant the request in a lawful way.

The language of paragraph 28 that Qwest cites (as well as the paragraph 22 prohibition against connecting loop/transport combinations to tariffed services) is not so plainly supportive of Qwest's interpretation. These provisions talk about prohibiting loops and loop/transport combinations to be commingled with tariffed services. However, we must remember that which is the UNE and which is the tariffed service. In this limited case, no loop or loop/transport UNE are being commingled with the tariffed service; the tariffed service is itself the access to the DS1 loop. AT&T seeks to connect the tariffed sought DS1 service with a transport element.

Given that the motive is not to avoid access charges, that the result is not to avoid access charges (because rate or price ratcheting will not be permitted), and that one cannot read the language cited by Qwest as having no construction consistent with AT&T's request, it is appropriate that the connection of UNEs that AT&T wants be permitted, under controlled circumstances. Therefore, the following language should be included in the SGAT:

> *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.*

3. Waiver of Termination Liability Assessments for EELs

AT&T argued that Qwest failed to provide EELs when required, choosing to wait until extensive litigation about the obligation to provide them ended in a 1999 decision by the U.S. Supreme Court, and subsequent federal court decisions. 288 AT&T took the position that Qwest was required to provide UNE combinations, including EELs, as of the time of the *First Report and* Order on August 8, 1996.289 Only after litigation about that order ended long thereafter did Qwest begin to provide EELs. Therefore, CLECs were required up until that time to make purchases of special access/private line circuits in order to achieve the functionality of EELs. Those purchases were made under terms that impose charges for early termination and that

288 The U.S. Supreme Court decision came in the case of *AT&T Corp. v. Iowa Utils. Bd.*, et al., 119 S.Ct. 721, 737 (1999). The subsequent federal decisions were in the cases of *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).

289 AT&T Brief at pages 48 and 49.

sometimes require up-front payment of portions of the costs of construction. AT&T argued that CLECs should not now have to pay these termination charges when they seek to transform the private line purchases into EELs that should have been available in the first place. AT&T underscored the appropriateness of its recommended solution by noting that CLECs have already paid the much higher private line rates (as compared to TELRIC-based UNE rates) and in some cases up-front construction costs.

XO and ELI also addressed this issue.290 They argued that Qwest refused to provide EELs even after the *UNE Remand Order* in November 1999, continuing to provide their functionality only through private line or special access services under tariffs.291 CLECs agreed to lower rates for those services in exchange for that required volume or term commitments and penalties for early termination. While not arguing against such provisions per se, these participants consider it unreasonable to enforce them when CLECs seek to migrate from such services to EELS, which are now available. Arguing that they should have been able to obtain access at UNE rates in the first place, XO and ELI take the position that they have already paid significantly more for the facilities than Qwest could have charged for them as UNEs.

XO and ELI asked that Qwest be required to waive termination liability where a CLEC has incurred such liability because it could not obtain UNEs. They would create a rebuttable presumption that such a waiver should apply until the Commission rules that Qwest has demonstrated that it is providing high capacity UNEs and EELs as required by the Act and Commission-approved interconnection agreements. They would consider the presumption rebutted by evidence that one of the following two conditions has been met:

- The termination liability is for the recovery of special construction costs on the same terms and conditions that Qwest applies to other customers
- The CLEC had an effective choice between tariff services and UNEs at the time it made an election to take tariffed services.

Qwest's brief argued that it has no obligation to waive TLAs when special access circuits are converted to EELs, which, Qwest said, it only became obligated to provide recently. Qwest argued that is would be unfair for CLECs to keep the advantages of the reductions they received from full tariff prices they have paid under long-term arrangements, while avoiding the term requirements that are Qwest's compensating side of the bargain. Qwest also said that the FCC, which is now reviewing the issue of converting special access circuits to EELs (under Public Notice, FCC-96-98, January 24, 2001), has already decided that TLAs are not an appropriate issue for Section 271 proceedings.292

During the workshops, we encouraged Qwest to seek alternate language addressing TLAs, recognizing that conversion of special access circuits would not necessarily involve a shortening of the term over which Qwest receives revenues for similar use of the facilities (even if under presumably lower UNE rates). Qwest's brief, while disclaiming an obligation to do so, did offer

290 XO/ELI Brief at pages 10 through 12.
291 Exhibit WS3-ELI-THP-1.
292 Qwest Loops Brief at page 28.

to waive any rights to recoup TLAs under certain specified conditions, on an individual case basis with each CLEC.293

Proposed Issue Resolution: The evidence of record in these workshops demonstrates that CLECs have purchased special access circuits in cases where Qwest is now making EELs available. More specifically, it is reasonable to conclude that CLECs are paying higher interstate access tariff rates for facilities that could now be acquired as EELs. A harsh view might suggest that CLECs made their choice at the time, and now must live with it. However, the fact that Qwest did not succeed in its prior arguments about EELs raises a number of considerations that are appropriate to a more balanced view of what the circumstances as a whole require.

On the one hand, it would not be consistent with the public interest to accept Qwest's baseline argument, which essentially says that there is no ill in forcing CLECs to live with the precise terms of the bargain that they made, while contesting a policy that was eventually overturned. On the other hand, it would not be fair to allow CLECs simply to walk away from their prior commitments with no analysis of the benefits that they have gained from discounted tariff prices secured through making minimum term commitments. Interestingly, no participant presented any analysis of the difference between full and discounted tariff prices, or between the likely price for EELs and the price actually paid under the arrangements made between Qwest and the CLECs involved. Accordingly, the only certainly supportable resolution suggested by the record made here would be to say that Qwest could not impose termination liability assessments in any case where continuation of facility use by the CLEC as a UNE would have allowed for the same degree of facility investment recovery as was implicit in the original agreement giving rise to the TLA. Such a solution would leave Qwest no worse off than it would have been anyway; certainly it should not be entitled to claim better results by asking for payment of TLA amounts even though a CLEC's continued use of the facilities as a UNE produces greater revenues than those implicitly guaranteed by a minimum term.

However, Qwest's proposal appears to go beyond that requirement; it would allow TLA waiver even where it might not obtain similar revenues. Therefore, it is generally acceptable. However, it contains three provisions that raise questions, which are as yet unanswered given the first appearance of this offer in Qwest's brief.

First, Qwest would waive TLAs only where they apply to facilities that Qwest had no obligation to build294 under requirements existing at the time that a CLEC purchases a "private line circuit." What is not clear about this provision is why there would have been a TLA in the first place if Qwest had an obligation to construct at the time. Moreover, even if there were, it is equally unclear why this issue takes on any different dimensions because Qwest had an obligation to build the facility in question.

Second, Qwest adds the condition that any conversion from a special access circuit must qualify under the local use options that the FCC has set forth to assure (temporarily) that conversions to

293 Qwest Loops Brief at page 30.

294 Qwest defines the obligation to build as similar to its provider-of-last-resort obligations as addressed in the Qwest Obligation to Construct New Facilities to Provide EELs issue in this report.

EELs preserve the status quo with respect to avoidance of access charges. This provision is troublesome in two respects. In the first instance, Qwest can refuse any conversion for failure to meet the FCC's requirements; the provision here would not expand the right to convert; it would only deal with the application of TLAs where conversion is otherwise permitted. In the second instance, Qwest's wording would make permanent a restriction that may disappear after the FCC completes its review of the issue of avoiding access charges. Nothing in Qwest's provision would allow for a change in SGAT provisions to reflect a change at the FCC.

Third, Qwest would require CLECs to identify by August 1, 2001 the circuits that might qualify for TLA waiver. The date needs to be extended to November 30, 2001 to make the section meaningful, given where the Qwest 271 proceedings and these workshops stand at present.

Therefore, this issue can be considered resolved on terms consistent with the public interest if Qwest agrees to drop the second and fourth conditions of page 30 of its loops brief and to extend the circuit identification date to November 30, 2001. SGAT language to the following effect will accomplish such a resolution:

> *Qwest will waive any TLA charge otherwise applicable under the agreement or tariff election by which a CLEC ordered or augmented a special access circuit under interstate tariff between February 17,2000 and May 16, 2001, provided that CLEC identifies and communicates in writing to Qwest on or before November 30, 2001 each circuit it believes to qualify hereunder. Nothing herein shall be construed as expanding the rights otherwise granted by this SGAT or by law to elect to make such conversions.*

Qwest should also have the right to demonstrate, in any comments to the commissions concerning this report, why the obligation-to-build provision not accepted here would promote the public interest. This proposed language also does not explicitly incorporate Qwest's brief condition that its proposal be implemented on an individual case basis with each CLEC. The reason is that the structure of the procedure incorporated into the above-recommended language appears to make the process inherently CLEC-specific. It is not clear what, if anything, would be added by an explicit ICB clause.

4. Waiving Local Use Restrictions on Private Lines Purchases in Lieu of EELs

AT&T made a related argument about the application of use restrictions on such private lines.295 AT&T cited instances where special access/private line circuits may meet the local use restrictions applicable to an EEL. Where a CLEC determines that it is not economic to convert such to EELs because of TLAs, AT&T believes that it should have the option to connect special access/private lines that would qualify as EELs to UNEs. Qwest prohibits this combination of UNEs and tariffed services. AT&T argues that Qwest's previous, unjustified failure to provide EELs justifies this alternative.

AT&T also expressed concern about the consequences of a Qwest refusal to build UNEs in the

295 AT&T Brief at page 50.

transport context.296 Qwest does not consider itself obliged to construct new UNEs for CLEC use; however, it might undertake construction to provide a tariffed private line or retail services that CLECs would use for the same function. AT&T noted that Qwest has argued that the *Supplemental Order Clarification* supports prohibiting the connection of the CLEC's tariffed DS1 loop to an EEL.297 Therefore, AT&T argues that Qwest should be required to build UNEs for CLEC's, or at least be required not to apply restrictions against connecting tariff or finished services to UNEs under SGAT Sections 9.1.5 and 9.23.1.2.2.

Proposed Issue Resolution: The easing of TLA application as recommended under the immediately previous issue will serve to address adequately the concern that TLA application by Qwest would inhibit CLEC elections to convert special access circuits that it ordered while challenges to Qwest's policies were pending. No further relief is necessary to provide for a fair and equitable means of allowing access to EELs in the manner and in the cases allowed by the FCC.

5. Counting ISP Traffic Toward Local Use Requirements

XO and ELI argued that ISP traffic should be counted toward local usage requirements, because it presents no threat of avoiding special access charges, from which ISP traffic continues to be exempt.298 These participants argued that not doing so would produce improper discrimination, because Qwest could require CLECs to use more costly special access service for ISPs, even where Qwest provides its ISP customers with local exchange service.

XO/ELI contended that the FCC's recent order on ISP traffic and reciprocal compensation should not alter the classification of such traffic for this purpose. XO/ELI noted that, even after the recent FCC order, LEC's will continue to provide ISPs with service absent charges for special access. They argued that it would be discriminatory to require CLECs to purchase significantly more expensive access services to serve ISPs, while Qwest could provide its ISP customers with less expensive local exchange service.299

Qwest addressed this issue in a footnote in its brief. Qwest argued that ISP traffic couldn't be defined as local, because the *ISP Remand Order* held indisputably that such traffic was interstate in nature.300

Proposed Issue Resolution: The FCC's recent order on reciprocal compensation leaves little doubt that ISP traffic is interstate in nature and has nothing to do with the provisions of the Telecommunications Act of 1996 as they relate to reciprocal compensation for the exchange of local traffic. Therefore, on its face, ISP traffic cannot count, under any practical application of the

296 AT&T Brief at page 51.
297 *Supplemental Order Clarification*, ¶ 22.
298 XO/ELI Brief at page 9.
299 XO/ELI Brief at pages 8 through 10.
300 Qwest Brief at page 30, citing 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 at ¶ 58 (rel. Apr. 27, 2001).

FCC's requirements, as local usage. It may be that the *ISP Remand* Order was issued without recognition of what its interplay with the significantly older *Supplemental Order Clarification*. Otherwise, the XO/ELI discrimination argument raises good reason for reconsidering it.

Hopefully, the FCC will address the interplay between commingling issues and the recent *ISP Remand Order*, because XO/ELI have made a credible argument that it does not serve the public interest to require CLECs in some cases to pay tariff prices that include subsidies to serve ISPs, while incumbents can serve them on a basis that conforms more closely to their costs. The FCC has been struggling for some time to bring balance to one of the more difficult issues in opening local exchange markets. It would be unfortunate if it left in place the imbalancing factor that may well have been entirely unintentional. It does not satisfy the public interest to impose, absent more weighty justification, differential costs on CLECs and ILECs in serving ISPs.

VII. Checklist Item 6 – Access to Unbundled Local Switching

Background – Switching

Checklist item 6 requires Qwest to provide "[l]ocal switching unbundled from transport, local loop transmission, or other services". Section 271(c)(2)(B)(vi). The FCC in the *Local Competition Order*301 identified local switching as an unbundled network element, and this was confirmed in the *UNE Remand Order:*

> *[w]e require incumbent LECs to provide local switching as an unbundled network element.302*

The FCC did find an exception to this rule 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).303*

Issues Resolved During This Workshop - Switching

1. Specifying Additional Types of Switch Access

AT&T expressed concern that the language of SGAT Sections 9.10 and 9.11 were not sufficient to address access to unbundled switching in certain cases, e.g., where a CLEC provides its own loop.304 Qwest changed the language to address AT&T's concern.305 This issue can be considered closed.

2. Availability of Switch Features

AT&T sought an explicit mechanism under the SGAT for securing all features of the switch, not merely those loaded and activated by Qwest. AT&T sought a more definitive method for describing the vertical features of given switches. AT&T also sought an exploration of whether the special request process would be sufficiently simple and expeditious for securing access to loaded features that require activation by Qwest. AT&T also sought an exploration of whether the special request process would be sufficiently simple and expeditious for securing access to loaded features that require activation by Qwest.306

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301 Id. at paragraphs 410-427.
302 *UNE Remand Order*, at paragraph 253.
303 Id.
304 AT&T UNE Comments at page 22.
305 Simpson UNE Rebuttal at page 19.
306 AT&T UNE Comments at pages 22 through 24.

Qwest responded that it would make available to CLECs all loaded switch features, whether activated or unactivated. It also said that it would provide features available but not loaded into the switches as used by Qwest, where it is technically feasible to do so. Qwest provided, in testimony and on its web site a list of all loaded vertical switch features.307 Qwest amended SGAT Section 9.11.2.1 to clarify that unloaded or unactivated features could be secured through the special request process. The ability of the special request process to efficiently and expeditiously handle such requests was addressed in the subsequent workshop on General Terms and Conditions. Other than that consideration, this issue can be considered closed.

3. Unbundling Switch Centrex Management and Control Features

AT&T asked that the SGAT be changed to allow CLECs access to switch features that would allow it to manage its own Centrex type services.308 Qwest agreed to add SGAT Section 9.11.2.10 to clarify that CLECs can get access to the Centrex Customer Management System with unbundled switching.309 This issue can be considered closed.

4. Notice of Switch Changes and Upgrades

AT&T requested the addition of a provision requiring notification of switch changes and upgrades.310 Qwest said that the FCC's Open Architecture rules already required such disclosure, but agreed to add SGAT Section 9.11.2.9 to confirm the obligation and to continue an obligation to provide notice should those rules change.311 This issue can be considered closed.

5. Unbundling Tandem Switches

AT&T objected to the SGAT Section 9.10 provision that limited unbundling to "local" tandem switches. AT&T argued that the modifier be eliminated, thus permitting CLEC access to all Qwest tandem switches.312 Qwest objected to AT&T's contention that the FCC did not differentiate between local and other tandem switches, citing the FCC Rule 51.319 reference to "local tandem switching." Qwest also agreed to amend SGAT Section 9.10.12 to unbundle an access tandem in wire centers that subtend only an access tandem switch, but not a local tandem switch.313 This change responded to part of AT&T's request; AT&T did not brief this issue. Therefore, the issue can be considered closed.

6. Definition of Tandem Switching Element

AT&T asked that the description of tandem switching in SGAT Section 9.10.1 be changed to more closely conform to FCC requirements.314 The frozen SGAT contains some changes to the

307 Simpson UNE Rebuttal at page 13.
308 AT&T UNE Comments at page 27.
309 Simpson UNE Rebuttal at page 29.
310 AT&T UNE Comments at page 27.
311 Simpson UNE Rebuttal at page 29.
312 AT&T UNE Comments at page 28.
313 Simpson UNE Rebuttal at pages 30 and 31.
314 AT&T UNE Comments at page 28.

section, but not all those requested by AT&T. AT&T also requested a change to SGAT Section 9.10.2.2 to clarify the extent of the requirement to unbundle tandem switching. Qwest added to the AT&T proposal a sentence that AT&T questioned in its comments.315 Qwest provided responses to AT&T's questions, and suggested further amendments to the section.316

No party briefed these issues; therefore, they can be considered closed.

7. Tandem to Tandem Connections

AT&T argued the SGAT Section 9.10.2 required more specificity with respect to what kinds of connections were necessary, how they would be provided, and by whom they would be provided.317 Qwest amended the section to provide additional details in response to this concern.318 This issue can be considered closed.

Issues Remaining in Dispute - Switching

1. Access to AIN-Provided Features

There are four kinds of "features" at issue here. They are as follows:

- Unloaded: Features available for the switch type involved, but not loaded into the switches that Qwest has acquired and uses to provide local exchange service
- Unactivated: Features available for the switch type involved, that have been loaded into the switches that Qwest has acquired, but that Qwest has not activated for use in providing local exchange service
- Activated: Features available for the switch type involved, that have been loaded into the switches that Qwest has acquired, and that Qwest has activated for use in providing local exchange service
- AIN Available: Features often available through switches, but which Qwest has made available through its Advanced Intelligence Network.

AT&T expressed concern about clarity in identifying which features Qwest is providing through the switch and which it is providing through AIN capabilities. AT&T then would seek a "discussion" about "why" Qwest chose not to provide them through the switch.319 AT&T disagreed with Qwest's contention that Qwest need not make access to Qwest's own AIN features available to CLECs.320

315 AT&T UNE Comments at page 29.
316 Simpson UNE Rebuttal at page 32.
317 AT&T UNE Comments at page 28.
318 Simpson UNE Rebuttal at page 31.
319 AT&T UNE Comments at pages 22 through 24.
320 AT&T UNE Comments at page 27.

Qwest also said that it makes available, to the full extent required by the FCC, the feature-development capabilities of its AIN. Qwest said that the FCC does not require incumbents to make available to CLECs the software that provides an end user feature. Rather, incumbents need only make available the same capabilities (AIN databases, service creation environment, SMS, and STPs) that the incumbent uses to create the feature-providing software. Qwest said that it provides CLECs with access to such capabilities, with which they, like Qwest, are able to provide features for end users. Qwest also said that, when it moves from providing a feature from the switch to providing it through AIN, it is willing to leave resident on the switch the capability to continue to provide that feature. Qwest concluded by saying that its AIN-developed features are proprietary, although not conceding that their being so is a condition to precluding CLEC use of them.321

AT&T argued in its brief that the FCC failed to conduct a proper analysis in determining that it was sufficient for incumbents merely to provide CLECs with the capabilities to develop and implement AIN-based features.

Proposed Issue Resolution: First, it is clear that Qwest does provide all available switch features. It provides those that are loaded and activated. It provides through the special request process those that are loaded, but require activation. It also will both load and activate those features that are technically feasible. Finally, when it stops providing a feature from a switch (i.e., migrating the feature's provision to AIN) it will agree to leave the feature available for CLEC provision to its end users through the switch. Moreover, Qwest has provided a list of available switch features.

Therefore, the issue becomes one of determining whether and to what extent Qwest must make AIN-provided features available. No argument exists that Qwest fails to meet the current FCC standard, which is to provide the capability for CLECs to develop their own AIN-based features, rather than having to provide the results of Qwest's own use of those same capabilities to provide its own features. Rather, the argument by AT&T is that, had the FCC properly considered the applicable statutory test, it would have been forced to conclude that Qwest must make the AIN-based features themselves available for CLEC use.

AT&T presents no substantial evidence to counter the core FCC conclusion, which is that CLECs can use AIN access to develop their own features, not only ones similar to what Qwest has provided, but other and perhaps superior ones. There is no basis for concluding that Qwest should, in order to meet its checklist obligations, be required to provide CLECs with access to the AIN-developed features themselves (or the software that delivers them). To the contrary, it remains proper to rely upon the FCC conclusion that giving CLECs access to the ability to use the tools to develop competing features is sufficient.

2. 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

321 Simpson UNE Rebuttal at pages 14 and 15.

switching in the 50 top Metropolitan Statistical Areas to end users with four or more access lines within a wire center. Only one wire center in the seven states could qualify: it is the Salt Lake Main wire center in Salt Lake City.

AT&T first argued that the FCC froze those 50 areas to those existing as of January 1, 1999; therefore, Qwest should be required to confirm that its claimed wire centers meet that criterion. Second, AT&T argued that some wire centers serve more than density zone one; customers in such wire centers are not within the exclusion. Qwest responded that the SGAT's identification of wire centers subject to the exclusion (See SGAT Section 9.11.2.5) do meet the January 1, 1999 qualifying date, and do not include any end users outside of density zone one.

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 also argued that the SGAT should prohibit disconnection of CLEC customers from service before arranging an alternative service arrangement.322 Qwest responded by saying that, if AT&T intended its term "loop/switch combination" to be the equivalent of UNE-P, then Qwest's stated willingness to offer UNE-P (but at market-based pricing for the switching portion) even in the wire centers subject to exclusion should address AT&T's concern. Qwest also objected to the alternate service arrangement proposal. Qwest said that CLECs are in control of service continuity to their end users.323

AT&T also offered a number of clarifications to SGAT Section 9.11.2.5.3 to address what it said were ambiguities in determining when the exclusion applied. These changes would provide that:324

1. The addition of a fourth line or more by the customer would not preclude a CLEC from continuing to serve the customer through unbundled switching secured from Qwest

2. The exclusion applies per customer location (i.e., each of a customer's separate locations within the wire center would qualify for up to three lines served through unbundled switching secured from Qwest)

3. Aggregated customer billing for multiple locations would not prevent the second provision from applying

4. Lines other than voice lines (e.g., data, alarm, or security) would not count against the limit

5. The high frequency portion of a loop would not count as a separate line

322 AT&T UNE Comments at pages 23 and 24
323 Simpson UNE Rebuttal at pages 25 and 26.
324 AT&T UNE Comments at pages 25 and 26.

6. End-users count individually in MTE or campus environments

7. A basic rate ISDN line count as a single line.

Qwest at least partially accepted the first change, by allowing CLECs the option to continue UNE-P service to pre-existing UNE-P lines. It did not accept the second two changes. Qwest did accept the last four changes.325

Finally, AT&T sought to make the exclusion inapplicable where: (a) Qwest had insufficient space to allow multiplexing, concentration, or additional equipment needed to provide transport facilities, (b) Qwest had insufficient transport capability to provide EELs, or (c) service was provided through RSMs, which are typically used in offices too small to provide multiplexing or concentration space.326 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. Moreover, Qwest's view that there is no obligation to build UNEs buttresses the argument that facility exhaust is not a relevant issue.327 Therefore, Qwest objected to AT&T's request to make the exclusion inapplicable in the three cited cases.

Proposed Issue Resolution: There appears to be no further issue with respect to the January 1, 1999 qualifying date or the multiple zone issues; Qwest's rebuttal witness Simpson testified that Qwest meets the standards as interpreted by AT&T.

Qwest's brief asserted that UNE rates should not apply to the first three lines of customers who have additional lines. Qwest's argument was that the FCC's distinction was intended to measure when market conditions merit an entire elimination of the right to UNE rates.328 AT&T did not brief this issue. Qwest's interpretation of the intent of the *UNE Remand Order* is reasonable. The phrasing is in terms of which customers for whom UNE rates do not apply; it is not in terms of the lines to which UNE rates do not apply. Accepting that the basis for the FCC's distinction is the distinction between the mass and business markets, there is no material distinction to be made between a medium or large customer's first three lines and the remainder of its lines.

3. Basis for Line Counts in Applying the Four-Line Exclusion

AT&T argued that neither the FCC nor the SGAT 9.11.2.5 were clear in explaining whether the three-line maximum per customer should be applied on a per-customer or per-location basis. AT&T said that it would be proper to define the requirement as applying on a per location basis, given the FCC's focus on access to the mass market, which AT&T said the FCC meant to include the residential and small business markets. AT&T argued that it would be proper to define customer size on a per-location basis. AT&T also argued that it would be more difficult for it to implement a per-customer count, because the information it secured from customers

325 Stewart UNE Rebuttal at pages 27 and 28.
326 AT&T UNE Comments at pages 25 and 26.
327 Simpson UNE Rebuttal at pages 24 and 25.
328 Qwest Loops brief at page 23.

discussing services was generally location based; the CLEC may not even know of other locations the customer has in the wire center.329

Qwest argued that the FCC's requirements clearly required the count to be on a wire center basis, citing the use of the phrase "for end users with four or more access lines within density zone 1" in paragraph 253 of the *UNE Remand Order*.330

Proposed Issue Resolution: Applying the FCC's definition to a user with two lines in two separate locations within the density zone would capture customers that fit any practical definition of a small business. However, the interpretation that AT&T urges would not be limited to such limited situations. It would extend to a user with many more lines, subject only to the limit that it have no more than three at any one of many locations. Thus, AT&T's proposed definition does not come closer in more precisely defining what the FCC meant. Moreover, it could be argued that four lines in a single location itself does not make one a medium or large business; yet the FCC has clearly exempted that user from access to unbundled local switching in the relevant Salt Lake City market. Therefore, the most direct approach is to give meaning to the phrase chosen by the FCC, rather than to speculate about the objectives behind it. The language says four lines in the relevant density zone; the rule should apply on a per-customer, not a per-location, basis. This interpretation also gives the FCC credit for recognizing the obvious, which is that multiple locations are common for business customers. It is likely that the FCC therefore would have inserted the added language it takes to adopt AT&T's interpretation, had that been its intent.

4. Providing Switch Interfaces at the GR-303 and TR-008 Level

Qwest had objected to AT&T's request for such access during the workshops. However, Qwest noted in its brief that it had since incorporated into SGAT Section 9.11.1.1.2 language that it felt would give AT&T the access it sought. Qwest concluded that the issue could be considered closed.331 AT&T's brief did not reflect awareness of this language change. Therefore, this issue should be considered open, in order to allow AT&T to offer any comments it may have on the language in its comments to the commissions regarding this report. The issue can be considered closed if no such comments are forthcoming.

329 AT&T UNE Brief at page 30
330 Qwest UNE Brief at page 46
331 Qwest UNE Brief at page 40

BEFORE THE NEW MEXICO 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

FACILITATOR'S REPORT ON GROUP 3 ISSUES: GENERAL TERMS AND CONDITIONS, SECTION 272, AND TRACK A

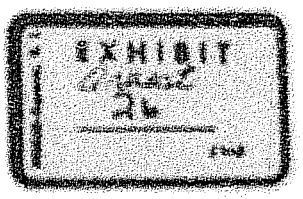

TABLE OF CONTENTS

I. Scope of This Report 1
II. Disputed Issues And Recommendation Summary 5
III. General Terms and Conditions 15
A. Background – General Terms and Conditions 15
B. Issue Carried Over from First Report 15
1. Landowner Consent to Agreement Disclosure Issue 15
C. Issues Resolved in this Workshop – General Terms and Conditions 17
1. SGAT Amendment Process 17
2. Implementation Schedule 17
3. SGAT Definitions 18
4. Discontinuance of Specific Services 18
5. Term of Agreement 18
6. Proof of Authorization 18
7. Payments 19
8. Taxes 20
9. Insurance 20
10. Force Majeure 21
11. SGAT Section 5.11 – Warranties 21
12. Nondisclosure 21
13. Agreement Survival 22
14. Dispute Resolution 22
15. Controlling Law 22
16. Notices 22
17. Publicity 22
18. Retention of Records 23
19. Network Security 23
D. Issues Remaining in Dispute – General Terms and Conditions 23
1. Comparability of Terms for New Products or Services 23
2. Limiting Durations on Picked and Chosen Provisions 24
3. Applying "Legitimately Related" Terms Under Pick and Choose 25
4. Successive Opting Into Other Agreements 26
5. Conflicts Between the SGAT and Other Documents 27
6. Implementing Changes in Legal Requirements 29
7. Second-Party Liability Limitations 30
8. Third-Party Indemnification 31
9. Responsibility for Retail Service Quality Assessments Against CLECs 33
10. Intellectual Property 35
11. Continuing SGAT Validity After the Sale of Exchanges 36
12. Misuse of Competitive Information 38
13. Access of Qwest Personnel to Forecast Data 39
14. Change Management Process 41
15. Bona Fide Request Process 41
16. Scope of Audit Provisions 43
17. Scope of Special Request Process 46
18. Parity of Individual Case Basis Process with Qwest Retail Operations 46

IV. Section 272 Separate Affiliate Requirements 47
A. Background 47
B. Separate Affiliate Requirements 49
1. Separation of Ownership 49
2. Prior Conduct 49
C. Books and Records 50
1. Generally Accepted Accounting Principles 51
2. Materiality 55
3. Documentation 56
4. Internal Controls 57
5. Separate Charts of Accounts 58
6. Separate Accounting Software 58
D. Separate Officers, Directors, and Employees 58
1. Routine Employee Transfers 59
2. 100 Percent Usage 60
3. Award Program Participation 61
4. Comparing Payroll Registers 62
5. Separate Payroll Administration 63
6. Officer Overlap 63
E. Transaction Posting Completeness 64
1. Posting Billing Detail 64
2. Initiation of the Posting of QCC Transactions 66
3. Indefinite Service Completion Dates 67
4. Verifications 68
F. Non-Discrimination 69
G. Compliance With FCC Accounting Principles 70
V. Track A Requirements 71
A. Background 71
B. Existence of Binding, Approved Interconnection Agreements 72
C. Provision of Access and Interconnection to Competitors 73
D. Existence of Competing Residential and Business Service Suppliers 74
1. Market Share of Competing Providers 74
2. Estimates of Bypass Lines 76
4. Number of CLECs Serving End Users 80
D. Existence of Facilities-Based Competitors 85

I. Scope of This Report

This report discusses the group five issues that form part of the seven-state workshop process created in order to address Qwest's compliance with the Section 271 Checklist of the Telecommunications Act of 1996. The issues addressed in this report were originally to be included as part of other subject groupings. However, the greater than expected number of issues to be addressed required that they be treated in separate workshops. This report addresses the following issues:

- General Terms and Conditions (which affect a broad range of Section 271 Checklist Items)
- Section 272 Requirements
- Track A Requirements

Group five issues originally included consideration of the public interest standard of Section 271(d)(3)(c), which provides that the FCC shall not approve a BOC's application to provide in-region, InterLATA service unless "the requested authorization is consistent with the public interest, convenience, and necessity." There had been uncertainty about how, if at all, these workshops would consider the post-entry assurance plan aspects of the public interest standard.

This uncertainty arose from the fact that the Qwest Regional Oversight Committee (ROC) was conducting, contemporaneously with but separate from these workshops, a Qwest Post-Entry Performance Plan Collaborative (the PEPP Collaborative), whose goal was to provide a structured negotiation process for creating a plan that would created inducements sufficient to assure that local markets would remain open should Qwest receive authorization to provide in-region InterLATA. Twelve state public services commissions, including all seven of those participating in these workshops participated in the efforts of the PEPP Collaborative. The efforts of the collaborative, which were both substantial and commendable, produced a lengthy list of agreements on issues, as well as an identification of a number of remaining areas of disagreement among the collaborative participants. Those participants included representatives from the participating commissions, Qwest, a large number of CLECs, and other stakeholders from the participating states.

After a number of workshops and other exchanges of plans, proposals, and information, Qwest announced, in May of 2001, its belief that further workshops would not be warranted. There issued then a report summarizing the progress of the PEPP Collaborative. Thereafter, the seven state commissions participating in these workshops, joined by the commissions of Nebraska and Washington, decided that these workshops would constitute an appropriate forum for addressing specifically the differences remaining from the PEPP Collaborative process, and, more generally, the relationship between Qwest's Performance Assurance Plan (filed with each state after the end of the PEPP Collaborative) and the public interest standard.

We scheduled and have since held two weeks of hearings on these post-entry assurance plan issues. Briefing is completed and a report on the Performance Assurance Plan issues is scheduled to be issued in October of 2001. A review of the record and the initial briefs

makes it clear that Qwest's Performance Assurance Plan is central to the consideration of the Section 271(d)(3)(c) standard. It is difficult to conceive how a coherent treatment of the public interest, convenience, and necessity can be made without consideration of Performance Assurance Plan issues. Therefore, we have decided to defer the treatment of the remainder of the public interest issues (all of which have been addressed in testimony, comments, and briefs in the workshop sessions covering the group five issues) to the October report.

The testimony and comments on the remainder of the public interest issues have been comprehensive. Main and reply briefs have fully argued all of the relevant issues. Moreover, the comments, testimony, and briefs on the Performance Assurance Plan are similarly comprehensive and thorough. Therefore, there will be no need or opportunity for further submissions prior to the issuance of that October report.

II. Disputed Issues And Recommendation Summary

A. Issue Carried Over From First Report

1. Landowner Consent to Agreement Disclosure

The first report recommended that CLECs be required either to: (a) obtain landowner consent, or (b) provide Qwest with indemnification before Qwest would be required to provide CLECs with the right of way agreements under which Qwest facilities occupied third-party property. It was decided to revisit this issue in connection with general terms and conditions issues. AT&T presented no new evidence or argument that would call into question the propriety of the recommendation as a means for assigning to CLECs the costs and risks properly associated with Qwest's providing them a service that is required by the FCC.

B. General Terms and Conditions Issues Remaining in Dispute

1. Comparability of Terms for New Products or Services

AT&T sought an SGAT provision that would oblige Qwest to offer new products and services under terms and conditions substantially in accordance with those applicable to existing, similar ones. There are already adequate provisions for assuring that the terms and conditions under which offers any required products and services comply with federal statues, FCC requirements, and state commission requirements. Including such a provision would add unneeded and unhelpful uncertainty to those provisions.

2. Limiting Durations on Picked and Chosen Provisions

AT&T objected to the SGAT provision that would limit the duration of any offerings made available through provisions allowing a CLEC access to the terms and conditions of offerings from another interconnection agreement to the duration of the agreement from which a CLEC might pick or choose such offerings. The Qwest limitation is, however, reasonable as a means for avoiding the indefinite extension of offerings whose prices or other terms are no longer reflective of current costs or other applicable conditions.

3. Applying "Legitimately Related" Terms Under Pick and Choose

AT&T objected to what it considered to be Qwest's abuse of its right to apply legitimately related terms and conditions to offerings that CLECs may pick and choose from other interconnection agreements. After changes made by Qwest to respond to this argument, the SGAT adequately provides: (a) that Qwest has the burden to prove the required relationship, (b) that Qwest must provide a written explanation, and (c) means for promptly and effectively resolving disagreements. There was no showing of a patterned abuse that would call for measures beyond these.

4. Successive Opting Into Other Agreements

AT&T objected to Qwest's refusal to allow a CLEC to opt into an interconnection agreement that was itself created by another CLEC's opting into a different agreement. This refusal is inappropriate because it denies CLECs their established rights to opt into any other effective agreement. The SGAT should be changed to preclude such a refusal.

5. Conflicts Between the SGAT and Other Documents

AT&T wanted to restrict substantially the ability of subsequent tariff changes to supersede SGAT provisions. XO raised a concern about conflicts between the SGAT and other documents more generally, i.e., not limited to tariff/SGAT conflicts. The SGAT already contains provisions that are adequate to control the impact of tariff changes on the SGAT; those provisions allow, as they should, a state commission to permit tariff changes to override SGAT provisions where the commission deliberately seeks to do so. Qwest changed the SGAT sufficiently to address an XO concern; the SGAT now contains a sound rule for assuring that other documents do not expand or contract rights and obligations established by the SGAT. The failure to make a CLEC's determination of any dispute controlling until resolution of the dispute is appropriate. Qwest must undertake the activities necessary to provide services to CLECs; therefore, it should have provisional authority to decide what kinds of operational rules and requirements it must use to do so, subject to eventual determinations about the propriety of those rules and requirements.

6. Implementing Changes in Legal Requirements

AT&T objected to an SGAT provision that would allow Qwest to stop immediately the provision of any product or service after a change in law removed Qwest's obligation to provide it. AT&T noted that the instantaneous approach would favor Qwest because it is easier to stop suddenly the provision of something than it is to develop the capability to provide a product or service newly made obligatory. Qwest proposed suitable language for promoting a reasonable transition when either an old obligation would end or a new one would begin as a result of changes in legal requirements. The Qwest proposed language also appropriately allowed for truing up to any later dispute resolution involving the change in requirements. The SGAT would address the AT&T concern insofar as it had merit, should Qwest agree to incorporate its proposed SGAT Section 2.2 language.

7. Second-Party Liability Limitations

AT&T commented that Qwest's liability to CLECs for damages under the SGAT was too limited. Part of the disagreement related to how payments under the PAP will be treated; those disagreements will be discussed in the next report in these workshops. Some of AT&T's comments or arguments confused second-party (i.e., CLEC) liability with third-party (e.g., end-users or members of the public) liability, and were, therefore, not appropriate for consideration in the context of the SGAT's second-party liability provisions, which were at issue here. However, the SGAT did inappropriately exclude liability for damage to second-party tangible property, and should be changed to correct this deficiency. The remaining issues were whether gross negligence is a proper standard of liability and where liability for fraud by customers should lie. The exclusion of gross

negligence as a standard (i.e., requiring willful or intentional conduct), as Qwest proposed, is appropriate under the commercial circumstances here. With certain changes, AT&T's approach to dealing with the customer fraud issue should be incorporated into the SGAT.

8. Third-Party Indemnification

AT&T commented specifically that Qwest should bear responsibility for damages that CLECs pay their own end users as a result of poor Qwest performance and, more generally, that the SGAT's indemnity provisions should be broadened to more closely mirror those found in competitive commercial settings. AT&T also argued for the creation of incentives to make Qwest, as a monopolist, more apt to perform adequately in serving CLECs. The question of incentives will be addressed in connection with the Performance Assurance Plan; the issue here should be limited to responsibility for damages. Qwest's SGAT limitations are generally consistent with the available evidence of what might be expected in a competitive marketplace. However, the SGAT should be amended to provide that Qwest will indemnify CLECs (and vice versa) for bodily harm and damage to tangible property that results from Qwest's negligence or intentional or willful conduct.

9. Responsibility for Retail Service Quality Assessments Against CLECs

XO commented that Qwest should bear responsibility for assessments that state commissions levy against a CLEC for meeting retail performance standards, in cases where Qwest failed to provide the CLEC with related wholesale services that met SGAT standards. Such an immutable rule is neither necessary nor appropriate. CLECs may argue questions of third-party responsibility for their failure to meet retail standards in proceedings that set or enforce such standards. Commissions can then decide on the basis of a full record, as opposed to the presumption that would be effectively created by XO, whether and what assessments should be levied against a CLEC.

10. Intellectual Property

AT&T presented SGAT language that it said would resolve its concerns about the mutual obligations of SGAT parties to deal with intellectual property issues. The frozen SGAT contained language largely incorporating AT&T's proposal; however, the lack of briefing made it difficult to determine whether this issue had been resolved to all parties' satisfaction. Absent comments to the individual commissions on this report, it should be assumed that such agreement has been reached.

11. Continuing SGAT Validity After the Sale of Exchanges

AT&T proposed a series of provisions that would apply should Qwest seek to sell exchanges: transferring SGAT obligations to the exchange purchaser, providing CLECs with prior notice of the sale, facilitating CLEC discussions with the transferee, and waiving objections to commission authority to impose SGAT obligations on the transferee or CLEC participation in commission proceedings. Qwest agreed to provide notice and to facilitate discussions. AT&T's proposal to require Qwest to waive objections to commission authority or to CLEC participation in commission proceedings

are against public policy and the normal rules of construction applicable to statutes conferring authority on state agencies. The SGAT should be changed to provide a short period during which the SGAT will continue to apply while the commission exercises any existing power it may have to examine and condition the transfer of exchanges by Qwest.

12. Misuse of Competitive Information

AT&T cited one instance from Minnesota of an abuse of competitive information to support a requirement that Qwest be made to offer a comprehensive showing that Qwest retail marketing personnel have no access to CLEC confidential customer information. The issue AT&T raised is very serious, but its evidence falls far short of proving a failure to meet Section 271 requirements or of supporting an extensive remedial plan. However, the record does not contain substantial evidence of what Qwest does to: (a) minimize the possibility of, (b) discourage, (c) detect, and (d) punish inappropriate contact by its resources. Therefore, in order to provide an adequate baseline for determining that adequate measures are in place, Qwest should within 30 days provide each state commission with a description of its programmatic efforts in these four key steps in controlling the use of sensitive customer information.

13. Access of Qwest Personnel to Forecast Data

AT&T argued that Qwest did not adequately identify the persons to whom access to individual CLEC forecast information (recognized by the SGAT to be sensitive) could be made available. XO and AT&T both objected as well to Qwest's refusal to restrict access to aggregated CLEC forecast data. The SGAT would properly limit access to individual CLEC forecast data, if it were to include a recommended limitation on access to that data by Qwest legal representatives. The SGAT should be interpreted as not allowing access to aggregated data to any population broader than that entitled to receive individual data. Moreover, the SGAT should be changed to require Qwest to take precautionary steps in cases where it is ordered to provide CLEC forecast data by a state commission.

14. Change Management Process

The process that Qwest calls CICMP constitutes the change management process that Qwest offers to comply with FCC requirements. Qwest was making significant changes to this process while the workshops took place. Therefore, the record did not allow an assessment of Qwest's compliance with FCC requirements applicable to change management processes. No constructive recommendations for the state commissions or, in turn, the FCC about CICMP can thus be made.

15. Bona Fide Request Process

AT&T raised three discrimination concerns about the SGAT bona fide request (BFR) process: (a) Qwest failed to show that it required a similar internal process when its end users asked for non-tariffed services, (b) Qwest did not provide CLECs with sufficient notice of the existence of prior, similar BFRs, and (c) there were no objective standards for standardizing products and services made available under repeated BFR requests. First, AT&T failed to demonstrate that there is an actual retail analogue for the BFR

process that CLECs use. Second, Qwest was unduly reluctant to provide CLECs with help that would serve to disclose what other CLECs have asked for through BFRs. This reluctance is inappropriate: Qwest has an obligation to make available to others what it has made available to one. The SGAT needs to be changed to provide a practical method for disclosing the terms and conditions of access to its network that Qwest has made available through BFRs. Third, the question of repeat BFRs of a similar nature is not a common one: Qwest had only received 17 BFRs in the more two and one-half years leading up to the workshops. The new SGAT language this report recommends to resolve AT&T's concern should help significantly in cases where another CLEC has already been granted a BFR in similar circumstances. No more has been shown to be required.

16. Scope of Audit Provisions

AT&T wanted to remove the SGAT provision that limited audits to billing information. The SGAT should be expanded to allow audits addressing compliance with requirements to protect confidential information that one party supplies to another. However, broadening them to other areas of Qwest operations is not only unduly intrusive, it is not necessary. The PAP workshop has considered what inducements, such as monetary payments and root cause analyses, are necessary to assure proper performance by Qwest. Allowing what amount to "performance" audits on top of these measures, could give CLECs very broad (and unreciprocated) access to information about how and how well Qwest performs activities that may give it a competitive edge.

17. Scope of Special Request Process

The SGAT allows the so-called "SRP" to be used as an expedited way to get access to UNE combinations about which there is no technical feasibility concern. AT&T asked that it be expanded to apply to all non-standard offerings for which technical feasibility is not in question. AT&T's request is appropriate: nothing in the record would support the conclusion that the SRP is only applicable in the case of UNE combinations. However, SGAT Exhibit F, which addresses the SRP, already appears to allow it to be used for more than just UNE combination requests.

18. Parity of Individual Case Basis Process with Qwest Operations

AT&T made the same argument here that it did in the case of the BFR process; i.e., Qwest discriminated against CLECs because there was no similar process Qwest used when addressing similar requests from its own customers. As was true in the BFR case, so here did AT&T fail to demonstrate that there is a proper retail analogue, thus making its parity argument inapt.

C. Section 272 Separate Affiliate Requirements

The record demonstrates that Qwest has met the each of the separate affiliate requirements established by section 272 of the Telecommunications Act of 1996. The issues resolved in making this recommendation are discussed immediately below.

Separate Affiliate

1. Separation of Ownership

No participant questioned the evidence Qwest presented to show that the ownership of Qwest Communications Corporation (QCC), which is the affiliate designated to provide in-region, interLATA service, is sufficiently separated from that of the BOC, which is Qwest Corporation (QC).

2. Prior Conduct

AT&T said that three prior instances, in which the FCC had found Qwest to be providing separate services that constituted in-region, InterLATA services, demonstrated a substantial and predictive history of Qwest's non-compliance with Section 272 requirements. AT&T's examples do not show that Qwest either fails to understand the need for a separate affiliate. Therefore, there is no reason to predict from these examples that Qwest, after having established a separate subsidiary, will fail to operate it in accord with applicable requirements.

Books and Records

The record here gives rise to a substantial concern about the sufficiency of recent Qwest efforts to begin compliance with transaction-related requirements of section 272(b)(2). Therefore, Qwest should provide by November 15, 2001 the results of a third party examination to verify that those changes are now producing an accurate, complete, and timely recording in its books and records of all appropriate accounting and billing information associated with transactions between the BOC and the 272 affiliate. This examination should cover the months from April through August of 2001. This recommendation arose from comments and arguments made in six areas (discussed immediately below) related to the Section 272(b)(2) books and records requirements.

1. Generally Accepted Accounting Principles

AT&T conducted a review of the records of transactions between the BOC and the 272 affiliate. This examination produced a number of findings that Qwest failed to make timely records, accruals, and payments for a number of transactions. While Qwest was able to demonstrate that a number of AT&T's findings were invalid, some were not supported or Qwest conceded that there were at least what it would term "isolated instances" and insignificant failures to bill or accrue relevant expenses on a timely basis. Much of Qwest's argument focused on how it accounted for transactions from and after the date of its designation of an entity as a Section 272 affiliate. This argument misses the mark. What is more interesting is whether Qwest's past conduct gives rise to concerns about its ability to keep books and records in accord with applicable requirements. Qwest made a showing that it has recently undertaken substantial efforts to assure that its keeps such books and records. There is not substantial evidence to demonstrate that these measures are yet fully effective.

2. Materiality

The discussion of the books and records issue here was not aided by arguments about the accounting profession's use of the term "materiality." The examination recommended here should apply the materiality standard, but limit it to the universe of transactions between the BOC and the 272 affiliate for the April-August 2000 time period.

3. Documentation

AT&T argued that Qwest's decision to stop posting to its web site the details of specific transactions with the Section 272 affiliate violated the FCC's public-notice requirements. However, AT&T overstated the requirement, which extends only to providing sufficient detail to permit a non-affiliated entity to make a business decision about whether to avail itself of the right to take under the same terms and conditions the same services being provided to the Section 272 affiliate. The kind of detail that AT&T sought is not necessary for this purpose. Moreover, the recommended examination would address whether the postings Qwest made during the period covered are sufficient and accurately reflective of the terms and conditions actually made available.

4. Internal Controls

AT&T said that the instances found in the examination described under the *Generally Accepted Accounting Principles* discussion above also showed a lack of sufficient internal controls. The recommended examination would test the adequacy of internal controls in the wake of the changes that Qwest says it has made recently.

5. Separate Charts of Accounts

AT&T said that it had difficulty in finally securing from Qwest charts of accounts for the BOC and 272 affiliates. AT&T did get the charts; thereafter it made no argument that it found any problem with them. Its argument that the difficulty in obtaining them, the source or duration of which was not explained, shows Qwest's lack of diligence in meeting the separate charts of accounts requirement, rests upon an inference that is not supported by the facts it presented.

6. Separate Accounting Software

AT&T said that it found no evidence of the use of separate accounting software by the BOC and the 272 affiliate. None is required; AT&T also acknowledged that the different Qwest entities have separate accounting codes to keep their records separate. There is no evidence to support a conclusion that the accounting of the affiliates is inadequately separated.

Separate Officers, Directors, and Employees

AT&T made a number of arguments, addressed below, that Qwest failed to meet the requirements applicable to the separation of officers, directors, and employees between the BOC and the 272 affiliate. The evidence, however, demonstrates that Qwest has complied with the applicable requirements.

1. Routine Employee Transfers

AT&T said that the "revolving door" atmosphere between Qwest affiliates has produced employee movements that subvert the purpose of the Section 272(b)(3) that the 272 affiliate have separate employees. First, the standard explicitly set forth is simultaneous employment, not transfers of employment from one affiliate to another. Second, the record evokes nowhere near demonstrating a free and massive movement back and forth between the BOC and the 272 affiliate. Third, Qwest produced evidence of reasonable efforts, whose existence and sufficiency were not challenged, to protect the confidentiality of information upon the transfer of employment.

2. 100 Percent Usage of Another Affiliate's Employee's Time

AT&T argued that many individuals employed by the BOC, assigned all of their time to the 272 affiliate, thus subverting the purpose of Section 272(b)(3). Time-sharing per se is not pernicious; in fact, it is a central element of the allowable sharing of services among affiliates. However, long-term assignment of all an employee's time to an affiliate can raise concerns in some cases. Qwest has agreed to limit full-time assignments to no more than 4 of any 12-month period, which constitutes an adequate way to mitigate such concerns.

3. Award Program Participation

AT&T cited 272-affiliate employee participation in an award program available to BOC employees as evidence that Qwest had compromised the independent operation of the two entities. AT&T did not fully explain the nature of the award program. However, the evidence that AT&T did provide ran counter to AT&T's stated concern, which was that the program would induce an employee of one company to spend significant amounts of time in the service of an affiliate.

4. Comparing Payroll Registers

Qwest provided a recent comparison of BOC and 272 affiliate payroll registers; there was agreement that it showed no overlap. However, AT&T said that the failure of Qwest to have performed such comparisons previously meant that it could not verify non-overlap for earlier time periods. The evidence of record demonstrates no overlap, a commitment by Qwest to preclude overlap, and a reasonable basis for expecting future Qwest efforts to control overlap appropriate. No more is or should be required.

5. Separate Payroll Administration

AT&T argued that common payroll administration for the BOC and the 272 affiliate was inappropriate. This argument is unsound. The FCC, in recognition of the fact that companies such as Qwest (and AT&T for that matter) should be able to exploit economies of scale and scope, specifically allows common services, except in certain cases not relevant here.

6. Officer Overlap

AT&T raised concern about an employee who, after the merger, moved from being a 272-affiliate officer to becoming a director of the BOC. Qwest presented evidence sufficient to demonstrate that this employee was never in violation of the applicable requirements against simultaneous service for the BOC and the 272 affiliate. Moreover, no inference about inattention to the goals of separation can be properly drawn from the case of a single officer changing roles as a merger was being implemented.

Transaction Posting Completeness

1. Posting Billing Detail

AT&T objected to the decision Qwest recently made to stop posting transaction details to its web site. The transaction detail that AT&T sought is not necessary to allow an informed choice about whether to take services. Moreover, the purpose of posting is not to provide in a public forum every piece of information that may be necessary to establish parity of treatment.

Qwest does make monthly posting of transaction true up data, it allows the observation of transaction details after execution of a nondisclosure agreement, and the examination recommended above would verify that the posted information conforms to the actual terms and conditions under which an affiliate has been served. These factors support a conclusion that Qwest's transaction postings will be sufficiently complete and detailed.

2. Initiation of the Posting of QCC Transactions

There was a great deal of contradictory evidence and argument about when QCC (the currently designated Qwest in-region, InterLATA service provider) became the 272 affiliate. The evidence shows that Qwest accepts the obligation to post now and into the future and the recommended examination will test whether its recent posting has been sufficient. It serves no useful purpose to argue about past circumstances that clearly involved a transition that Qwest was making from one designated 272 affiliate to another.

3. Indefinite Service Completion Dates

A number of posted Qwest agreements have indefinite completion dates, which AT&T says is in violation of FCC requirements that a project whose terms and conditions are posted include a time length or an estimated completion date. This argument ignores the plain and common reality that service agreements often allow for continuation until cancellation notice is provided by one of the parties. There is no reason to conclude that the FCC intended to prohibit forms of agreement that are commonly used in commercial settings. AT&T has provided no evidence that, for services truly constituting a "project" or for services that do have definite end dates, Qwest has failed to post them. No more should be required.

4. Verifications

AT&T found a BOC verification of transaction certification that was signed by an officer of the designated 272 affiliate, not by an officer of the BOC, as required. This instance confirms the existence of difficulties in Qwest's treatment of 272 issues during its post-merger transition to a newly designated 272 affiliate. Those difficulties led to the April-August 2001 period examination recommended earlier. That examination's scope includes confirmation that a BOC officer has the requisite knowledge to make the required certifications and will do so. No further actions are required, nor, in the event that such confirmation is provided, should it be concluded that Qwest is unlikely to meet the requirements of section 272 in the future.

Non-Discrimination

AT&T used the same findings from its examination of Qwest's books and records (primarily those relating to the failure to make timely payments) to support an argument that Qwest cannot meet the non-discrimination test of section 272(c)(1). That issue would be included in the examination recommended earlier. AT&T also said that Qwest has not committed to a number of items that the FCC has said are important in assessing compliance with this statutory requirement. This position ignores a number of other occasions in prior workshops where issues of discrimination were considered and the specific and general commitments Qwest made in this workshop regarding the discrimination requirements of section 272(c) and (e). Together they provide a basis for concluding that there are adequate measures to assure that Qwest does not discriminate in favor of its 272 affiliate.

Compliance With FCC Accounting Principles

AT&T's argument that Qwest fails to comply with the section 272(c)(2) requirement to account for all transactions in accord with FCC approved accounting principles, arises from the same instances it cited to prove lack of compliance with Generally Accepted Accounting Principles and the lack of adequate internal controls. The earlier treatment of those issues and the recommendations related thereto are equally applicable to the argument made here.

D. Track A Requirements

Satisfaction of the Track A provisions of 47 U.S.C. § 271(c)(1)(A) requires answers to four questions:

- Whether there are binding agreements approved under section 252
- Whether Qwest is providing access and interconnection services to CLECs
- Whether CLECs are providing telephone exchange service to residential and business customers

- Whether those providers are offering service over their own facilities (including UNEs leased from Qwest) or predominantly over their own facilities in combination with resale services.

As is described more fully below, Qwest's evidence demonstrates that it meets all of the requirements of Track A in all seven of the participating states, with two exceptions:

- Qwest has not presented substantial, credible evidence that CLECs are serving residential end users in Idaho
- Qwest has not presented substantial, credible evidence that CLECs are serving residential end users in New Mexico

1. Existence of Binding, Approved Interconnection Agreements

Qwest presented evidence demonstrating the existence of over 400 interconnection agreements in the seven states totally, with no fewer than 39 agreements in any single state. There was some evidence that some of the carriers do not do business under these agreements at present, but no participant questioned the widespread existence of agreements meeting the applicable test.

2. Provision of Access and Interconnection to Competitors

Qwest presented evidence demonstrating that it is providing access and interconnection in each of the seven states, to at least six CLECs in each. Qwest's evidence showed that it was providing from 2,000 to over 100,000 unbundled loops to CLECs in each of the seven states. This evidence specifically demonstrates Qwest's compliance with this aspect of the Track A standard, and was unchallenged by any participant.

3. Existence of Competing Providers of Residential and Business Service

Qwest presented evidence that CLECs in fact were providing service in each of the seven states to residential and commercial customers. Qwest offered evidence quantifying the number of unbundled loops it has been providing to CLECs as evidence of the number of access lines served by CLECs. It supplemented that evidence by providing an estimate of CLEC access lines served through loops that bypass Qwest's loop plant entirely. It based that estimate on the amount of numbers it was porting. Qwest adjusted that estimate downward by cutting the ported numbers in half (to allow for customers who initially migrated to a CLEC, but who then discontinued service from that CLEC) and by adjusting for the unbundled loop numbers (to avoid double counting). Qwest made no effort at all to estimate the number of access lines CLECs were serving through numbers not ported from Qwest.

Qwest buttressed this quantitative evidence by presenting what it knew from its generally obtained knowledge and responses from data requests issued to CLECs participating in these workshops. This evidence provided qualitative indications of which CLECs were serving residential or business customers in each of the seven states.

AT&T made arguments that appeared to suggest some required level of CLEC market share, but it did not specify what that was. There is in fact no market share test, and the

numbers presented in Qwest's combined actual and estimated access line counts are sufficient to meet the test, provided that the numbers are adequately substantiated.

AT&T criticized Qwest's estimating method, but it is clearly more conservative than one already considered by the FCC in determining another BOC's satisfaction of this test. The Qwest method is unsophisticated, but it applied a reasonable assumption that there is a relationship between numbers ported and access lines, it used reasonably conservative assumptions to measure that relationship, and it also did not consider an entirely separate source of CLEC access line numbers (i.e., those served by bypass and without number porting). The Qwest method was sufficient to make a prima facie case; thus, the AT&T attack upon it, without the presentation of any contrary evidence or of any factual evidence to support its attack, was not persuasive.

There was, however, one aspect where Qwest's evidence was not persuasive. It used a particularly rough means for segregating its unbundled loop counts and access line counts between residential and commercial service. That method will serve adequately as a way to apportion lines when there is other evidence that CLECs are serving residential customers. However, it is too rough to serve as independent proof that any residential customers at all are being served. Qwest's independent evidence of service to residential customers consisted of the qualitative evidence it presented. There was no specific evidence offered to show that any CLEC served residential customers in Idaho and New Mexico. There was evidence of residential service by CLECs in the other five states. Therefore, it can be concluded that Qwest has failed to show that CLECs are providing residential service in New Mexico and Idaho.

4. Existence of Facilities Based Competitors

Qwest's evidence supporting fulfillment of this aspect of the Track A standard was combined with its evidence regarding the immediately preceding one. There was no specific CLEC contest of compliance with this aspect. Qwest has provided evidence sufficient to support a conclusion that it meets the facilities-based competition standard, subject to the previously noted conclusion about service to residential customers in New Mexico and Idaho.

III. General Terms and Conditions

A. Background – General Terms and Conditions

Qwest's Statement of Generally Available Terms and Conditions (SGAT) is an offer for an agreement between Qwest and any requesting CLEC.[1] Section 5 of Qwest's SGAT contains the general terms and conditions governing the relationship between the CLEC and Qwest. While these general terms and conditions are not part of a checklist item under the Act, they "are an integral part of how Qwest purports to implement its specific checklist requirements identified in the SGAT sections..."[2] A review of general terms and conditions was not initially included in this multistate proceeding, but was added to the agenda later to when it became clear that this topic was important.

B. Issue Carried Over from First Report

1. Landowner Consent to Agreement Disclosure Issue

There was a request to revisit the proposed resolution of the third unresolved *Checklist Item 3: Access to Poles, Ducts, Conduits and Rights of Way* issue (*Access to Landowner Agreements*) from the March 18, 2001 *Paper Workshop Issues* report in these workshops. AT&T had asserted that CLECs must sometimes have access to the agreements that Qwest has with private landowners and building owners, in order to determine the scope of Qwest's ownership and control. The parties disagreed about whether landowners should have to give consent before Qwest may disclose to CLECs the agreements that give Qwest permission to occupy their property. The proposed resolution of that issue in the earlier report was to require the addition to the SGAT of a new Section 10.8.4.1.3.1, as follows:

> *Alternatively, in order to secure any agreement that has not been publicly recorded, a CLEC may provide a legally binding and satisfactory agreement to indemnify Qwest in the event of any legal action arising out of Qwest's provision of such agreement. In that event, the CLEC shall not be required to execute either the Consent to Disclosure form or the Consent Regarding Access Agreement form.*

Qwest's comments to the individual commissions on this report accepted this resolution. Qwest subsequently stated that it continued to support the report's resolution of this issue. AT&T recommended an alternate approach, which this report will now consider. AT&T commented on its proposal on June 20, 2001. It said that a separate indemnification provision for this purpose was not appropriate; the general SGAT section on indemnification should apply. AT&T commented that neither party was in a position to assure that there would be no "frivolous law suits" by landowners claiming confidentiality with respect to their agreements to provide access to their property for

[1] Rebuttal Testimony of Larry Brotherson, p. 2.
[2] AT&T's Closing Brief on General Terms and Conditions, p.3

Qwest facilities. Therefore, it would be inappropriate to place the entire burden on CLECs for bearing the costs of such litigation.

Proposed Issue Resolution: There are several problems with AT&T's argument. First, it shifts between two mutually inconsistent grounds: (a) that there are few or no occasions where landowners will have protected rights, thus suggesting that Qwest should bear the risks involved, and (b) that CLECs will face extensive competitive barriers if they have to bear the risk of defending these lawsuits that will virtually always be "frivolous," according to AT&T.

AT&T is probably correct in defending the first ground. If it is, then its argument that there will be a veritable flood of foolish litigation has no support in the record or in manifest common experience. However, let us assume that AT&T is correct in saying that the costs of these lawsuits could be large. We still face the problem of why that is a reason for saying that Qwest should bear those costs, lest we impose "chilling" and anti-competitive barriers on CLEC market entry. It will cost a negligent CLEC much more to pay for rebuilding a central office where the CLEC's negligence with respect to collocated facilities causes the office's destruction. To take another example, a collocation may cost a CLEC several hundred thousand dollars, or perhaps only a small fraction of that amount. How much the costs of that service are does not bear on the question of who should pay them. High cost collocations pose a substantially greater economic barrier than we are talking about here; yet there is no question there that CLECs should pay the costs that they cause Qwest to bear.

The material question to ask is not how much the costs are or what the risks entail, but who has caused the costs to be incurred or the risks to arise. The 'causer' should pay the costs and that principle does not at all depend on what the magnitude of the costs or risks may be. It is profoundly clear from AT&T's comments that it considers lawsuits to be a risk of doing business. There is no merit in placing them at the feet of Qwest. Those who want Qwest to provide the information should bear the risk. Two acceptable CLEC options for managing those risks have been provided: (a) get landowner releases, or (b) give Qwest relief if the CLEC finds the first option burdensome. In any competitive vendor/customer marketplace, it would be inconceivable to expect the vendor to bear uncompensated risks. Asking CLECs to find a way to bear and mitigate risks associated with a service (the provision of information that Qwest is unquestionably required to offer them) perfectly mirrors what would be expected in normal commercial circumstances.

The AT&T argument that this matter could have been dealt with by reference to the SGAT's indemnification provisions (Section 5.9) ultimately proved to be disingenuous. This indemnification language applies to third-party actions arising from an SGAT signatory (whether Qwest or a CLEC) action that constitutes a "breach of or failure to perform" an SGAT obligation. The landowner claims at issue here would actually arise from full compliance with the applicable SGAT obligation, which is for Qwest to provide the agreements to CLECs. Thus, melding this issue with other indemnification questions is merely another way of accomplishing indirectly what the prior report recommended against in the first place, which is to transfer to Qwest full responsibility for risks that Qwest must reasonably take to provide a service to CLECs.

To conclude, AT&T: (a) first overstates, as is clear from its own implicitly self-contradictory assertions, the magnitude of the risks at issue, and (b) second, diverges from the sound rule that the costs borne directly and reasonably to provide a service should flow not to the service's provider, but to its beneficiary. The initial recommendation remains appropriate.

C. Issues Resolved in this Workshop – General Terms and Conditions

1. SGAT Amendment Process

SGAT Section 1.7 provided that Qwest could modify the SGAT at any time, even after Commission approval.

Both AT&T[3] and XO[4] objected to this language, arguing that it permits unilateral SGAT amendment without Commission approval. In response, Qwest agreed to delete the existing language and replace it with the following:

> *Any modification to the SGAT by Qwest will be accomplished through Section 252 of the Act.*[5]

AT&T did not comment on this changed language, which addresses the unilateral amendment issue, in its Supplemental Response, or in its closing brief. XO did not brief the issue either. This issue can be considered closed.

2. Implementation Schedule

SGAT Section 3.0 imposes specific requirements on CLECs for placing orders for service. XO commented that this section assumes that the parties have no prior relationship.[6] The SGAT requires CLECs to complete a "CLEC Questionnaire" even if the parties are operating under a prior agreement. XO suggested that this section should be modified to permit parties operating under a prior agreement merely to amend any prior implementation schedule, including completion of the Questionnaire.

AT&T[7] said that Section 3.1 required parties to "negotiate" an implementation schedule. Second, AT&T argued that the need for an implementation schedule was not clear, especially for a CLEC that had been doing business with Qwest for a number of years. Finally, AT&T noted that the elements of the CLEC Questionnaire should be identified in the SGAT so that the information that Qwest might seek is fixed for the term of the SGAT.

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[3] AT&T's Initial Comments on General Terms at Conditions (AT&T Comments) at 10.
[4] Response Testimony of David Lafuze on Behalf of XO Utah, (XO Response) at 8.
[5] Rebuttal Testimony of Larry B. Brotherson (Brotherson Rebuttal) at 5-6.
[6] XO's Response at 8-9.
[7] AT&T's comments at 20-21.

START

OF

RETAKE

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[3] AT&T's Initial Comments on General Terms at Conditions (AT&T Comments) at 10.
[4] Response Testimony of David LaFrance on Behalf of XO Utah. (XO Response) at 8.
[5] Rebuttal Testimony of Larry B. Brotherson (Brotherson Rebuttal) at 5-6.
[6] XO Response at 8-9.
[7] AT&T Comments at 20-22.

END

OF

RETAKE

Qwest agreed to remove the implementation schedule requirements from this section. It also agreed that a CLEC with an existing interconnection agreement would not need to complete the new customer CLEC questionnaire.[8] Neither AT&T nor XO briefed this issue. It can be considered closed.

3. SGAT Definitions

AT&T noted that Qwest's direct testimony did not contain Section 4 of the SGAT; therefore, the parties had no opportunity to review the current form of definitions in the SGAT.[9] Qwest filed this SGAT section as part of Brotherson's Rebuttal Testimony (Exhibit LBB 1). No further comment was made by any party on this section, with the exception of section 4.24(a) which sets forth the definition for individual case basis (ICB), addressed later in this report. This issue can be considered closed, subject to the later discussion herein addressing ICB issues.

4. Discontinuance of Specific Services

XO commented that, while SGAT Section 5.1.3 should allow either party to discontinue a specific service or circuit that is causing interference on the other party's network, this provision was too broad, because it allowed discontinuance for any level of interference.[10] Qwest agreed to modify the section to address XO's concern.[11] XO did not brief this issue. AT&T offered language to change this section also. AT&T commented that Qwest should attempt to resolve issues through good faith negotiation before unilaterally discontinuing service.[12] Qwest did not respond directly to this proposal, but did offer modified language for this section. AT&T did not raise this issue again and did not discuss this section in its closing brief. This issue can be considered closed.

5. Term of Agreement

AT&T suggested that SGAT Section 5.2.2.1 implied that the SGAT could only be replaced at the end of the two-year term. AT&T noted that this interpretation would create an inconsistency with rights under section 251(i) of the Act, and suggested language changes. Qwest agreed that there was an inconsistency, and deleted the section.[13] This issue can be considered closed.

6. Proof of Authorization

XO stated that state commission and FCC rules already address requirements for proof of authorization to change service providers; therefore it was unnecessary to include them in the SGAT.[14] AT&T made a similar comment, and suggested a language change to

[8] Brotherson Rebuttal at 14-15.
[9] AT&T Comments at 22.
[10] XO Response at 9
[11] Brotherson Rebuttal at 19.
[12] AT&T Comments at 23-24.
[13] Brotherson Rebuttal at 18.
[14] XO Response at 9.

section 5.3.1.[15] Qwest agreed to this proposal, but also added section 5.3.2 to give effect to AT&T's language. Qwest noted that these changes would address XO's concerns as well.[16] No participant addressed this section in the briefs; the issue can be considered closed.

7. Payments

SGAT Section 5.4 set forth the terms for payment of charges due under the SGAT. Section 5.4.2 permitted Qwest to discontinue processing orders after a CLEC failure to make full payment within 30 days of a bill's due date. AT&T proposed two language changes: (a) to extend the time period from 30 to 90 days, and (b) to require Qwest to seek Commission approval to disconnect in the event of a dispute.[17] Qwest did not agree in its testimony to either change. It stated that it was entitled to payment on time and should not have to wait nearly three months from the time it provided service for payment. Qwest also did not agree to the Commission review requirement. It commented that CLECs with good faith disputes could use the dispute resolution section of the SGAT.[18] The frozen SGAT does reflect a change to require a 10-day notice before the cessation of order processing and it specifically preserves the rights to secure relief from the decision to stop processing orders.

Both XO[19] and AT&T expressed concerns about section 5.4.3. Under this section, Qwest could disconnect service for failure to make full payment, less any disputed amounts, within 60 days of the due date on CLEC's bill. AT&T suggested that this period be extended to 120 days. Qwest rejected this proposal, saying that the change would guarantee a six-month revenue loss to Qwest. Qwest also rejected an AT&T proposal that would require Commission approval before disconnection.[20] The frozen SGAT reflects a changed to require a 10-day notice before the service disconnection and it specifically preserves the rights to secure relief from the decision to disconnect.

Qwest did agree to proposed AT&T language that added the words "under this agreement" to sections 5.4.2 and 5.4.3. This change had the effect of limiting charges for which disconnection could be made to those involved in this specific agreement.

AT&T also suggested that the 30-day time period in 5.4.4 for a party to identify problems with a bill be extended to six months. Qwest did not agree to this change.

AT&T also commented that Qwest should change SGAT Section 5.4.6 to provide that the conditions for return of deposits consider only the payment of undisputed amounts. The frozen SGAT reflected this change.

Qwest made substantial changes to address most of the comments and no participant briefed any issues on which Qwest declined to make requested changes. This issue can be considered closed.

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[15] AT&T Comments at 26-27.
[16] Brotherson Rebuttal at 19.
[17] AT&T Comments at 27-29.
[18] Brotherson Rebuttal at 21.
[19] XO Response at 9-10.
[20] Brotherson Rebuttal at 21-23.

8. Taxes

AT&T stated that SGAT Section 5.5 was unbalanced, because it seemed to require that almost all taxes be paid by the CLEC. It proposed language changes to the SGAT to require the party who is responsible under applicable law to pay the applicable taxes.[21] Qwest countered that AT&T's reading of this language was incorrect, and stated that the SGAT calls for "no more than is required by applicable law".[22] However, Qwest did agree with AT&T that the result of the section should be to require the responsible party (under applicable law) to pay the given tax. Qwest suggested modifications to meet AT&T's concerns. These modifications, set forth in the Brotherson rebuttal testimony, were later incorporated into the frozen SGAT. This issue can be considered closed.

9. Insurance

AT&T and XO raised concerns about the insurance provisions of SGAT Section 5.6. XO commented that: (a) insurance should be part of an interconnection agreement, not the SGAT, (b) if this general provision remained in the SGAT, some type of limitation should be included, and (c) the provision should be made reciprocal.[23] Qwest said that because the SGAT offers terms and conditions for collocation and access to poles, ducts and rights of way, the insurance section is an essential term. Furthermore, Qwest did not want to be obliged to determine whether a CLEC had insurance whenever it entered Qwest's premises. Resolution of that question should instead be accomplished at the beginning of the relationship.[24] The frozen SGAT makes the insurance obligations reciprocal.

AT&T made several proposals for language changes to this section. AT&T would add Section 5.6.1 language that would permit a captive insurance company to provide coverage.[25] The frozen SGAT allows this option. AT&T also suggested that the word "business" be substituted for "comprehensive" in section 5.6.1.3. Qwest agreed to this change. In section 5.6.1.5, AT&T struck the sentence that relieved Qwest of liability for loss of profit or revenues for business interruption, and suggested that this be addressed in the indemnification provision. Qwest agreed that this exclusion is addressed elsewhere, and placed a reference to that provision into this section of the SGAT.

AT&T offered several clarifying changes to Section 5.6.2. The changes made to the language involving the date for providing a certificate were acceptable to Qwest, as was the modification of language naming Qwest as an additional insured. Qwest partially agreed to a proposal to change Section 5.6.2 (3) and (4) were partly agreed to by Qwest.

Qwest changed the SGAT section to address most of the comments made. No participant briefed any insurance issue disputes. This issue can be considered closed.

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[21] AT&T Comments at 30.
[22] Brotherson Rebuttal at 24
[23] XO Response at 10
[24] Brotherson Rebuttal at 27.
[25] AT&T Comments at 30-32.

10. Force Majeure

SGAT Section 5.7 listed the external events or occasions that may relieve a party from liability for failure to perform its obligations. Both XO[26] and AT&T[27] asked Qwest to remove "equipment failure" from the list. Qwest agreed to eliminate that term from Section 5.7. XO also asked that "government regulations" and "inability to secure products or services of the other persons" be excluded from the force majeure provisions. Qwest responded that it was not appropriate to remove these two items from the list, but it did qualify the entitlement to claim force majeure conditions in the case of third party products, services, or transportation. This issue can be considered closed.

11. SGAT Section 5.11 – Warranties

AT&T offered a change to SGAT Section 5.11, which dealt with warranties, in order to make it consistent with warranty language proposed for section 5.10. This change would add the phrase "Except as expressly set forth in this agreement..." to qualify the general disclaimer against express or implied warranties.[28] The frozen SGAT incorporates the requested change. This issue can be considered closed.

12. Nondisclosure

Section 5.16, the SGAT's nondisclosure section, deals with the handling of confidential and proprietary information. Nondisclosure with respect to CLEC forecasts (Section 5.16.9 of the SGAT) is addressed in the disputed issues section of this report under "*Access of Qwest Personnel to Forecast Data*". AT&T suggested changes to Section 5.16.1. First, it wanted to include "business and marketing plans" as information that need not be marked confidential in order to be subject to the protections of this section.[29] AT&T also asked that Qwest add new language to this section in order to provide a 30-day period for identification of proprietary information. AT&T proposed that language be added to section 5.16.3 to address in greater detail the circumstances and protections that confidential information require. Qwest responded that AT&T has provided no compelling reason for its proposed changes, and did not agree to change the SGAT. AT&T proposed language for section 5.16.5 that would further explain when confidential information may be disclosed for regulatory and enforcement purposes. Qwest agreed to this proposed change, and revised the SGAT accordingly. AT&T also proposed that a new subsection be added to this section in order to allow a party to seek equitable relief to enforce confidentiality obligations. Qwest agreed to accept this new section with minimal changes. The new section is numbered 5.16.7.

The frozen SGAT made changes that address virtually all of the comments made. No participant briefed this issue, which can therefore be considered closed.

[26] XO Response at 10-11.
[27] AT&T Comments at 33.
[28] AT&T Comments at 43.
[29] AT&T Comments at 46-47.

13. Agreement Survival

AT&T proposed a change to section 5.17.1 to account for the possibility that the SGAT may expire or terminate before or after the two-year term of the Agreement.[30] Qwest agreed to make this change.[31] This issue can be considered closed.

14. Dispute Resolution

XO commented that limiting the SGAT Section 5.18 dispute resolution provision to mediation and arbitration under American Arbitration Association processes would foreclose the option of seeking resolution dispute from the Commission.[32] Qwest responded that XO incorrectly read the language, which made it clear that parties "may" demand that the dispute be settled by arbitration, but does not limit the parties to this option.[33] AT&T offered a complete revision to this section. AT&T stated that the parties required a detailed process to follow in the event of a dispute, and proposed language.[34] The frozen SGAT reflects a substantial rewrite of this SGAT Section, incorporating many of the suggested AT&T changes. No participant briefed this issue, which, therefore, can be considered closed.

15. Controlling Law

AT&T commented that the federal law applicable to the SGAT under Section 5.19 should not be limited to the Telecommunications Act of 1996.[35] Qwest agreed to a change that would make "federal law" generally applicable.[36] This issue can be considered closed.

16. Notices

SGAT Section 5.21 governs notices to the parties. AT&T suggested two additional methods for providing notice: personal delivery and overnight courier.[37] Qwest agreed that these changes are reasonable, and revised the SGAT accordingly.[38] This issue can be considered closed.

17. Publicity

XO argued that SGAT Section, which addresses publicity, was overbroad because it might be read to the consent of another party to issue public statements about Commission or judicial proceedings.[39] Qwest agreed conceptually to XO's proposed

[30] AT&T Comments at 50.
[31] Brotherson Rebuttal at 55.
[32] XO Response at 12.
[33] Brotherson Rebuttal at 59.
[34] AT&T Comments at 50.
[35] AT&T Comments at 51.
[36] Brotherson Rebuttal at 59-60.
[37] AT&T Comments at 52.
[38] Brotherson Rebuttal at 60-61.
[39] XO Response at 12.

change, and offered new language, which is contained in the frozen SGAT.[40] This issue can be considered closed.

18. Retention of Records

AT&T proposed a new SGAT section that would require Qwest to retain records under the SGAT for at least five years.[41] This provision would require Qwest to retain documents and other data for at least five years. Section 18.2.7 of the frozen SGAT requires the retention of SGAT transaction documents for 24 months. No party briefed this issue, nor is there any reason to contest the sufficiency of 24 months as a retention period, particularly given the large number of records likely to be created in the course of Qwest transactions with many CLECs. This issue can be considered closed.

19. Network Security

XO suggested that SGAT Section 11.3 be made reciprocal.[42] Qwest agreed and modified the section accordingly.[43] This issue can be considered closed.

D. Issues Remaining in Dispute – General Terms and Conditions

1. Comparability of Terms for New Products or Services

At the workshops, AT&T proposed a new SGAT section, which it had not previously noted in its pre-workshop filings. AT&T proposed new Section 1.7.2, which would require that Qwest offer new products and services on substantially the same rates, terms and conditions as existing products and services when the new and existing products and services were comparable.[44] AT&T did not brief this issue.

Qwest did brief the issue, opposing the new section on numerous grounds: (a) that SGAT Section 5.1.6 already obligated Qwest to price new products and services in accordance with applicable laws and regulations, (b) that under the CICMP process, Qwest is obligated to allow CLEC input on new products before formally introducing them,[45] (c) that Qwest's rates are already subject to review public service commissions under section 252(f)(2) of the Act, and (d) that the terms "comparable products and services" and "substantially the same rates, terms and conditions" are so vague as to invite lengthy and difficult to resolve disputes.[46]

Proposed Issue Resolution: There are already established standards and methods for resolving disputes related to the terms and conditions that Qwest may apply to offerings under its SGAT. Those standards are adequate to assure that such terms and conditions comport with Qwest's obligations under the Act and FCC requirements. Those methods are also sufficient to allow for a resolution of disputes in a timely and effective manner.

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[40] Brotherson Rebuttal at 63.
[41] AT&T Supplemental Response at 8.
[42] XO Response at 12.
[43] Brotherson Rebuttal at 65.
[44] June 28, 2001 Transcript at page 37.
[45] SGAT § 12.2.6, and June 28, 2001 Transcript at page 38.
[46] Qwest GT&C Brief at pages 3 to 6.

AT&T's proposed SGAT section would introduce substantial uncertainty over the applicability of those standards and those methods. AT&T indicated that comparability to other SGAT offerings should be the primary focus of disputes about terms and conditions for products or services added to the SGAT. Such comparability would, at best, be a secondary evidentiary indicator of compliance with statutory and regulatory standards, never should it replace those standards as the test for resolving disputes. Moreover, there is no reason on this record to support any conclusion that the existing methods by which disputes over the terms and conditions of SGAT offerings should be altered.

Therefore, changing the SGAT as recommended by AT&T would introduce uncertainty and complexity in a type of situation that is already adequately addressed by the SGAT.

2. Limiting Durations on Picked and Chosen Provisions

AT&T argued that it was improper for Qwest to limit CLEC access to provisions selected from other CLEC agreements to the termination date of the agreement from which the provisions were selected. AT&T argued that the FCC has set three conditions that Qwest may apply to limit CLEC "pick and choose" rights, none of which supports this limitation. AT&T argued that the three cases where Qwest is allowed to offer terms and conditions other than what the original CLEC acquired are: (a) where the service would cost more than it does to serve the carrier under the other agreement, (b) where it is technically infeasible to provide the service to the opting-in carrier; or (c) where the particular contract has been available for an unreasonable amount of time after its approval.[47]

Qwest responded that adopting AT&T's argument would allow CLECs, in succession, to indefinitely extend the duration of opted into provisions. For example, assume that CLEC A had an agreement with 6 months left and that CLEC B had an agreement with 2 years left. Under the AT&T approach, CLEC B could opt into a provision that would still be in effect when CLEC A's agreement expired. CLEC A could then enter a new agreement with a term extending past CLEC B's agreement term, and could opt into the same term. The CLECs could then, with overlapping terms indefinitely extend particular provisions of an increasingly dated interconnection agreement. Qwest also cited dicta from a case that the FCC decided on other grounds:[48]

> *[I]n such circumstances, the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or portions of the agreement), including its original expiration date.*

Proposed Issue Resolution: There needs to be an appropriate means for changing over time the terms and conditions under which Qwest provides service to CLECs. As the FCC has recognized in the provisions cited by AT&T, both costs and technical feasibility will change as time passes. However, AT&T's proposal would provide a major barrier to reflecting such change, particularly as it relates to costs. It would allow leapfrogging pick and choose decisions that could perpetuate prices long after the costs underlying

[47] AT&T General Terms and Conditions Brief at page 8, citing 47 C.F.R. § 51.809(b) & (c).
[48] Qwest General Terms and Conditions Brief at page 9, citing *In re Global NAPs, Inc.*, CC Docket No. 99-166, FCC 99-109 released Aug. 3, 1999).

them have changed. The provision cited by AT&T would only prevent opting in when the costs of serving the opting, or second, CLEC were different from those of the first CLEC. It would not allow relief where the costs of serving both rise to the point that makes the available price non-compensatory. In this respect, it is unreasonable.

Moreover, it is clear that opting in neither does, nor should, allow a CLEC to avoid the other terms and conditions that can be said to relate closely to the provision being elected. The duration or term of an agreement operates as a fundamental limit on all of the rights and obligations (absent explicit exceptions) that a contract creates.

Absent compelling circumstances (AT&T showed none here; it was arguing for a generally applicable rule), it should be concluded that the duration of the agreement from which the provision is being picked or chosen forms an integral part of any substantive provision that a CLEC seeks to use. Under this rule, a CLEC could take the provision from the agreement with the longest remaining duration, if it considered duration to be of primary importance. Where it did so, it would not be extending the duration of any commitment Qwest was already willing or obligated to accept. There should, however, be no right, in the case of picking and choosing, to require Qwest to make an offering at a term beyond that for which it is already obligated. If a CLEC wants to do that, it should employ the Act's negotiation and arbitration procedures.

3. Applying "Legitimately Related" Terms Under Pick and Choose

AT&T commented that Qwest had abused the "legitimately related" requirement by requiring adherence to other, peripheral SGAT requirements. AT&T cited a Qwest requirement (from a state that was not identified) that AT&T accept forecasting provisions before it could take advantage of a provision allowing access to trunk blocking reports. AT&T also cited a Wyoming instance where Qwest required AT&T, before opting into a single point-of-interconnection provision to accept other (unidentified) unrelated provisions.[49] AT&T argued that these cases demonstrate a general failure to comply with the Act's section 252(i) requirement that an incumbent not require, as a condition of opting into another agreement, adherence to terms and conditions not related to interconnection, services, or elements being requested.[50]

Qwest responded to AT&T's concerns by adding SGAT Section 1.8.2 language, which would provide that:[51]

> *In addition, Qwest shall provide to CLEC in writing an explanation of why Qwest considers the provisions legitimately related, including legal, technical or other considerations.*

Qwest also proposed to add the following language to SGAT Section 4.0:

> *"Legitimately Related" terms and conditions are those rates, terms and conditions that relate solely to the individual interconnection, service or element being requested by CLEC under Section 252(i) of the Act, and not those that specifically relate to other interconnection, services or elements*

[49] AT&T's Initial Comments on General Terms and Conditions (AT&T GT&C Comments), at page 15.
[50] AT&T GT&C Brief at page 9.
[51] Qwest GT&C Brief at pages 10 and 11.

> *in the approved Interconnection Agreement. These rates, terms and conditions are those that, when taken together, are the necessary rates, terms and conditions for establishing the business relationship between the Parties as to that particular interconnection, service or element. These terms and conditions would not include General Terms and Conditions to the extent that the CLEC Interconnection Agreement already contains the requisite General Terms and Conditions.*

Qwest also noted that the already existing language of SGAT 1.8.1 placed on Qwest the burden of demonstrating that any provision it sought to include was in fact legitimately related.

Proposed Issue Resolution: When combined with the placing of the burden on Qwest to demonstrate a legitimate relationship, the new Section 1.8.1 and 4.0 provisions adequately limit Qwest's rights to attach other provisions to those that a CLEC might pick and choose. They go as far as can be expected to address what will often have to be case-by-case decisions about what other terms should go along with those that a CLEC chooses. The changes establish a proper foundation for resolving disputes, which is sufficient. AT&T's evidence did not show a firm pattern of unreasonable conduct in the participating states; therefore, it is appropriate to conclude that Qwest's past conduct does not require more than what these changes already accomplish.

4. Successive Opting Into Other Agreements

AT&T argued that Qwest does not allow a CLEC (call it "CLEC 3") to opt into an agreement that itself is an agreement reached by a CLEC (call it "CLEC 2") that made that agreement by opting into an agreement with yet another CLEC (call it "CLEC 1"). Rather, AT&T said, Qwest requires that CLEC 3 opt into the agreement of CLEC 1, not into the agreement that CLEC 2 secured by opting into the agreement of CLEC 1.[52] Qwest's brief did not respond to this issue.

Proposed Issue Resolution: Once a CLEC has opted into an agreement of another, that opting CLEC's agreement has its own status as an interconnection agreement. It thus should acquire the ability to be "opted into" by yet another CLEC. There is not a sound reason, particularly given the recommendation above not to extend the duration of provisions opted into, for denying other CLECs the ability that AT&T seeks. It must be recognized, however, that if all other terms and conditions remain the same, and are not extended by the first opting in decision, that there should generally not be a material difference between the Qwest and the AT&T approach. The one possible difference that could apply is where Qwest agrees at the first opting to extend the term of the first agreement. However, that case provides a good example of why Qwest should allow the next CLEC to opt into the extended agreement. Otherwise that next CLEC would be denied an offering that Qwest has already agreed to make available. Therefore, the SGAT should contain a provision stating that:

> *Nothing in this SGAT shall preclude a CLEC from opting into specific provisions of an agreement or of an entire agreement, solely because such*

[52] AT&T GTAC Brief at page 10.

process of agreement itself resulted from an opting in by a CLEC that is a party to it.

5. Conflicts between the SGAT and Other Documents

AT&T argued that tariff filings should not have the effect of automatically amending any interconnection agreement or the SGAT. AT&T said that, tariffs were generally subject to change at the sole discretion of Qwest.[53] XO more broadly argued that Qwest should be prohibited, upon a complaint by a CLEC, from imposing the terms of any other document ruling tariffs, methods and procedures, technical publications, policies, product notifications, or other Qwest documents) outside the SGAT unless and until Qwest could prevail under the SGAT's dispute resolution procedures.[54]

Qwest has said that a later commission decision specifically overriding the SGAT should prevail. It then agreed to adopt language that would eliminate "conflicts" as the basis for deciding when there was incompatibility between the SGAT and other documents. The language of the Qwest SGAT instead makes it clear that the SGAT prevails over other documents that change or expand the rights or obligations of each party to the SGAT.[55]

Proposed Issue Resolution: The first part of this issue is AT&T's tariff conflicts concern. Likely conflicts between the SGAT and tariffs consist of two principal types: (a) the SGAT makes a tariff provision applicable for some SGAT purpose and the tariff later changes from the version in existence at the time of the SGAT's adoption, and (b) there is no such SGAT reference, but a tariff provision that becomes effective after the SGAT did contains terms that conflict with those of the SGAT. In the first case, Qwest's Section SGAT language contains a Section 2.1 statement that:

> *any reference to any statute, regulation, rule or Tariff applies to such statute, regulation, rule or Tariff as amended and supplemented from time to time and in the case of a statute, regulation, rule or Tariff, to any successor provisions.*

This provision resolves the first type of conflict by providing that the most recent tariff provision applies. This resolution is appropriate, given that there was agreement in the first place to subject an aspect of the Qwest/CLEC contractual relationship to tariffs, which are changeable by their nature. Had there been intent to freeze the tariff provisions in force existing at the time of SGAT adoption, the words of the tariff, then existing rather than a mere reference to it, could have been used. Moreover, opting in opportunities would become confusing to administer in the event that the tariff provision in effect at the date each CLEC began to use the SGAT would apply to that CLEC.

Finally, CLECs generally have the ability to participate in tariff proceedings that affect them. Thus they have the power to ask commissions to impose limits on the effectiveness of new or changed tariff provisions (for SGAT or Interconnection Agreement purposes), should CLEC's consider them appropriate. It does not demand too much of CLECs

[53] AT&T GT&C Brief at page 11

[54] Brief of XO Utah on General Terms and Conditions (XO GT&C Brief), at page 4.

[55] Qwest GT&C Brief at pages 15 and 16

providing local exchange service to a state to maintain a reasonable level of diligence regarding Qwest tariff provisions that they know are included in their SGATS or Interconnection Agreements.

The second type of conflict is also addressed in the SGAT Section 2.3:

> *Unless otherwise specifically determined by the Commission, in cases of conflict between the SGAT and Qwest's Tariffs, PCAT, methods and procedures, technical publications, policies, product notifications or other Qwest documentation relating to Qwest's or CLEC's rights or obligations under the SGAT then the rules, terms and conditions of this SGAT shall prevail. In the event another document abridges or expands the rights or obligations of either Party under this Agreement, the rules, terms and conditions of this Agreement shall prevail.*

The provision clearly prohibits the application of any new tariff provision, unless a public service commission decrees otherwise, that would conflict with the SGAT clause, or would abridge or expand any party's rights or obligations under the SGAT, even if there were no direct conflict. This provision provides sufficient protection against subsequent changes in tariffs. The only possibility left open is one that should be left open, i.e., an explicit decision by a commission that a new or changed tariff provision for some reason should affect the SGAT. It would be inappropriate to take from commissions the right to consider such issues efficiently at the time that Qwest tariffs are before them. Moreover, the Qwest language also precludes changing the SGAT by allowing a tariff to go into effect by operation of law (there would be no required "specific determination" by the commission in that case). Therefore, the concern raised by AT&T is clearly settled, going further would unduly restrict the ability of public service commissions to consider at convenient times and in efficient manners the relationship between tariffs and the SGAT.

The second part of the issue is XO's broader concern about the proper method for ensuring that other kinds of documents do not override SGAT provisions. The Qwest language about expansion or contraction of rights and obligations establishes a sound general rule. What remains in issue is whose view should prevail while the SGAT dispute resolution methods take their course. XO's language arises from a concern that Qwest's position about inconsistencies (i.e., that there are none) will prevail pending resolution of disputes. XO would solve the problem by making the CLEC's provision prevail in that case.

The problem with XO's approach is that it does not take into account the great practical difficulties that would arise in the operation of Qwest's business if but a CLEC complaint could prevent Qwest from applying the business and operations rules that the documents at issue call for. The Congress, the FCC, and the participating states all expect that Qwest will act promptly and effectively to meet requirements across the spectrum of activities that it takes to provide local exchange service, whether directly to end users or at wholesale to CLECs who are making use of Qwest's network. It is simply not realistic to embody within the substantial guidance, procedures, operational requirements, and methods that make a company like Qwest able to serve CLECs in this fashion.

[illegible] will [illegible] be cases where Qwest documentation abridges or expands SGAT rights or responsibilities. However, the problem we have to solve is determining who, pending dispute resolution, ought to be able to define how needed activities, [illegible] procedures, methods, and the like need to progress in that interim period. Quite simply, it ought to be the one obliged to provide service who retains the right to decide what is [illegible] to provide that service while such disputes remain pending. XO's [illegible] approach would remove from Qwest too important a control that a service provider should have to define and manage the processes by which it provides services. However, lest the degree of this authority be misinterpreted, it should remain clear that an [illegible] arbiter of disputes should have the power to decide finally, and should be expected to decide with dispatch, whether other and, by definition, subsidiary Qwest operational and business practice documents abridge or expand the rights and obligations [illegible] by the SGAT. To best implement this approach, the SGAT should, as it does, [illegible] silent on the question of whose interpretation of consistency as here defined [illegible] while disputes remain in the process of resolution.

8. Implementing Changes in Legal Requirements

AT&T objected to what it termed Qwest's desire to change SGAT provisions to conform to changes in law as soon as the decisions making those changes (e.g., a court decision) become effective. AT&T argued that such an approach unduly favors Qwest. It is [illegible] easy to stop offering something almost immediately after a ruling that ends an obligation to provide it. However, it takes time to develop a product or service offering after a ruling that first creates an obligation to provide it. AT&T recommended that the SGAT should provide for a period of time for parties either to: (a) mutually agree to [illegible] how agreement after a ruling, or (b) resolve disagreements about the change through the SGAT dispute resolution procedures. AT&T said that this approach would [illegible] more balance in the transition needed upon a change in law, and that it would better comport with the impairment of contracts provision of Article 1, Section 10 of the United States Constitution.[56]

In response to concerns raised in the workshops, Qwest revised SGAT Section 2.2 to allow a 90-day status-quo maintenance period to allow negotiation of disagreements about whether a change in law (which Qwest broadened to include and "Existing Rules") would require a change in the SGAT. After that period, the SGAT dispute resolution processes would apply, with allowance for creating an interim operating arrangement pending completion of the procedures called for by those provisions. Qwest's language would make the eventual resolution of the dispute effective back to the effective date of the change in the existing rules. Qwest said that such a "true-up" mechanism was necessary to take away any incentive to extend the time taken to resolve disputes.[57]

Proposed Issue Resolution: In the first instance, the impairment of contract provision has no applicability here. The issue is what the contract (i.e., SGAT) should say in the first place, not how to interpret it after the fact of its execution. If and as that contract allows for changes due to changes in applicable legal requirements, there is no colorable

[56] AT&T 14/04 Brief at pages 12 and 13
[57] Qwest 07/31 Brief at pages 13 and 14

contractual clause. Nevertheless, it is necessary to provide for a reasonable period for the determination of what changes to the SGAT are appropriate in such cases, and for the determination of how any changes should be implemented. Qwest's new SGAT language, which arose in response to concerns we also raised at the workshops, provides for a reasonable means for accomplishing the needs at hand. The modifications that these provisions make to the SGAT's generally applicable dispute resolution procedures are appropriate to the need for particularly prompt action to address changes in those legal requirements that are fundamental premises underlying the SGAT. Qwest's so-called "true-up" mechanism is also appropriate, because it allows an outside dispute resolver to mitigate any overstatement, if deemed appropriate.

The Qwest language changes accomplish the purposes that underlie AT&T's objections to the old SGAT language. Moreover, these amendments do so in a way that will preserve the reasonably prompt adjustments that should accompany changes in legal requirements. If Qwest includes that language in the SGAT, it will adequately protect CLECs in the event that changes to the SGAT become necessary as a result of such orders below.

7. Second Party Liability Limitations

AT&T objected to the scope of Qwest's SGAT Section 5.8 agreement to bear liability, arguing that the scope was too narrow either to compensate CLECs for damages, or to provide an adequate incentive for Qwest to provide good service after it receives Section 271 approval. AT&T requested a number of specific changes to the language of Qwest's Section 5GAT.[36]

- Section 5.8.1: Address the parties' liability for damages assessed by a public service commission (addressed in the next succeeding issue)
- Section 5.8.2: Change Qwest's language addressing the inter-relationship between these general damages provisions and the Qwest post-entry assurance plan (PAP or QPAP);
- Section 5.8.3: Removing Qwest's provision limiting damages to the amount that would have been paid for services under the SGAT
- Section 5.8.4: Allowing consequential damages for gross negligence (Qwest limited it to willful conduct) and for bodily injury, death, or damage to tangible property caused by negligence
- Section 5.8.6: Expanding Qwest's liability for fraud by CLEC customers to any applicable theory of liability (Qwest limited it to its own intentional conduct).

Qwest responded by saying that its Section 5.8.2 language adequately addressed the PAP concern, that the expansion of liability in Section 5.8.4 was not consistent with industry practice, and that the AT&T changes to Section 5.8.6 would also unduly expand Qwest's liability.[37]

[36] AT&T 6/18/01 Comments at pages 33 through 35, and AT&T GT&C Brief at pages 14 through 17.
[37] Qwest 6/27/01 Reply at pages 20 through 22.

Proposed Issue Resolution: The parties generally agreed that the SGAT should rule out indirect, incidental, and consequential damages. This agreement is consistent with general commercial practice and, more particularly, with the provisions of telecommunications tariffs. One of the purposes of such limitations is to limit the exposure of a service provider to reasonably foreseeable and insurable risks. Indirect, incidental, and consequential damages tend to be less predictable and more plaintiff-specific.

Having generally agreed to this standard, much of the dispute between the parties amounts to the identification of appropriate carve-outs to the general rule limiting damages to direct ones. One exception is the AT&T Section 5.8.2 change regarding the PAP. The degree to which the provisions here will overlap with the PAP and the question of what to do about that overlap cannot be meaningfully addressed without considering the matters being addressed in connection with the PAP. Therefore, it is necessary to defer consideration of this issue until the forthcoming report that will address the PAP.

Returning to the other disagreements, the general rule that should be followed is that predictable and readily insurable risks should generally lie with the party whose conduct creates those risks. Moreover, insurance against those risks should be considered a reasonable cost of doing business.[60] With that general rule in mind, we approach the remaining AT&T arguments about the SGAT's liability provisions: i.e., 5.8.3, 5.8.4, and 5.8.6.

With respect to 5.8.3, the language in AT&T's brief notes Qwest's deletion of Section 5.8.3, which removed the general limitation on damages to payments for services. However, Qwest's frozen SGAT moved it to Section 5.8.2; it reappears nowhere in the language set forth in AT&T's brief. The provision should remain as Qwest has proposed it in the frozen SGAT. Otherwise, Qwest's exposure to damages becomes extended beyond the point that is reasonable in light of general commercial and telecommunications tariff experience.

With respect to Section 5.8.4, AT&T's language first combines notions of liability to second-parties (i.e., the parties to the SGAT) and third parties (e.g., CLEC customers or members of the public). This combination is not appropriate to the structure of the SGAT, which treats second-party liability in Section 5.8 and third-party liability in Section 5.9 (the indemnification section). Thus, no change to Section 5.8.4 should provide for liability other than by Qwest to CLECs and by CLECs to Qwest. That said, bodily injury and death are not appropriate subjects to treat at all in Section 5.8.4, because they concern third-party liability in a contract between two corporations.

[60] What this last point means here is that, to the extent that Qwest's liability is expanded beyond what it proposed in the SGAT, it should be able to recover through its prices to CLECs the reasonable costs of insuring against such liabilities, whether such insurance come from be by a third-party carrier or through self insurance. No large, complex business is perfect: from an economic perspective, the reasonable costs of insuring against ones own errors or omissions is a cost of doing business that one can expect to recover in an efficient market. Certainly, insurance premiums, even for liability, are traditionally considered appropriate for recovery.

After these exclusions concerning the AT&T Section 5.8.4 language, the next matter of concern becomes responsibility for damage to tangible property. It is not appropriate for Qwest to exclude liability for damage to the tangible property of one party to the SGAT, where that damage results from acts or omissions by the other party. It would be hard to imagine Qwest or AT&T disclaiming responsibility for physical damage to a customer's home if they were to cause it during a service call. Moreover, it would contravene public policy to diminish (by removing consequence) Qwest or CLEC incentives to act with due care where their activities place the property of others in harm's way. The same is true if the property is not of a customer, but is that of the other party to the SGAT. Both Qwest and CLECs will come into contact with very valuable property of the other in their relationship. It would be simply nonsensical to have those contacts take place with the knowledge that their actions need not pay due respect to the property of the other. Moreover, the risk of second-party property damage is a reasonably predictable and insurable one. The party creating it should insure against the risk. Therefore, the SGAT should contain a provision that provides as follows:

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

This language change also alters two other aspects of AT&T's proposal. First, it does not adopt gross negligence as a standard under item (i), but limits liability to willful or intentional conduct. The reason is that gross negligence is often an elusive thing to prove. There is precedent and good cause for leaving it out of commercial contracts. Second, unlike AT&T's proposal, the above language imposes liability only where the damage to the tangible property of an SGAT party arises from the sole negligence of the other. Because the harmed party has insurance opportunities as well, it is appropriate to make it bear the risk where its own actions materially contribute to loss, even in cases where the other party is at fault as well.

With respect to AT&T's proposed change to Section 5.8.6, we should begin from the premise that fraud by end-user customers or by those using customer services should be the primary responsibility of the carrier who provides, vis-à-vis the end user, the service used to perpetrate the fraud. Therefore, the CLEC should always bear responsibility for fraud in cases where its own acts or omissions materially contributed to its perpetration. AT&T's proposed language applies a much looser standard. First, it makes its own contribution to the fraud irrelevant, providing, it would appear, that Qwest is responsible even if its acts or omissions were not the sole cause of the ability to perpetrate the fraud. AT&T's language would be appropriate, however, if it applied to cases where Qwest was the only party whose acts or omissions contributed. Therefore, SGAT Section 5.8.6, as proposed in Qwest's frozen SGAT, should be changed to read as follows:

> *5.8.6 CLEC is liable for all fraud associated with service to its customers. Qwest takes no responsibility, will not investigate, and will make no adjustments to CLEC's account in cases of fraud unless: (a) such fraud is the result of any act or omission by Qwest, and (b) the ability to perpetrate*

such fraud was not contributed to by an act or omission by CLEC. Notwithstanding the above, if Qwest becomes aware of potential fraud with respect to CLEC's customers, Qwest will promptly inform CLEC and, at the direction and sole cost of CLEC, take reasonable action to mitigate the fraud where such action is possible.

8. Third-Party Indemnification

AT&T argued that the SGAT's Section 5.9 indemnity provisions must complement the Section 5.8 liability-limitation provisions and the PAP to provide an adequate incentive for Qwest, as a monopolist, to avoid anti-competitive and discriminatory conduct. AT&T expressed concern about SGAT language (in Section 5.9.1.2) that would limit Qwest responsibility for damages CLECs must pay to their end users. AT&T argued that the SGAT's indemnity provisions should "more closely mirror those found in competitive markets between willing buyers and sellers."[61] AT&T offered language (in Exhibit B of its brief) that would accomplish its purpose.

Qwest responded that its indemnity language did reflect a market-based approach. Qwest also noted that making a wholesale supplier broadly responsible for claims by the wholesale customer's end users would discourage the wholesale customer from imposing reasonable limits on its liability to its end users, because it could simply transfer those liabilities back to its wholesale service provider.[62] In the specific context of claims by CLEC end users, Qwest said that CLECs should not be encouraged to offer their end users an especially generous acceptance of liability, merely because they could transfer that liability back to Qwest and thereby gain a competitive advantage (since Qwest would presumably not be able to pass to someone else its own costs resulting from such generosity).[63] Qwest's proposed SGAT Section 5.9.1.2 would protect itself by requiring the CLEC to indemnify Qwest for any damages sought by the CLEC's end user.

Proposed Issue Resolution: AT&T sought a market-based approach, but did not provide evidence to demonstrate what a typical wholesaler/retailer agreement (particularly where the wholesaler also acts as a retailer in competition with its wholesale customer, which is not an unknown concept) would provide in analogous circumstances. However, we can, from the record here work to a reasonable approximation of market conditions by starting at the end of the value chain, which here is the relationship between the CLEC and its end user. The evidence shows that typical custom is to impose significant limits on customer compensation in the event of failure to deliver service.

One would expect in a competitive market that a wholesale supplier would: (a) provide service in accord with reasonable expectations and customs prevailing in the retail portion of the market, and (b) charge, in any case, premium prices for added services requested by its wholesale customer. Thus, if a wholesale purchaser wanted to provide added services to its retail customers, it should expect its wholesale seller to charge it for any special requests that impose more costs.

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[61] AT&T GT&C Brief at pages 18 and 19.
[62] Qwest GT&C Brief at pages 22 and 23.
[63] Qwest GT&C Brief at page 25.

It can be taken as a virtual certainty that Qwest's prices for wholesale service to CLECs do not include the costs that it would incur if it had to bear the costs involved were a CLEC to provide better than usual damage limitations in the CLECs agreement to serve an end user. Therefore, a competitive market analogy would strongly indicate that AT&T's request to transfer to Qwest the cost of relatively liberal damage responsibilities, vis-à-vis the CLEC's end users, is not appropriate.[64]

In addition to asking for a competitive market analogy, AT&T also argued that Qwest needs incentives to counteract the natural tendencies that a monopolist wholesaler has to deny good service to those who seek to take from it a share of its own end users. There is no fallacy in this argument's roots. However, the correct incentive is not to encourage CLECs to provide their end users with more than usually liberal damage provisions at Qwest's expense. As Qwest's incentives as a monopolist are questioned, so should we question the motives that would be created if CLECs were free to provide whatever benefits they chose for their end users, in the knowledge that, however high the cost of doing so, Qwest would have to pay them. The better course is to address the incentives issue in the context of the PAP, leaving us here to decide only the question of damage recovery. In that context, the record demonstrates that Qwest's SGAT provisions concerning indemnity, insofar as it involves CLEC end users, better reflect the competitive-market mirroring test that AT&T proposed.

There is, however, a separate concern about Qwest's Section 5.9.1.2 language. The Qwest indemnification language exempts itself not just from liberal lost-service compensation mechanisms that CLECs might wish to employ at its expense. The provision is written so broadly as to indemnify Qwest also in cases where its negligence causes bodily injury to CLEC customers or physical injury to their tangible property. It is proper to expect that Qwest will retain responsibility for its acts or omissions that cause such injury, on reasoning similar to that which applies to lost-service compensation.

A CLEC that wishes to offer liberal service-interruption benefits should bear their costs; the reason is that such a rule makes the causer of costs responsible for incurring them. Where Qwest's employees, contractors, agents, or representatives tortiously cause physical harm to CLEC customers or their property (during a service call, to repeat the example used in the discussion of the prior issue), Qwest should be responsible, again to align cause and effect. This is not a case where a CLEC is extending a benefit of value, while transferring the cost to someone else. Instead, the issue here is to preclude Qwest from transferring to someone else the consequences of its actions that cause physical injury. Therefore, SGAT Section 5.9.1.2 should include, as follows, a new sentence at its end:

> *The obligation to indemnify with respect to claims of the Indemnified Party's end users shall not extend to any claims for physical bodily injury*

[64] The XO GT&C Brief, at page 7, argues that the existence of the customer remedies in the CLEC's tariff should remove concerns about the lack of CLEC concerns to limit them. That factor certainly will tend to limit the extent to which CLECs will go in their arrangements with customers, because CLECs will have to bear the costs in the absence of Qwest fault for the underlying service problems. However, to the extent that we create a system where CLECs will have the opportunity to transfer a portion of the costs of their offerings to customers, not only away from themselves, but also to Qwest, a non-economic incentive will remain.

or death of any person or persons, or for loss, damage to, or destruction of tangible property, whether or not owned by others, alleged to have resulted directly from the negligence or intentional conduct of the employees, contractors, agents, or other representatives of the Indemnifying Party.

9. Responsibility for Retail Service Quality Assessments Against CLECs

XO argued that Qwest should bear responsibility for assessments or fines levied against a CLEC that fails to meet a state commission's retail performance standards because of a failure by Qwest to provide the CLEC with SGAT-compliant service.[65]

Proposed Issue Resolution: The XO request establishes an immutable rule about who should ultimately be responsible for state-commission imposed assessments for violating retail service requirements. The problem with this approach is that it may not be consistent with each state's policy regarding such assessments. For example, a commission could legitimately seek to penalize a CLEC whose failure to demand proper performance from its wholesale supplier (or perhaps even to be watchful enough to know that its end users were getting poor service due to the actions of Qwest as a vendor) contributed to the poor service that the commission may find cause to penalize. The fact that the vendor in this case is a competitor with a monopoly to protect may mitigate the usual prudence rule that requires a utility to manage its suppliers effectively, but it by no means should be read to obviate that important customer-protection rule ab initio.

The superior way to deal with CLEC concerns about such "vicarious" liability is for them to make arguments in proceedings that either establish such standards and assessments in the first place, or in cases that are opened to enforce them. This approach, as opposed to the inclusion of XO's language in the SGAT, is better designed to give commissions the ability to impose their view of what customer-protection demands in their individual jurisdictions.

10. Intellectual Property

There were disagreements at the workshop about SGAT Section 5.10, which deals with intellectual property. AT&T represented that agreement had been reached on a revised Section 5.10, the terms of which AT&T included in Exhibit C of its brief. AT&T said that this issue could be considered resolved, in the event that Qwest continued to agree to the Exhibit C language.[66] Qwest did not brief this issue, but its frozen SGAT contained language identical to that of AT&T, except as to several particulars.

Proposed Issue Resolution: There is no way from the record to verify that the differences between AT&T brief Exhibit C and frozen SGAT Section 5.10 are material to AT&T. It should, however, be presumed that this issue is closed, in the absence of

[65] XO GT&C Brief at pages 6 through 8. XO's argument would also obligate Qwest to make a CLEC whole for any payments it made to its customers for poor service, when Qwest caused it. That argument should fail for the same reasons set forth in the discussion of the immediately preceding issue.

[66] AT&T GT&C Brief at page 22.

comments to the contrary within the 10-day period established for filing comments on this report with the individual participating commissions.

11. Continuing SGAT Validity After the Sale of Exchanges

AT&T proposed a series of provisions that would apply upon the sale by Qwest of exchanges that include end users whom CLECs serve through services acquired under the SGAT. AT&T proposed the following language for SGAT Section 5.12.2:[67]

a. Requiring the written agreement of Qwest's transferee to be bound by the SGAT terms and conditions until a new agreement between the transferee and CLEC becomes effective

b. Providing notice of the transfer to CLECs at least 180 days prior to completion (AT&T agreed in its brief to less notice if 180-day notice could not be provided

c. Obligating Qwest to use best efforts to facilitate discussions between the transferee and CLECs with respect to SGAT continuation

d. Serve a copy of the transfer application on CLECs

e. Denying Qwest the ability to contest CLEC participation in the transfer approval proceedings or to challenge the Commission's authority to consider obliging the transferee to assume the SGAT obligations.

Qwest agreed to providing notice (item b above) and to facilitating discussions (item e above). Qwest objected to the remainder, on the grounds that those conditions would unreasonably "devalue" Qwest's assets by placing burdensome obligations on it or on transferees. Qwest cited as an example the burden that a PAP with substantial penalty obligations would be on a much smaller company that might be interested in purchasing some Qwest exchanges.

Proposed Issue Resolution: There should be no section 271 induced prohibition on the disposition by Qwest of its assets and no participant has proposed otherwise. On the other hand, there should be a reasonable transition period when exchanges contain CLEC end users (where service to them comes through facilities that CLECs secure under the SGAT). It would not serve the public interest to force customers to make changes too hastily. Qwest appears to accept this notion: it did not contest the need for it to provide notice of exchange transfers and to work with the transferee and CLECs to promote an effective transition.

The basic interests that clearly need to be protected are the following: (a) end user transitions to new suppliers should the new transferee not be willing to provide service on terms that a CLEC, or in turn its end users, can accept, (b) a reasonable CLEC opportunity to negotiate with the transferee, and (c) an opportunity for the commission to consider the application of any regulatory authority it may have to condition the transfer on commitments respecting continuation in whole or in part of the SGAT, with the transferee stepping into the shoes of Qwest.

[67] AT&T GT&C Brief at pages 20 and 21.

AT&T's proposal in effect goes beyond these needs in two critical respects: (a) it would give CLECs what amounts to an option to continue the SGAT to its scheduled duration, with the transferee accepting all of its obligations, and (b) it strives to preclude debate about the authority of commissions to consider the kinds of conditions noted in the third need area listed in the preceding paragraph. These two aspects of AT&T's proposal are inappropriate for inclusion in the SGAT.

The continuation option would exist because a CLEC could, to the extent it preferred the existing SGAT, merely choose not to execute a new agreement with the transferee. That unilateral act alone, under AT&T's language, would extend the SGAT at least until the termination date it contains. Such a possibility would have at least some support, if it were clear that the obligations of the transferee under the Act were the same as those applicable to Qwest. However, that has not been shown to be true and Qwest has provided at least one example of a case (the economic exposure under a PAP) where there would likely be a very different set of both requirements and expectations about what to anticipate from the transferee.

Because requirements applicable to Qwest and the transferee may well differ, CLECs should not have the unilateral right to continue the SGAT indefinitely. However, they should have a reasonable opportunity either to negotiate with the transferee or to seek relief from the commission in the event that negotiations are not sufficient. This need can be served by a minimum notice period, similar but not identical to what AT&T has proposed in its brief. That notice period is discussed below. Therefore, clause A of AT&T's proposed language should not be included in the SGAT.

Qwest should, however, provide notice of the transfer sufficiently in advance of its proposed effective date to permit the end-user transitions, transferee/CLEC negotiations, and CLEC requests to commissions discussed earlier. Given the nature of such transactions and the likely time requirements of commission approvals in the states where they apply, it would be sufficient and appropriate to include a new sub-paragraph of the SGAT's assignment clause (Section 5.12) as follows:

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

This provision gives Qwest the option of providing notice more than 60 days ahead of time or of having the transferee accept responsibility for a limited period of time should it decide not to do so. The provision also provides notice to a transferee that the

commission may impose SGAT transition requirements, provided that it already has the power to do so (i.e., the SGAT will not confer any such power, nor, if there is no such power, will the SGAT effectuate a continuation of the SGAT for more than the prescribed period). This clause excludes AT&T's no-contest clauses related to intervention or jurisdiction to condition transfers. Commissions are creatures of statute; their jurisdiction cannot be expanded by agreement. Moreover, commissions are competent to determine the public interest involved in requests for intervention; their decisions should be informed by what all parties in interest have to say on the relevant considerations.

This leaves the question of serving applications. It is unnecessarily burdensome to require Qwest to determine which of the more than 100 CLECS serving in its territory have end users in the exchanges involved or to send each a lengthy application. It is sufficient for Qwest, should it choose, merely to inform all CLEC's of the pendency of a transfer of identified facilities. CLECs may then determine for themselves their interest in the transfer and seek intervention as appropriate.

12. Misuse of Competitive Information

AT&T provided evidence that it said showed an abuse of Qwest's obligation not to disclose information to it marketing and sales personnel. Specifically, AT&T provided evidence that Qwest contacted a Minnesota end user to secure a rescission of the customer's election to transfer to AT&T, between the time that AT&T submitted the necessary LSR and the time that the transfer was to take place. AT&T took the position that Qwest's marketing and sales personnel must have learned of the switch through the LSR, which means that Qwest can similarly misuse information throughout its region, because it employs a system-wide OSS.[68] AT&T said that Qwest should not be deemed to comply with the requirements of Section 271 until it "demonstrates that it has corrected every mechanism through which Qwest's retail marketing personnel gain access to CLEC confidential customer information". Qwest did not brief this issue.

Proposed Issue Resolution: Abuse of information that Qwest gains through the ordering systems that CLECs use to secure facilities or services that will deprive Qwest of existing end users is a very serious matter. For competition to succeed, there must be a high level of confidence that Qwest will limit its use of such systems to serve CLECs, not to gain competitive advantage over them. Certainly, CLECs have no fully comparable method for learning of other carrier efforts (including those of Qwest) that will do them competitive injury.

The problem on this record becomes one of deciding what to make of the single incident cited by AT&T. It did not describe the kind of effort it undertook to uncover incidents of this type. Such a description would have helped to decide whether this case was symptomatic or isolated. There are surely circumstances where Qwest may learn of CLEC attempts to win its end users by means other than illicit access to LSR information. Qwest serves millions of access lines throughout its region. It would not be surprising for a telemarketer selling new services to Qwest end users to encounter by chance a household member who says that there has just been a decision to switch to another

[68] AT&T GT&C Brief at page 23.

carrier. Given these possibilities, citing a single incident (although AT&T does correctly observe that the state involved is not per se material) does not support a broad conclusion that Qwest's performance fails in meeting Section 271 requirements, or that there exists a need for imposing a potentially very substantial remedial plan.

However, the record does not allow a determination of whether Qwest takes reasonable steps to: (a) minimize the possibility of, (b) discourage, (c) detect, or (d) punish inappropriate conduct. Moreover, Qwest said at the workshop that it did not know whether its customer service representatives could determine from customer account screens whether a CLEC had recently issued through the OSS interface an order affecting that account.[69] Given the importance of this issue, therefore, Qwest should submit a report to the commissions within 30 days detailing its programmatic efforts addressing all four of these key steps in assuring that reasonable steps are taken to control the use of sensitive information. This report should be designed to allow the commissions to make a finding that Qwest has in place a reasonable and comprehensive program for assuring that the possibility for inappropriate use of information received through its GUI and EDI interfaces with CLECs is appropriately minimized.

13. Access of Qwest Personnel to Forecast Data

XO commented that Qwest's legal personnel should not have free access to aggregated CLEC forecast information to use in regulatory filings. XO considers the information in forecasts to be competitively sensitive. It said that Qwest should seek the information through discovery requests if it considers it important for regulatory purposes. XO concluded that the SGAT should preclude use of CLEC confidential information for any purpose other than that for which it was provided.[70]

AT&T expressed concerns about both the sufficiency of the description of those who can see individual CLEC forecast information (it said it could not determine all those to whom Qwest considered disclosure appropriate) and about the ability of Qwest to make free use of aggregated CLEC forecast information. AT&T argued that Qwest receives only a limited license to use CLEC information, not a more general right to transform it and use it for other purposes.[71]

Qwest responded that the language of SGAT Sections 5.16.9.1 and 5.16.9.1.1 would prohibit the disclosure of both individual and aggregated CLEC forecast data to its marketing, sales, and strategic planning personnel. Qwest also said that the language in question allows access to individual CLEC forecasts only by those Qwest personnel who need to have it for use in responding to the forecasts at issue. The positions that Qwest said this need extends to include wholesale account managers, wholesale LIS and collocation product managers, network and growth planning personnel. Qwest would also allow access by its attorneys when a legal issue arises about a specific forecast.[72]

Proposed Issue Resolution: Qwest's language does generally limit individual forecast information to those with a need to use the information to manage Qwest's contractual

[69] June 28, 2001 transcript at page 249.
[70] XO GT&C Brief at pages 2 and 3.
[71] AT&T GT&C Brief at pages 25 through 27.
[72] Qwest GT&C Brief at pages 30 and 31.

relationship with the CLEC who provided it. The list of authorized recipients is appropriately limited. However, the language allowing access by Qwest legal personnel is more open ended than it needs to be. As written, any time that there is any issue regarding the forecast, or access to it presumably, the language applies. That language should be limited to cases where the issue involved is about the quality or timeliness of the forecast in connection with the purposes for which it was submitted. Therefore, the phrase "legal personnel, if a legal issue arises about that forecast" in SGAT Section 15.16.9.1 should be replaced with:

> *Qwest's legal personnel in connection with their representation of Qwest in any dispute regarding the quality or timeliness of the forecast as it relates to any reason for which the CLEC provided it to Qwest under this SGAT.*

The other concern expressed about Qwest's language concerns the use of aggregated forecast information. SGAT Section 5.16.9.1.1 allows Qwest to file or use aggregated CLEC data for any regulatory filing or for any other purpose generally related to fulfilling its SGAT obligations. This section is again too open ended. The information involved clearly is highly sensitive and it is not sufficiently comforting merely to, as Qwest has, take precautions when it believes that aggregation will not be sufficient to protect the confidentiality of an individual CLEC's data.

The protection of the information is too important to trust only to such a provision. However, it is recognized that the participating commissions may have legitimate needs for access to such information; those needs should not require the commissions to solicit it from a vast number of individual CLECs. Therefore, Qwest should be permitted to provide the data upon a specific Commission order requiring it, upon the initiation by Qwest of any protective processes applicable in the state requiring it, and upon notice by Qwest to the CLECs involved on a basis that the commission involved determines to be sufficient to permit the completion of any procedures required to continue to protect its confidentiality. The following replacement language for SGAT Section 5.16.9.1.1 will accomplish this purpose:

> *5.16.9.1.1 Upon the specific order of the Commission, Qwest may provide the forecast information that CLECs have made available to Qwest under this SGAT, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures and further provided that Qwest provides such notice as the Commission directs to the CLEC involved, in order to allow it to prosecute such procedures to their completion.*

Note that this provision, unlike Qwest's language, does not allow Qwest to use aggregated CLEC forecast information for any other purpose whether or not related to fulfilling its responsibilities under the SGAT. Section 5.16.9.1 already makes individual CLEC forecast information available to the specified persons who need to know it to fulfill Qwest's SGAT responsibilities. There is thus no basis for concluding that anyone else within Qwest has a need for aggregate information.

14. Change Management Process

AT&T cited the FCC's SWBT Texas 271 Order as requiring the existence of a change management process that meets five specific criteria.[73] Qwest's relevant change management is called CICMP (Co-Provider Industry Change Management Process). At the workshops, Qwest indicated that it was in the process of making significant changes to CICMP. Therefore, the record in these workshops does not allow for an assessment of Qwest's compliance with the cited FCC standards, which are:

- Clearly organized and readily accessible change management process information
- Substantial CLEC input into the creation and operation of the process
- Existence of a procedure for timely dispute resolution
- Availability of a stable test environment that mirrors production
- Adequacy of documentation available for use in building an electronic gateway

Proposed Issue Resolution: The record here does not allow meaningful consideration of the sufficiency of Qwest's CICMP, which forms part of Section 12.2.6 of the SGAT. Therefore, there is not at present a sufficient basis for concluding that Qwest meets applicable requirements in this aspect of its relationship with CLECs.

15. Bona Fide Request Process

AT&T said that the SGAT Section 17 bona fide request process could not be shown to be nondiscriminatory, for two reasons:[74]

- There is no evidence to show that it would apply similarly to the process Qwest uses when its own end users ask for services not already provided for under tariffs
- Qwest fails to provide notice of previously approved BFRs with similar circumstances
- Qwest has no objective standards for standardizing products or services that result from repeat BFR requests.

Qwest noted that it had only received 17 BFR requests since 1999.[75] Qwest also noted that it would not require subsequent BFRs for substantially similar cases, with the burden on Qwest to show that a subsequent request is not substantially similar. SGAT Section 17.12, which incorporates this concept, provides that a CLEC can get substantially similar services without a BFR, but must still pay individual case basis prices until Qwest standardizes the offering reflected in the granted BFR. Qwest will also not require a BFR and will refund the BFR application fee if it has recently denied a similar request.

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[73] AT&T GT&C Brief at page 27, citing paragraph 108 of the FCC's order *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238 (Released, June 30, 2000).

[74] AT& T GT&C Brief at pages 30 and 31.

[75] Rebuttal Testimony of Larry B. Brotherson Re: Terms and Conditions and BFR (Brotherson Rebuttal), May 23, 2001, at page 66.

Qwest objected to providing general notice (i.e., other than in the context of the filing of a similar BFR by an individual CLEC) of granted BFRs because a CLEC could object to the providing of public notice about something it developed and requested and in which it therefore has a proprietary or trade secret interest. With respect to standardizing products or services made available through repeat BFRs, Qwest opposed a firm, objective standard, arguing that it should have the discretion to determine when conditions justified standardization.[76]

Proposed Issue Resolution: The first aspect of this issue concerns the issue of parity with Qwest end-user requests for non-standard retail services. There is not a sound basis for concluding that this retail process is analogous in purpose or scope to the wholesale BFR process. The latter focuses often and centrally on: (a) the question of technical feasibility, recognizing that federal law in many cases requires an incumbent to provide some form of access on that condition, and (b) the related question of whether access is necessary to give a CLEC a reasonable opportunity to compete. Those are not often, if ever, the same types of standards that will apply to Qwest's analyses of whether to make a non-standard service available to its end users. Moreover, the cost analysis under a wholesale BFR will often differ widely from that applicable to a request for service by an end user, depending on what cost underpinnings, if any, will apply to what can be charged by Qwest for non-standard services at retail.

Therefore, it would be misleading to broadly consider wholesale BFRs comparable with requests by Qwest end users for retail services. Perhaps some subset of retail requests could be considered comparable, but identifying them would be difficult, and would require facts well beyond those on the record here. Moreover, even if such a subset could be defined after the expenditure of great effort, it is not clear that the resulting rule or standard would better protect CLEC interests, as compared with a direct analysis of how well and how promptly Qwest responds to individual BFR requests. Therefore, the parity standard that AT&T suggests here is not appropriate.

The second aspect of this issue concerns notice of previously granted BFRs. In the first place, we must bear in mind that what a BFR seeks is access to Qwest's property. What a CLEC wants to do with that access or how it will advantage it to have such access are not the directly relevant point. What is of immediate concern is what access Qwest will give to its network. It is difficult to see how a CLEC can gain proprietary rights in Qwest facilities. Moreover, it seems less likely that a BFR will come because a CLEC has invented a "better mousetrap." It is far more likely that it will simply be the first to ask for access that, theretofore was not technically feasible, but which since has become feasible. It makes for bad policy to require CLECs to bear the burden of asking Qwest continuously whether technical barriers precluding an important form of access have come down. It is also not appropriate to make CLECs ask informally what progress may have been made on certain offerings before they expend the time and expense to prepare a BFR. It is far better to require Qwest to inform CLECs generally, because Qwest will know as soon as any material change takes place.

CLECs should be required to take the risk that others will learn something about portions of their business that rely upon the same rights of access to Qwest network that others

[76] Qwest GT&C Brief at pages 34 and 35.

here, when such knowledge comes through information about network access Qwest makes available through the BFR process. When balancing the risks of this exposure against the need for assuring nondiscriminatory treatment of all CLECs, the resolution is clear. CLECs should have prompt notice from Qwest when important technical feasibility barriers have been overcome.

If there is confidential information in the CLEC request, it can be protected adequately. What other CLECs need to see is not the request, but the particular form of access to Qwest's network that Qwest will provide as a result of the request. That access, because it forms part of the requesting CLEC's "contract" with Qwest, should be available to other CLECs. As is true for those contracts, a reasonable rule for assuring nondiscrimination is to make knowledge of access so gained generally available. Apart from the protection given through denying access to the request itself, CLECs will be on notice of this rule, and therefore should be expected to be judicious in what they provide to Qwest in their requests. The SGAT should therefore contain the following language:

> *Qwest shall make available a topical list of the BFRs that it has received with CLECs under this SGAT or an interconnection agreement. The description of each item on that list shall be sufficient to allow a CLEC to understand the general nature of the product, service, or combination thereof that has been requested and a summary of the disposition of the request as soon as it is made. Qwest shall also be required upon the request of a CLEC to provide sufficient details about the terms and conditions of any granted requests to allow a CLEC to elect to take the same offering under substantially identical circumstances. Qwest shall not be required to provide information about the request initially made by the CLEC whose BFR was granted, but must make available the same kinds of information about what it offered in response to the BFR as it does for other products or services available under this SGAT. A CLEC shall be entitled to the same offering terms and conditions made under any granted BFR, provided that Qwest may require the use of ICB pricing where it makes a demonstration to the CLEC of the need therefore.*

Qwest may satisfy the latter, more detailed portion of this request by making the information available on the generally available list or by providing the information on request.

The third aspect of this issue concerns standardization of products or services first made available through BFRs. There is a substantial interest in assuring that network access granted through the BFR process become standardized as soon as it reasonably can. Qwest made note of the expense of the BFR process, but that expense falls largely on the CLECs in the last analysis. Qwest charges fees to recover its costs for processing BFRs. CLECs must prepare each one at their own expense. There is not sufficient information, given the small number of BFRs to date, from which to determine whether Qwest can improve the process of moving from BFR to standardized product and service offerings. Moreover, there is no pre-set number of "similar" BFRs after which there should of necessity be such standardization. How similar those BFRs were and how complex are the offerings are factors that will need to be considered.

CONTINUATION

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The SGAT language proposed by this report immediately above should do much to mitigate the costs associated with subsequent requests, including, in some cases, considerations of costs and prices. Should experience demonstrate in the future, as it has not done to date, that Qwest lags in standardizing offerings, the dispute resolution procedures of the SGAT are available for CLECs to seek relief.

16. Scope of Audit Provisions

SGAT Section 18 addresses audits. This section limits allowable audits and examinations to "the books, records, and other documents used in the billing process for services performed" under the SGAT. AT&T wanted to expand the scope of these provisions, in order to allow audits and examinations of other aspects of performance under the SGAT. AT&T cited only verification that proprietary information is being maintained as required as an example of a significant additional area for audits and examinations, but it would not limit the audit and examination provisions to this additional area. AT&T's brief did assert that audit provisions are routinely granted in other contracts that require the exchange of intellectual property.[77]

Qwest responded that if AT&T had concerns in other areas of performance, it could use the SGAT's dispute resolution procedures to get any documents necessary to resolve them. Qwest particularly objected to the fact that CLEC examinations would provide an opportunity to get around the SGAT's dispute resolution discovery provisions, merely by requesting an "examination," which is substantially similar in purpose. Qwest also objected to the disruption that could occur in the case of unfettered CLEC examination rights across the broad spectrum of activities that Qwest must perform to meet its SGAT obligations. Finally, Qwest objected to allowing CLECs such deep access into the operation of its business.[78]

Proposed Issue Resolution: The audits of information about billing share an important characteristic; they are mutual, because both parties may make errors or omissions that affect bills. The parties will mutually exchange confidential or proprietary information as well. Moreover, abuse of the protections applicable to such information, whether by design or through neglect, can be hard to detect through the normal interchanges that will take place between the parties. Therefore, there is a sound reason for extending the audit provisions to any question that may exist with respect to either party's compliance with requirements to protect such information. However, there are valid concerns about extending examination rights to these cases. Examinations are not limited in number, which distinguishes them from audits.

There are natural limits to the places where billing examinations may go, because of the narrowness of the parts of the organizations that address billing matters. The same is not true of confidential information. Examinations to investigate or discover who has what proprietary information could extend to a wide range of each party's organization. Those examinations could become disruptive. Moreover, there has been no showing that they, as opposed to occasional audits have an important role in investigating compliance with SGAT requirements. It is one thing to seek access to sets of documents that each party

[77] AT&T GT&C Brief at page 31.
[78] Qwest's GT&C Brief at pages 38 and 39.

knows or expects to be in existence to support proper billing. It is quite another to pursue open-ended inquiries into whether any place contains or any person possesses documents that should be in only a very few places and known to a very small group of persons. Therefore, while audits should be allowed in the case of compliance with proprietary information protections, examinations should not.

As to areas beyond billing and proprietary information, it must be remembered that the PAP will address performance measurement auditing and other testing and the PAP will also address root cause analyses of persistent performance deficiencies. The PAP should also provide substantial financial incentives in all areas that the parties have agreed are important to successful performance by Qwest, from the Commission and CLEC perspectives. There is no reason at present to question the sufficiency of these measures to assure quality and compliant performance, which is the purpose that audits and examinations would serve.

Moreover, even if there were some reason to doubt the sufficiency of the PAP to address other areas of performance, the gravity of that doubt would have to be balanced against the potentially great inconvenience that could result from unconstrained CLEC examinations into any area of performance. Also weighing substantially in that balance would be the issue of competitive information transfer that could result if CLECs had wide access to how Qwest performs activities that compete with the CLEC's own existing or potential means of performing similar activities. Qwest does have to make its network available to CLECs; it does not have to make available peculiar knowledge that makes certain aspects of its operations particularly competitive.

There is of course, the argument that confidentiality can be protected by the use of protective agreements limiting use of the information in CLEC business operations. However, a practical conception of the use of such agreements must recognize that their effectiveness is inversely proportional to both the number of people who have access and the breadth of knowledge of the competitor's total business operations involved. From that view, offering them as a protective measure is not highly comforting.

Therefore, the SGAT section on auditing should contain the following section to address audits of proprietary information use:

> *Either party may request an audit of the other's compliance with this SGAT's measures and requirements applicable to limitations on the distribution, maintenance, and use of proprietary or other protected information that the requesting party has provided to the other. Those audits shall not take place more frequently than once in every three years, unless cause is shown to support a specifically requested audit that would otherwise violate this frequency restriction. Examinations will not be permitted in connection with investigating or testing such compliance. All those other provisions of this SGAT Section 18 that are not inconsistent herewith shall apply, except that in the case of these audits, the party to be audited may also request the use of an independent auditor.*

The granting of the right of the audited party to request an independent auditor (only the auditing party has that right now under the frozen SGAT) is intended to reflect the

particularly extensive access such an audit might require in organizations dealing with particularly sensitive information of the audited company.

Qwest's brief also noted that AT&T objected to the SGAT Section 18.3 provisions for treating audit information as confidential. AT&T did not brief this issue. Moreover, it is evident that audit information should be treated as confidential.

17. Scope of Special Request Process

AT&T noted that Qwest limited the special request process to UNE combination requests. The SRP is more streamlined than the BFR process is, because the SRP does not require a consideration of technical feasibility, which must already have been established. The purpose of the SRP is to address deviations in a requested service from the circumstances that apply to services and products that have pre-established prices and other terms and conditions. AT&T argued that the SRP should be available for all non-standard offerings for which there is no question about technical feasibility.[79]

Qwest made no response to this proposal on the merits. It argued that this workshop was intended only to address how the process worked, not to what it would apply.[80]

Proposed Issue Resolution: Qwest took too narrow a view of the questions deferred to this workshop. We are unaware of any document or statement that would have put all the participants on notice that we would here consider anything less than a general review of the SGAT provision dealing with the SRP. AT&T's request is reasonable; there is nothing unique about UNEs that makes them any more or less amenable to SRP resolution than are other non-standard elements or services, such as stand-alone UNEs, for example. That concluded, however, the language of SGAT Exhibit F, which addresses the SRP, does extend beyond UNE combinations. It is not clear what specific kind of expansion AT&T now seeks; therefore, the SGAT should be deemed as already providing an adequate basis for streamlined consideration of access to UNEs not yet subject to standard terms and conditions.

AT&T also incorporated by reference those parity arguments it made in connection with the BFR process, which was addressed under the *Bona Fide Request* issue above.[81] The resolution proposed there is equally applicable here. Parity with Qwest's retail operations is not an appropriate way to evaluate Qwest's execution of the SRP for CLEC requests.

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

As it did in the case of the Special Request Process, AT&T also incorporated by reference those parity arguments it made in connection with the BFR process, which was addressed under the *Bona Fide Request Process* issue above.

Proposed Issue Resolution: The resolution proposed under the preceding *Bona Fide Request Process* issue is equally applicable here. Parity with Qwest's retail operations is not an appropriate way to evaluate Qwest's execution of the SRP for CLEC requests.

[79] AT&T GT&C Brief at page32.
[80] Qwest GT&C Brief at page 36.

IV. Section 272 Separate Affiliate Requirements

A. Background

Section 272 of the Telecommunications Act of 1996 imposes substantial structural and nonstructural safeguards applicable to the provision of in-region InterLATA service by BOCs, such as Qwest. The FCC has said that section 271(d)(3)(B) of the Act makes compliance with section 272 an independent ground for denying relief under section 271.[83] The FCC specifically said that:[84]

> *Congress required us to find that a section 271 applicant has demonstrated that it will carry out the requested authorization in accordance with the requirements of section 272. We view this requirement to be of crucial importance, because the structural and nondiscrimination safeguards of section 272 seek to ensure that competitors of the BOC's will have 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 section 272 affiliate. These safeguards, therefore, are designed to promote competition in all telecommunications markets, thereby fulfilling Congress' fundamental objective in the 1996 Act.*

The FCC has recognized that this requirement obliges it to make "a predictive judgment regarding the future behavior of the BOC."[85]

Section 272 imposes a series of specific requirements, whose purposes include: (a) preventing improper cost allocation and cross-subsidization between Qwest and its §272 affiliate, and (b) assuring that Qwest does not discriminate in favor of this affiliate.[86] In summary, the provisions of Section 272 that are in dispute here require that:

- Qwest Communications provide in-region InterLATA service through an affiliate that is separate from Qwest Communications (the BOC) [§272(a)]
- The §272 affiliate "maintain books, records, and accounts in the manner prescribed by the Commission, which shall be separate from the books, records and accounts maintained by" Qwest Communications [§272(b)(2)]

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[83] AT&A TCG SC Brief at page 32.

[84] *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for the Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271 (released. Oct. 13, 1998) ("Bellsouth Louisiana II Order"); at ¶ 333

[85] *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. Aug. 19, 1997), ("Ameritech Michigan Order"), at ¶ 346.

[86] Ameritech Michigan Order at ¶ 347

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

- The §272 affiliate have "separate officers, directors and employees" from those of Qwest Communications [§272(b)(3)]
- Transactions with Qwest Communications be conducted "on an arm's length basis with any such transactions reduced to writing and available for public inspection" [§272(b)(5)]
- Qwest Communications not discriminate in favor of its §272 affiliate in any dealings between the two [§272(c)(1)]
- Qwest Communications account for all transactions with its §272 affiliate in accord with FCC accounting principles [271(c)(2)].

For ease of reference, the following list of Qwest entities will be discussed in this portion of the report:

- Qwest Communications International (QCI): the parent company of the Qwest family of enterprises
- Qwest Corporation (QC): the BOC, which is the entity that provides local exchange service in the 14-state region once served by US WEST
- Qwest Services Corporation (QSC): a wholly owned subsidiary of QCI, the parent. QSC owns the long distance affiliate, which is Qwest Communications Corporation
- Qwest Communications Corporation (QCC): the currently designated §272 affiliate. QCC is wholly owned by QSC and it is the pre-merger entity through which Qwest had previously provided InterLATA services in many areas of the United States
- Qwest Long Distance, Inc. (QLD): the entity that Qwest and before it US WEST used for some time to provide InterLATA service outside its 14-state region, and, until fairly recently the designated §272 affiliate.

Qwest filed the Section 272 testimony of Marie Schwartz and Judith Brunsting on March 30, 2001. AT&T filed the Affidavit of Cory Skluzak on May 4, 2001 and the Supplemental Affidavit of Cory Skluzak on May 17, 2001. Qwest filed the rebuttal testimony of Marie Schwartz and of Judith Brunsting on May 23, 2001. Qwest, AT&T and the Wyoming Consumer Advocate Staff filed briefs on section 272 issues[86] on July 23, 2001. AT&T and Qwest both filed Reply briefs on August 1, 2001.

[86] WYCAS's comments on section 272 urged the Wyoming Commission to review the entire record, including confidential testimony and exhibits, and to "seriously consider the concerns raised by the intervening parties". Post-workshop Brief of the Consumer Advocate Staff on Issues Relating to Public Interest, Track A and Section 272, Arising Out of Workshop Session 7 and Workshop Session 8, pages 4-5.

B. Separate Affiliate Requirements

1. Separation of Ownership

Qwest's testimony was that QCC, its designated §272 affiliate, is a wholly owned subsidiary of QSC, which in turn is wholly owned by the parent, QCI. Qwest also testified that QC and QCC own no stock in each other.[87] AT&T presented no evidence or argument to contest this testimony, although it did perform and present the results of its extensive examination of Qwest's compliance with Section 272 requirements.[88]

Proposed Conclusion: The uncontroverted evidence of record in these workshops fully supports a conclusion that QCC, the QCI entity currently proposed to provide in-region InterLATA service following anticipated §271 approval, is, by virtue of the corporate structure and ownership under which it operates, separate from QC, which is the entity that provides local exchange service in the seven participating states.

2. Prior Conduct

AT&T cited three prior instances that it says demonstrate a history of Qwest's non-compliance with the §272(a) requirement that in-region InterLATA services be provided through a separate affiliate:

- A September 27, 1999 FCC finding 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 that "the nationwide component of U S WEST's non-local directory assistance service was unlawfully configured."[89]
- A September 28, 1998 FCC conclusion that U S WEST, through its marketing arrangement with pre-merger Qwest, was "providing in-region, InterLATA service without authorization, in violation of section 271 of the Act."[90]

A February 16, 2001 FCC ruling that Qwest's "1-800-4US-WEST" calling card service constituted the provision of in-region, InterLATA service in violation of section 271.[91]

Qwest argued that each of these three cases resulted from a good faith difference of opinion (in some cases the same ultimately rejected opinion was held by at least one other BOC) about what the statutory term "provide" means in the context of in-region, InterLATA service. Finally, Qwest argued that reliance on past behavior as predictive of likely §272 compliance should be confined to behavior related to §272. Qwest argued

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[87] Brief of Qwest Corporation in Support of Its Compliance with the Requirements of 47 U.S.C. §272 (Qwest 272 Brief), at pages 5 and 6.
[88] Affidavit of Cory W. Skluzak Regarding Section 272, Exhibit S7-ATT-CWS-1 (Skluzak 272 Affidavit).
[89] *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 (released September 27, 1999), ¶¶ 2 and 63. See Exhibit S7-ATT-CWS-1, ¶¶ 106-109.
[90] *AT&T Corp. et al., v. U S WEST Communications, Inc.*, File No. E-99-42, Memorandum Opinion and Order, FCC 98-242 (released October 7, 1998), ¶¶ 1, 38 and 52. See Exhibit S7-ATT-CWS-1, ¶ 110.
[91] *AT&T Corp. v. U S WEST Communications, Inc.*, File No. E-99-28, Memorandum Opinion and Order, DA 01-418 (released February 16, 2001). See S7-ATT-CWS-1, ¶ 113.

that historical performance with respect to §271 requirements, which are different, has no place in a predictive examination related to §272.[92]

Proposed Conclusion: The examples cited, while significant in their own right, are not predictive of future Qwest conduct that is relevant to the issue of meeting the separate subsidiary requirements of §272(a). A proper examination of the significance of AT&T's references to the three prior FCC findings requires us to separate the analysis of §272(a) requirements into two related, but distinct, parts:

- Does the service in question constitute in-region intraLATA service?
- Assuming it does, then, is it being provided through a separate affiliate?

AT&T has unarguably demonstrated that Qwest has failed in a significant number of prior cases to determine correctly what does and does not constitute in-region InterLATA services. In other words, Qwest has often enough answered the first question incorrectly. However, there is no reason to believe that Qwest's subsequent decision to provide the services directly was a consequence of its refusal to accept the obligation to use a separate subsidiary for in-region, InterLATA services. Quite to the contrary, it is self-evident that Qwest only failed to use a separate subsidiary in the mistaken belief that the services did not constitute in-region, InterLATA service.

The important question here is whether Qwest accepts the separate subsidiary obligation and stands ready to meet it; the preceding proposed conclusion demonstrates that it does. Qwest's violations in the three examples cited were entirely a function of failing to meet the requirements of section 271, which is what the FCC found. Extending that to a §272 violation is at best peripheral to a predictive assessment of whether Qwest will accept the responsibility to provide in-region, InterLATA service through a separate subsidiary.

Qwest was held accountable in the past for failing to correctly interpret what constitutes in-region, InterLATA service: it should and undoubtedly will be so held in the future. There is, however, no reason to conclude here that such interpretations have had or will have anything material to do with the parallel issue of creation and maintenance of a separate subsidiary to provide in-region, InterLATA service.

C. Books and Records

Section 272(b)(2) of the Communications Act says 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.*

AT&T took issue with several aspects of Qwest's performance under this standard:

- Use of generally accepted accounting principles (GAAP)
- Relevance of the GAAP Materiality Principle

[92] Qwest 272 Brief at pages 29 and 30

- Adequacy of Documentation or "Audit Trail"
- Sufficiency of Internal Controls
- Separate Charts of Accounts
- Separate Accounting Software

L. Generally Accepted Accounting Principles

Qwest cited the testimony of its witness Brunsting in support of the conclusion that QCC follows GAAP.[93] Qwest said that QCC and QLD have used accrual accounting, which is required by GAAP. Moreover, while contesting the requirement that QC must also follow FCC requirements in accounting for transactions with the §272 affiliate,[94] Qwest said that the rebuttal testimony of its witness Schwartz shows that QC (the BOC) does follow such accounting requirements.

AT&T's examination of books and records disclosed what it considered to be many examples of a failure by QCC and by QLD (when it was the §272 affiliate) to follow accrual accounting and to make timely transaction entries into its books and records:[95]

- Failure to record any QC/QCC transactions between July 2000 and April 2001
- Use of artificially high billing rates for service to QCC, which served to create cross subsidies and to deter use of services by third parties
- Failure to accrue and pay expenses for roughly half (as a percentage of total services billed) the services rendered to QLD until the year after the services were provided
- Billing monthly services provided to QLD (such as rent) only yearly
- Other failures to accrue expenses for services to QLD on a timely basis

Qwest's main brief did not address the merits of each of the findings made by Mr. Skluzak in his Exhibits S7-ATT-CWS-1 and 2. However, it did concede that it had not accrued expenses payable to QCC before it was designated as its §272 affiliate, but argued that this fact is not probative because the amount in issue constituted less than 1 percent of QC's total yearly affiliate transactions, and because the failure to accrue expenses was for a finite period before QCC became its designated §272 affiliate.[96]

Qwest's reply brief did object to the AT&T contention that no QC/QCC transactions were posted between July 2000 and April 2001, but again relied not on contesting the factual accuracy of the findings of Mr. Skluzak, but upon the arguments that: (a) the transactions in question predated the time when QCC was designated as the §272

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[93] Qwest 272 Brief at page 7

[94] Qwest said that the FCC's GAAP requirements under §272(b)(2) and (c) apply only to the §272 affiliate, not to the BOC

[95] AT&T's Brief on Section 272 of the Act (AT&T 272 Brief), at page 5, citing specific paragraphs (see fn 97 and 98) of the examinations that Mr. Skluzak performed of Qwest books and records, which were described in Exhibits S7-ATT-CWS-1 and 2.

[96] Qwest 272 brief at page 8

affiliate, and (b) that AT&T made no claim that Qwest is now failing to accrue and pay expenses on a timely basis.[97]

Qwest's reply brief did address some of the AT&T findings about the failure to accrue expenses associated with services to QLD when it was the designated §272 affiliate. It provided evidence to show that:

- One expense item that AT&T found to be accrued in the year after services was in fact was accrued on a timely basis
- Two expense items that AT&T said were paid late were not paid on a current basis because they were disputed by QLD under Master Services Agreement procedures posted on the web site
- One expense item that AT&T said was not accrued properly appeared to duplicate another already criticized by AT&T.

Qwest's brief did appear to acknowledge what it would term "isolated instances" and exceptional failures to bill or accrue expenses involving QLD.[98]

Qwest also argued that consideration should be given to the difficulty it faced when it decided after the merger to change from one affiliate to another as the entity that would provide in-region, InterLATA service. Qwest cited the testimony of its witness Brunsting that a task from mid-January to late-March of 2001 to accomplish the transition, which included a review of all QCC asset records to address asset ownership and special billing contract issues, to realign more than 7,500 employees, and to examine all relevant contracts and post-merger transactions. QCI's outside auditor provided assistance in identifying the transactions. Qwest noted that, after completing this transition, it was able to reduce discrepancies between its postings and its billings to zero percent for April and May 2001. The April data was submitted as an exhibit at the workshop; the May data was submitted in an e-mail sent two days before the filing of reply briefs on §272 issues.[99]

Qwest's brief summarized a number of the detailed changes it made to assure proper controls in the area of §272 compliance:[100]

- Quarterly monitoring of asset transfers
- Training of "key network leaders"
- Establishment of a Compliance Oversight Team that reviews all QCC transactions for compliance
- Annual code-of-conduct training and employee certification
- Targeted training for QC sales executives who do business with QCC
- Physical separation and color-coded badging of employees

[97] Reply Brief of Qwest Corporation in Support of its Compliance with the Requirements of 47 U.S.C. §272 (Qwest 272 Reply Brief) at page 3.
[98] Qwest 272 Reply Brief at pages 10 and 11.
[99] Qwest 272 Reply Brief at pages 7 and 8.
[100] Qwest 272 Reply Brief at page 9

- Establishment of a compliance hotline
- Other special training

Qwest said that the FCC has found similar measures at other BOCs sufficient to meet what Qwest quoted as the applicable test, which is to demonstrate that the BOC

> *has implemented internal control mechanisms reasonably designed to prevent, as well as detect and correct, any noncompliance with Section 272.*[99]

Proposed Conclusion: Qwest focuses overmuch on the date at which QCC and QLD were and were not designated §272 affiliates. The issue that is material here is to determine the degree of confidence that can be placed in the ability to provide proper, complete, and timely recognition on the books and records for transactions between these entities. The past customs of the Qwest family of companies is relevant whether or not the transactions occurred when QCC was designated as the §272 affiliate. QC provides local exchange service under regulation by each of the seven participating commissions. It would be difficult to imagine Qwest arguing before them that the regulated entity has not operated since time out of mind under an obligation to provide adequate assurances that the regulated entity charges and receives (with respect to services among affiliates) fair and appropriate prices. Cross-subsidization is by no means an issue that the Telecommunications Act of 1996 created. Public service commissions have long concerned themselves with whether regulated services were burdened by costs that other affiliates should bear, or deprived of revenues that other affiliates should not be taking. It is doubtful that US WEST has in the past operated without recognition of this concern of state regulators; in any case if it failed to have such recognition, it should draw no sympathy at this point.

Therefore, we begin the analysis of this issue under the proposition that the burden to account properly for inter-affiliate transactions has not changed sufficiently (by passage of the 1996 Act or any FCC pronouncements thereunder) to render irrelevant the performance history for periods prior to designation as a §272 affiliate. However, we begin as well by rejecting any notion that once an entity is so designated, one should look at transactions involving that entity before it was such an affiliate no differently from the transactions that predated it. We will look at transactions from the perspective of what status the involved entities had when the transactions took place and we will judge the significance of those transactions to forward-looking circumstances appropriately. To do otherwise, would be to anomalously apply hindsight, on the one hand, or to erroneously expunge all transaction history before the 1996 Act came along.[102]

The natural conclusions that can be drawn include the following:

- Qwest did not, outside the context of §272, find it sufficiently important to assure that transactions between QC and QCC were accrued on a timely basis, or paid promptly or subjected to interest penalties for untimely payment

[99] Qwest 272 Reply Brief at pages 9 and 10, citing the *SBC Texas Order* at paragraph 398 and the *BANY Order* at paragraph 406 and note 1253.

[102] This witness of course assumes that it is acceptable to selectively split infinitives, as it were.

- Qwest did eventually undertake substantial efforts to bring its transactions, both past and current, into compliance with applicable accounting requirements
- The very magnitude of that effort gives reason to merit validation that the efforts undertaken have had current effect and are likely to continue to prove sufficient to meet applicable requirements
- The evident lack of attention to the kinds of transaction details that QC clearly would have paid had a third party (as opposed to an affiliate) been at the other end of the bargain buttresses the need for validation of the current and future effectiveness of the recent improvement efforts by Qwest
- The fact that AT&T's testing did disclose some errors with respect to QLD also buttresses this need, although it should be emphasized that the AT&T findings that remain valid after consideration of the documents Qwest provided on the record would not alone produce sufficient concern to warrant special measures at this time.

Therefore, Qwest should be required to arrange for independent (i.e., third-party) testing, covering the period from April through August of 2001 to determine: (a) whether there have been adequate actions to assure the accurate, complete, and timely recording in its books and records of all appropriate accounting and billing information associated with QC/QCC transactions, (b) whether the relationship between QC as a vendor or supplier of goods and services and QCC has been managed in an arm's length manner, including, but not necessarily limited to a consideration of what would be expected under normal business standards for similar contracts with an unaffiliated third party, and (c) whether there are reasonable assurances that a continuation of the practices and procedures examined will continue to provide the level of accuracy, completeness, timeliness and arm's length conduct found in examining the preceding two questions.

The examination should be conducted under the following requirements:

- Apply the testing and evaluation criteria deemed necessary by an independent party (qualified to perform such an examination) to provide a high degree of confidence that the answers it provides to these two questions can be relied upon by regulators.
- Consider in the development of test procedures the need for the completion of the examination and the filing with the seven participating commissions of the report described below no later than November 15, 2001
- Produce a report and supporting work papers that present a factual basis upon which regulators can form their own, independent answers
- The current independent auditor, whose personnel have substantially contributed to the creation of transaction detail whose adequacy will be examined, should not be considered for the performance of this examination
- Apply a materiality standard that does not consider consolidated financial results, or even the overall financial results of QC. In determining what would constitute a material failing or exception in connection with the two questions to be

[illegible] the examination will consider as the applicable universe not more than the total transactions between QC and QCC over the period to be covered. The reasons for the application of this materiality standard are described in the discussion of the immediately following issue.

Positive answers to the three established questions, under the type of examination described herein, should be sufficient to reduce to an acceptable level the current uncertainty about whether entry into the in-region, InterLATA market will be accompanied by compliance with the requirements of section 272(b)(2). Such answers will do so by validating whether the major efforts that Qwest has recently undertaken to produce significant change in its prior practices have achieved the changes from past practice that are necessary to comply in the future with these requirements.

Qwest's brief correctly noted that the "biennial audits" contemplated under section 272(d)(1) do not begin until after market entry under §271. Those audits serve a much broader purpose than the examination procedures contemplated here. Biennial audits, for example, will have to examine the much-expanded relationships between BOCs and their affiliates after these affiliates enter new markets. Qwest's brief also suggested that requiring it to undergo an audit here would impose an inordinate burden on it, because the FCC has required no other BOC to undergo a §272 audit before gaining §271 relief.[26] The examination proposed here is not, however, a "§272 audit." Rather, this examination is intended to determine whether the substantial efforts that Qwest has only recently undertaken, which it presumably undertook because it recognized the need for them, are sufficient to provide, in light of its recent history, adequate assurances that it will begin operating (and that the FCC allows it) an era of in-region InterLATA service in compliance with §272(b)(2) requirements.

Qwest did provide evidence of at least partial success (its findings of zero percent discrepancy in reconciling Internet postings with billing detail). However, their introduction, particularly the one that was filed two days before the reply briefs, so late in the process does not give sufficient comfort that they resulted from complete and fully reliable (for our purposes here) examinations.

2. Materiality

Qwest cited the opinion of its outside auditor for QCI's consolidated operations as evidence that QCI follows GAAP in all material respects. Qwest further said that the FCC has found that a showing about the parent's consolidated financial statements was sufficient to persuade the FCC in the Louisiana II 271 order that the §272 affiliate also followed GAAP.[27]

AT&T took issue with Qwest's use of such a materiality standard. It noted that the testing and examination undertaken by the outside auditor before providing its opinion might not have tested any transactions between QC and QLD. AT&T said that, in designing its sampling, the auditor would have had to deal with a universe that included $11.3 billion in consolidated QCI income and $9.8 billion in consolidated expenses in

[26] Qwest 272 Reply Brief at pages 8 and 9.
[27] Qwest 272 Brief at page 7.

here. In essence, QC paid QLD $29 million and QLD paid QC $3.5 million in this period. Here, AT&T said, what was material to the BOC/§272 affiliate relationship might well not be material in the consolidated QCI context. AT&T went on to reject the relevance of applying materiality even in a narrower context, however, citing the General Standard Procedures for Biennial Audits, which it said the Joint Federal/State Oversight Group has established. AT&T said that those procedures required all errors or discrepancies to be reported.

Proposed Conclusion: Underlying Qwest's main brief and its testimony were notions of materiality as it is defined in connection with the statements one typically sees from independent auditors in connection with the filing of required public disclosures of consolidated financial statements. Designed to give comfort to investors, such statements understandably and appropriately focus on overall results. They may well, as is likely the case here, be based on test procedures that resulted in the examination of none, let alone a representative example, of the transactions between QC and its §272 affiliate.

The focus of such statements makes them all but irrelevant in addressing the degree to which the transactions between QC and QCC or QLD comply with the requirements of §272(b)(2). What counts in addressing materiality is not QCI's entire universe, nor even QC's total universe, but the universe that consists of transactions between QC and QCC or QLD. AT&T is therefore correct to a substantial degree in its argument. It goes too far in dismissing materiality altogether, however.

That step has the effect of requiring perfection with respect to completeness, accuracy, and timeliness. It is self-evidently true that this standard could not be met in its own operations or, more importantly, in the operations of any wholesale supplier. Moreover, the standards that AT&T cited only relate to what must be reported in a biennial audit. The issue here is what should be considered material for determining pre-market entry compliance with §272(b)(2). The fact that something merely has to be included in a report of an audit for a different purpose hardly means that it would alone be grounds for a determination that market entry should be denied for non-compliance with §272(b)(2).

Thus, the concept of materiality should remain a part of evaluating compliance with §272(b)(2), but the universe to which the standard of materiality should be applied consists of the total transactions, in the time period in question, between QC and QCC or QLD.

3. Documentation

AT&T said that, as of January 2000, QC stopped providing information that is material to meeting the disclosure requirements of §272(b)(2). Until that time, postings to its web site included the following information:

- Service agreements
- Work and task orders issued under those agreements
- Details of specific transactions under the agreements and orders.

AT&T said that Qwest dropped the transaction details from the list of posted information. AT&T further argued that the failure to post QCC transactions prior to April 2001 demonstrates lack of an audit trail.[105]

Proposed Conclusion: As footnote 8 of AT&T's 272 brief indicates, this aspect of the AT&T argument depends upon the same failure to make timely accruals that AT&T cited to support its argument that Qwest does not comply with GAAP. The additional argument made here is that Qwest recently decided to remove from its Internet posting the details of particular transactions that take place under general agreements or work task orders. That additional argument is misplaced. The point of public posting of transaction information is to permit a non-affiliated entity to decide if it wished to make use of the same services that are being provided to a Qwest affiliate.

An auditor may have reason to test actual compliance with posted terms and conditions, but that does not mean that the public posting should support audit requirements, as opposed to the need for making a decision about the value of services that a non-affiliate might be able to secure. Thus, the public posting issue, which is addressed more fully below, has nothing to do with the question here at issue, which is whether there exists somewhere the information necessary to allow a validation that the services actually being provided to affiliates are in accord with the posted agreements, work orders, and task orders upon which non-affiliates must rely in deciding whether to take service from Qwest.

But still the issue raised by AT&T is not clearly severable from the accrual issue already raised and dealt with above. The examination recommended earlier in this report should test whether the posting of information is consistent not only with what the company says it provides for affiliates, but with what is actually provided. Therefore, if there is any difficulty in determining what is actually being provided and under what terms and conditions it is being provided, the examination required above will already address it. Therefore, no further action is necessary to address this aspect of AT&T's argument.

4. Internal Controls

AT&T also argued that its findings about the lack of timely accrual and billing for services demonstrated a lack of adequate controls at Qwest.[106]

Proposed Conclusion: Again, AT&T relied here upon the same factual basis as it used to argue that Qwest fails to follow GAAP. As noted under that issue, Qwest has cited many changes it has made to provide assurances that it is now complying with all applicable requirements. The examination recommended above was intended to determine whether those Qwest actions have produced sufficient assurances of such compliance. Therefore, this aspect of AT&T's concerns will be adequately addressed by that examination.

[105] AT&T 272 Brief at page 5
[106] AT&T 272 Brief at page 9

5. Separate Charts of Accounts

AT&T noted that it took several efforts before it could finally secure charts of accounts for QC, QCC, and QLD. AT&T acknowledged that it eventually secured them and that they satisfied the requirement that they be separate. AT&T argued that the failure to provide evidence of such separateness demonstrates a lack of diligence with respect to compliance with this requirement.[107]

Proposed Conclusion: The evidence of record demonstrates an acknowledgement by AT&T that the requirement about which it has expressed concern has in fact been met. The issue is not whether AT&T's examiner found them without effort, but whether they in fact existed. The record demonstrates that Qwest maintains separate charts of accounts for the entities involved.

6. Separate Accounting Software

AT&T said that it could find no evidence that QC and QLD were using separate accounting software. AT&T also said that it had found evidence that there had been a reversal of a billing to an affiliate, which called into question the Qwest assertion that it was not possible for one Qwest entity to enter a transaction by using any Qwest entity code other than its own. AT&T acknowledged that there is evidence that QC and QCC have separate accounting codes.

Proposed Conclusion: Much of AT&T's argument assumes that separate accounting software between the BOC and the 272 affiliate is required. However, AT&T has provided no legal support for that contention, which, in any event, runs counter to the FCC's recognition that inter-affiliate services represent an opportunity for economies of scale that should not be denied a company such as Qwest.

The real issue is whether the accounting function is separately performed and subject to adequate controls. AT&T acknowledges that the evidence now indicates that QC and QCC have different accounting software, which is more than sufficient to demonstrate separateness. As to the issue raised about QLD, citing a single instance of a reversal is not demonstrative of a systemic weakness or failure. Moreover, the fact that a reversal was made does not necessarily relate at all to the ability of one affiliate to make entries into the records of another affiliate. Stand-alone companies (i.e., those with no affiliates of any sort) make errors when they bill the wrong customer. That an entity can correct its own entry should not be in question; the issue is whether one entity can enter information as if it were another entity.

The evidence presented raises no substantial argument that Qwest fails to adequately separate the accounting of the BOC and the 272 affiliate.

D. Separate Officers, Directors, and Employees

AT&T asserted that Qwest's conduct to date demonstrates inadequate compliance:[108]

[107] AT&T 272 Brief at page 11
[108] AT&T 272 Brief at pages 12 and 13

- Employee transfers back and forth between QC and the 272 affiliate
- 100 percent usage by the 272 affiliate of many QC employees
- Participation of 272 affiliate employees in a QC award program
- Lack of comparison of payroll registers
- Lack of separate payroll administration[109]
- Officer Overlap

1. Routine Employee Transfers

Section 272(b)(3) says that the 272 affiliate "shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate." AT&T said that a "revolving door atmosphere" has produced movement back and forth between QC and the section 272 affiliate, which has "subverted" the purpose of this section of the Act.

Qwest argued that neither the Act nor the FCC precludes movement back and forth between QC and QCC. Specifically, Qwest said, what is prohibited is "simultaneous" employment by both.[110] Qwest also cited the fact that such transfers involve fewer than 100 employees.[111] Qwest also said that it has taken adequate steps to prohibit any inappropriate conduct that might result from such employment movement, including:[112]

- Requiring the return of 272-affiliate assets by an employee leaving the 272 affiliate
- Requiring employees leaving the 272 affiliate to account for documents in their possession
- Requiring employees leaving the 272 affiliate to acknowledge that they will no longer have access to that affiliate's information and that they may not disclose the affiliate's information
- Requiring such employees who take positions with another Qwest entity to sign a non-disclosure agreement that prevents the sharing of non-public information between the companies
- Instituting procedures training to ensure compliance with section 272
- Requiring employees to review annually the Code of Conduct that governs relationships among the QC affiliates
- Providing training for new employees
- Informing employees that violations may lead to disciplinary action that includes termination of employment
- Providing for physical separation of the offices of QC and QCC

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[109] These last two elements of AT&T's argument came in its 272 Reply Brief, at pages 5 and 6.
[110] Qwest 272 Brief at pages 11 and 12.
[111] June 5, 2001 transcript at page 159.
[112] Qwest 272 Brief at pages 12 and 13.

- Providing color-coded badges to identify the 272 affiliate's employees.

Proposed Conclusion: Congress has not prohibited movement between affiliates; it requires instead independent operation and separate employees. AT&T's argument conflates the Congressional concern about operating independence and separation of employment. A "revolving door" policy could arguably compromise independent operation. However, transfers of fewer than 100 employees out of the thousands involved in the restructuring that Qwest did among QSC, QC and QCC do not establish that Qwest is using transfers back and forth in a way intended to or actually causing a compromise of operational independence. With the current level of transition in the communications business, such levels can hardly be expected even to exceed the number of displaced Qwest personnel who find employment with CLECs, let alone sufficient to raise immediate concerns about operational independence and the protection of information.

The steps that Qwest has taken to assure independent operation and protection of confidential information are adequate to establish a baseline mode of operations that gives current assurances that it will meet applicable requirements. The existence of such a baseline is all that is required for present purposes, given the monitoring and examination of employee transfers that will take place in the future, for example, as part of biennial auditing.

The record here supports a conclusion that Qwest maintains the required degree of employee separation, and that transfers to date, given the mitigation measures adopted by Qwest and not challenged as to sufficiency by any other party, do not rise to a level that suggests a compromise of operational independence.

2. 100 Percent Usage

AT&T argued that employment of "many" individuals by QC who have been assigned full-time to the work of the 272 affiliate, also subverts the purpose of section 272(b)(3).[113]

Qwest responded with the general argument that the FCC clearly does not prohibit service sharing, which presumably would require the assignment of some QC employee time to the 272 affiliate he or she serves. Qwest then went on to say that its policy is to limit such assignments to specific time periods, functions, and projects, which relate to services posted on the Internet, and which are available to non-affiliates.[114] QC and QCC also agreed to implement a new policy prohibiting such assignments for periods of more than four months out of any twelve.

Proposed Conclusion: We must begin by recognizing that the FCC allows shared services between a BOC and its 272 affiliate. We next must understand that if the BOC is providing such services, the recipient (the 272 affiliate) must pay for them. Thus, it should not be considered surprising or inappropriate to find a substantial percentage of a BOC employee's time being charged to the 272 affiliate over what looks to be a long period of time. In fact, if one considers the economies of scale that come from common

[113] AT&T 272 Brief at page 12.
[114] Qwest 272 Brief at page 14, citing the June 7, 2001 transcript at pages 300 and 301.

provision of services (which we must, given the FCC's recognition of both the value and propriety of common services) it would also not be surprising to find that what four employees can provide the 272 affiliate through one quarter of their time, one employee can provide more efficiently through 100 percent of his or her time. Accordingly, without knowing more, there is no reason to be immediately critical upon observing that an employee has assigned substantial time to the 272 affiliate on a long-term basis.

On the other hand, we can think of examples where 100 percent assignment of time to the 272 affiliate is more clearly troublesome. Take as an example the hypothetical case where the director of marketing for the 272 affiliate is a BOC employee who assigns all time to the 272 affiliate. Such a complete and long-lasting separation of nominal employment and actual responsibility should trigger questioning, because the use of long-term assignments of senior personnel to an affiliate can have the tendency to compromise the separate employment requirement. However, it is not possible to prescribe the exact conditions where such compromise would lead to a conclusion that there occurred a failure to meet the intent of that requirement.

Certainly, the commitment to limit full-time assignments to no more than four months of any twelve represents a good-faith effort to simplify what can become a murky, very judgmental question to address. That proposal is therefore acceptable for present purposes, recognizing that experience gained through ongoing monitoring efforts (such as those attendant to biennial auditing) will be the better judge of how long-term separations of employment and assignment affect the fulfillment of Section 272 objectives.

3. Award Program Participation

AT&T cited an award program that allowed the participation of both QC and QCC personnel, which, AT&T said, compromised the independent operation of the two entities. AT&T said that its witness's examination of Qwest records disclosed the payment of "team awards" to former employees of QLD who were later "rehired" by QC. It appeared from AT&T's examination that, after returning to Qwest, the former QLD employees received such awards. AT&T found that a terminated work order (RMLD099) listed on QLD's website described a program that rewarded employees for customer referrals and cost saving ideas; AT&T said that QLD employees were allowed to participate in this program.[115]

Qwest said that the FCC had already rejected a claim by AT&T that the FCC should, "prohibit the BOCs from using any compensation system that directly or indirectly bases any part of the compensation of BOC officers, directors, or employees on the performance of the affiliate, or vice versa."[116]

Proposed Conclusion: As a general matter, the FCC has already decided that at least the overall performance of the BOC can be considered in compensating 272 affiliate employees and vice versa. However, tying individual compensation to overall affiliate performance is not what is at issue here. The FCC should not be read as being indifferent to a compensation mechanism that specifically induces BOC or 272 affiliate employees

[115] Exhibit S7-ATT-CWS-1, at paragraph 30.
[116] Qwest 272 Reply Brief at footnote 69, citing paragraph 186 the *Non-Accounting Safeguards Order*.

to act in a manner that would promote inappropriate inducements for customers to change carriers. Therefore, if the compensation mechanism at issue can be read to create a clear inducement to misuse information or to act anti-competitively, a further inquiry would be in order.

A close reading of the exhibit relied upon by AT&T does not present any evidence of improper inducements. There is nothing wrong with inducing a QC or a QCC/QLD employee (whether or not a former employee of the other) for referring customers or offering cost saving suggestions for the benefit of their employer. Both have customers and both have costs. The primary incentive, not to mention the primary knowledge base and the primary concern of the employee's management, can be expected to be the business of the affiliate by whom the employee is currently employed. It is farfetched to project, as AT&T does, that such a program will have the effect of causing an employee to spend material time trying to refer customers or save costs for the other company, rather than for the one by whom it is currently employed.

Except in the case of a misuse of information (otherwise dealt with through conduct restrictions and training, as is elsewhere discussed in this report), there is no compromising of independent operation by virtue of the fact that there is a common customer referral and cost-saving reward system.[117] It is true that the record does not disclose all of the facts about the operation of this reward system. There has been no claimed shortage of discovery opportunity in these proceedings. Absent more from the proponent of this issue, therefore, it remains clear that there is no significant likelihood that running it to ground will bear significantly on Qwest's compliance with the independent operations requirements of section 272.

4. Comparing Payroll Registers

Qwest testified that it performed a comparison of the payroll registers of QC and the 272 affiliate, and that this comparison showed no overlap.[118] AT&T argued that the evidence demonstrated that such comparisons came about only recently, thus demonstrating that Qwest had failed to verify earlier that it complied with separate payroll requirements.[119] AT&T specifically said that it was clear that Qwest, before these proceedings, had never conducted a payroll register analysis for prior years.[120]

Proposed Conclusion: AT&T has cited no requirement that there be routine, cyclical payroll register comparisons for some period predating a 271 application. Thus, the issue of whether Qwest has performed them repeatedly in the past is not directly relevant. The primary issue is whether the evidence before us shows what the current practice is and how well it is implemented. The evidence of record demonstrates that there is not at present an overlap, that Qwest recognizes the obligation to preclude overlap, and that Qwest considers an examination of payroll registers to be an appropriate tool in assuring that the restriction against simultaneous employment is being met.

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[117] This conclusion stands even if (although it has not been proven that the program is intended to reward employees for actions intended to benefit QCI entities other than the one that employees them directly) the economic impact of the program is to an employee of one affiliate for benefits to another affiliate.
[118] Qwest 272 Brief at page 10, citing its Exhibits S7-QWE-MES 1 and MES-3.
[119] AT&T 272 Brief at page 13, citing Exhibit S7-ATT-CWS-1, at paragraph 31(j).
[120] AT&T 272 Reply Brief at page 5.

Under these circumstances, we can conclude that the requirement is being met, that there is no basis in this record for concluding that it has not been met historically, and that we may be satisfied that the biennial audits will suffice to assure that the requirement continues to be met.

5. Separate Payroll Administration

AT&T argued that the performance of recruiting by QCC for QC and the lack of separate payroll administration between the two would undermine any conclusion that the companies maintain the operating independence required by section 272(b)(1).[121] Qwest noted that AT&T has conceded in testimony that separate payroll administration is not an FCC requirement, and it noted that the payroll administration function that QC provides for QCC is available as required to non-affiliates at posted rates, terms, and conditions.[122]

Proposed Conclusion: What AT&T essentially complains of, in both the cases of recruitment and payroll administration, is the provision of common services between the BOC and the 272 affiliate (i.e., between QC and QCC). The FCC has, however, specifically rejected the notion that common services should be prohibited as a means of encouraging "independence" as AT&T would define it. To the contrary, the FCC has endorsed common services, outside the network-related areas where they are specifically prohibited, as a means of capturing economies of scale.[123] This rule is particularly sound, as it allows Qwest to do no more than to exploit the same kinds of economies that are available to other efficient competitors in the marketplace.

Hamstringing the BOCs is not the goal; assuring that they do not unduly advantage themselves is. The conduct limits, simultaneous employment restrictions, biennial auditing, and other requirements are sufficient to mitigate the potential for such discrimination. There is no evidence here of any need to go further and remove those natural economies that, in a competitive marketplace, inure to the benefit of customers. Were we to eliminate these two areas of common service, there would be no end to the debate, short of prohibiting any at all, about which services should be permitted and which should not.

6. Officer Overlap

AT&T expressed concern about the independence of 272 affiliate employees, officers and directors.[124]

Qwest said that this individual has not been an officer of QCC since it became the 272 affiliate on March 26, 2001. From that time forward, according to Qwest, the individual has been an employee and officer of QSC and a director of QC (the BOC).[125]

Proposed Conclusion: The cited transcript pages contain no information from which it can be concluded that the employee whose status AT&T questioned simultaneously

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[121] AT&T 272 Reply Brief at pages 5 and 6.
[122] Qwest 272 Brief at page 15.
[123] Third Order on Reconsideration, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 14 FCC Rcd 16,299, ¶ 18 (1999).
[124] AT&T 272 Reply Brief (Confidential Version) at page 6.
[125] Qwest 272 Reply Brief at page 16, citing the June 7, 2001 transcript at page 265.

served the BOC and the 272 affiliate as an employee, officer, or director. In fact, there is no evidence that the employee was ever an employee or officer of QC, the BOC. The employee came from the Qwest side of the pre-merger house. The employee did become, according to the evidence, a director of the BOC, but after leaving employment with QCC. The evidence does not show that the employee ever was a director of QCC. When asked about whether AT&T's witness had any information that the employee served both QC and QCC simultaneously, he could not recall without reference to his notes. There was subsequently no testimony from AT&T regarding those notes.

The record fully supports the conclusion that there was no simultaneous service. Moreover, this employee made a clear break from the pre-merger Qwest side of the house before taking on a position as a director of QC. It is beyond unrealistic to expect no movement between companies such as Qwest and US WEST after a merger; more importantly, such movement is not improper. AT&T's suggestion that this one cited incident somehow casts doubt on the independence of the 272 affiliate's employees, officers, and directors is without a substantial factual basis, and is lacking a clear legal foundation.

E. Transaction Posting Completeness

Section 272(b)(5) requires the 272 affiliate to cause its transactions with its affiliated BOC to be "reduced to writing and available for public inspection." The FCC has set the standard for meeting this requirement in saying that:

> [T]*he description of the asset or service and the terms and conditions of the transactions should be sufficiently detailed to allow* [the FCC] *to evaluate any compliance with our accounting rules.*

AT&T claimed that Qwest failed to meet this standard in a number of ways:

- By deciding to stop posting the specific billed amounts necessary for AT&T to determine whether Qwest complied with FCC accounting rules
- By failing to post on a timely basis transactions with QCC from the time that it became a 272 affiliate
- By failing to provide service completion dates for some services
- By failing to provide the required verification of the accuracy of the publicly posted information.

1. Posting Billing Detail

AT&T objected to Qwest's decision, apparently effective as of January 1, 2000, to stop posting "billed amounts" under the transactions whose terms and conditions Qwest was making public. From that point, Qwest began to limit inspection of such information to on-site examinations by those who first executed protective agreements.[126] AT&T said

[126] AT&T 272 Brief at page 14.

that posting the agreements, work orders, and task orders is not sufficient, because non-affiliates need to see the transaction details in order to make an informed decision about whether to take the same services. AT&T would include in such required detail the actual service or items purchased and the amount actually paid for it. AT&T said that such detail was also required to verify that there was no discrimination against non-affiliates in providing the services or items at issue.[127]

Qwest said that its posting of Master Services Agreement, along with work orders thereunder, served to provide adequate notice of the details of the services provided, the dates of service commencement and completion, and the prices charged, with additional detail available to those willing to execute a nondisclosure agreement.[128] Qwest said that the FCC had already objected to the very same request for billing detail that AT&T made here. Specifically, according to Qwest, the FCC approved of SBC's postings, over AT&T's objections, even though they did not include "the billing details about individual occurrences of services provided pursuant to its agreements." Qwest also noted that it provided a monthly reconciliation of all transactions accrued and billed.[129]

Proposed Conclusion: The requirement for making transaction information available serves two purposes, which are distinct and which require distinct levels of information. The first purpose is to provide competitors with enough information to make a business decision, i.e., whether to avail themselves of their right to take services on the same terms and conditions as are provided by the BOC to its 272 affiliate. Serving that purpose does not necessarily require the posting of the individual transaction detail that AT&T seeks. Depending upon what they contain, the master agreements and work orders under them may be sufficient. It is correct that the information posted needs to describe the terms and conditions under which services were actually provided, should they differ from what the master agreements or work orders provided. However, the monthly posting of what Qwest calls "reconciliation" or what AT&T calls "true up" data can serve this need. The examination recommended under the preceding *Books and Records* discussion will address the sufficiency of the master agreements, work orders, and reconciliation data to provide competitors with an adequate specification of terms and conditions to allow rational decisions about taking services.

The second purpose for making transaction data available is to assure that audits or other formal examinations of transactions can take place. There is no sound reason why a public posting of such data is necessary to accomplish this purpose. There are, to the contrary, substantial reasons for not making such information publicly available. The nature and level of services that are provided inside Qwest are competitively sensitive. A competitor may get access to any service that a BOC provides for a 272 affiliate. There should not be free access to the exact level and timing of services that a BOC is providing. Therefore, requiring non-disclosure agreements and on-site examinations of such information constitute appropriate means for assuring that audit-related work can take place without allowing competitors to make competitive use of the information observed. In fact, if there are adequate means for regulatory review of such information,

[127] AT&T 272 Brief at page 20.
[128] Qwest 272 Reply Brief at page 12.
[129] Qwest 272 Reply Brief at page 13, citing paragraphs 405 and 407 of the *SBC Texas Order*.

it may be argued that access to such information could logically be denied to competitors altogether.

2. Initiation of the Posting of QCC Transactions

There was substantial debate about when QCC became, for purposes of transaction posting, subject to section 272 requirements. AT&T argued that Qwest's assertion that the initiation date was March 26, 2001 was undercut by Qwest's own evidence, which supported a date of January 1, 2001. Thus, according to AT&T, Qwest violated the posting requirements by failing to post transactions before late March of 2001. Moreover, AT&T said that QCC became, by operation of law, a section 272 affiliate as of the July 2000 US WEST/Qwest merger effective date.[130] AT&T continued by reciting many instances of "late" transaction postings, which generally correspond to the same cases of failure to follow GAAP or to provide sufficient internal controls (see the earlier discussion under *Books and Records*). AT&T also noted that the web site of the former 272 affiliate, QLD, was activated in September of 1998, close to two years after the effective date of the *Accounting Safeguards Order*, which established transaction posting requirements.[131]

Qwest responded that it is now providing timely transaction posting, that it should not be obliged to post transactions before an entity becomes a section 272 affiliate, that many of the cases cited by AT&T occurred during the unsettled period of the transition to QCC as the 272 affiliate during the first 3 months of 2001,[132] and that AT&T's arguments here essentially repeat what it termed elsewhere as a failure to follow GAAP, a lack of internal controls, impermissible discrimination, and a failure to follow accounting rules.[133]

Proposed Conclusion: In the first instance, AT&T begins from an illogical conception of what constitutes a section 272 affiliate. AT&T incorrectly argues that QCC became a 272 affiliate by operation of law when it became affiliated with a BOC through merger in July 2000. Not all BOC affiliates are necessarily section 272 affiliates; in fact, none may be, depending on the circumstances. Even an affiliate that provides out-of region InterLATA services is not automatically a 272 affiliate. That section only says that manufacturing, in-region InterLATA telecommunications, and InterLATA information services need to be provided through a separate affiliate. If no such services are being provided, then there is under the Act, no "272 affiliate." Moreover, the transaction posting (and other) requirements of section 272 only apply to "the separate affiliate required by" section 272.

Therefore, absent the provision of in-region, InterLATA services (the other two categories are not at issue here), it can be argued that there was and is, at least for some purposes, no "272 affiliate" within Qwest. Alternatively, if there were, then every QC affiliate would have to be so construed prior to the time that an election was made.

Thus, there is no inherent reason for concern about a decision to elect to provide what continues to be a future service offering through an affiliate different from the one earlier

[130] AT&T 272 Brief at page 15.
[131] AT&T 272 Brief at pages 15 through 18.
[132] Qwest 272 Reply Brief at page 4.
[133] Qwest 272 Reply Brief at footnote 4.

expected to carry out that role. Nor is it necessarily wrong to allow a reasonable transition when such a change is made. Nor does it necessarily constitute an admission against interest to post transactions for an earlier period. AT&T's arguments to the contrary not only strain the plain language of federal law past the breaking point. They would impose a circular string of obligations that would make it impossible for a BOC to make and to revisit reasonable organizational and business decisions in the course of its preparations to meet requirements applicable to a business it has not yet even entered, but must prepare for if it is to meet the substantial public requirements associated with that business.

We have already addressed whether Qwest's traditional accounting practices and controls give sufficient confidence about its ability to meet 272 requirements after it may enter the business to which the section applies. AT&T has presented no sound argument or evidence that we should go further by addressing in this particular Qwest's historical compliance.[134] The recommendation under the earlier *Books and Records* discussion seeks an examination of the effectiveness of recent Qwest changes in systems, practices, and controls in giving assurances that it is committed and prepared to comply with section 272 requirements on a predictive basis. No more is required here.

3. Indefinite Service Completion Dates

AT&T argued that the FCC requires that transaction postings provide either the length of time or estimated completion date of any project. AT&T said that it found agreements between QC and QCC that have "indefinite" completion dates.[135] There was testimony that such examples exist because the services are provided under agreements of indefinite duration, which Qwest also said was the case in its brief.[136]

Proposed Conclusion: We need no evidence of record to state the self-evidently true conclusion that commercial contracts often provide for indefinite terms subject to the right of either party to terminate them by providing notice. There is no reason to believe that the FCC did or should have intended to restrict the ability of BOCs and their 272 affiliates to enter into such contracts. The requirement that completion dates or estimates be provided should not be construed as prohibiting what AT&T has objected to, which are "agreements" that have this common form of establishing duration. AT&T's position finds no support either in commercial practice or in the requirements of the FCC, which do not prohibit agreements of indefinite duration. Whether work and task orders under such agreements are sufficiently precise and complete is a different matter; it is not those, but the "agreements" under which they are issued that AT&T has addressed here.

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[134] Parenthetically, it is worth noting the confusion created by the lack of care that AT&T's testimony and briefs showed in making it clear that it was relying upon essentially the same factual circumstances to support what amounted to many different claimed violations. The value in mentioning this circumstance is to help prevent the impression that there are many more apparent, independent occurrences of alleged violations than actually existed. Given the way that AT&T chose to present its evidence and argument, it took a painstaking effort to determine which of the many AT&T arguments ultimately depended on the same instances.

[135] AT&T 272 Brief at page 18, citing paragraph 337 of the *Bell South Louisiana II Order*.

[136] June 8, 2001 transcript at pages 40, 41, and 45 and Qwest 272 Reply Brief at footnote 53.

4. Verifications

Paragraph 122 of the *Accounting Safeguards Order* requires that transaction information available for public inspection be accompanied by a certification declaring that:

> *An officer of the BOC has examined the submission and that to the best of the officer's knowledge all statements of fact contained in the submission are true and the submission is an accurate statement of the affairs of the BOC for the relevant period.*

AT&T presented evidence that it found no statements during its examinations in 1998 and in 1999; Qwest admitted that it filed none, because it construed the certification requirement as applying only after filing of a section 272 application.[137] AT&T later discovered certifications for QC and QCC, which were filed by the same officer. The signer was listed as an officer of QCC, but not of QC. AT&T argued that the failure of a QC officer to sign the QC certification constituted a violation of the *Accounting Safeguards Order*.

Qwest acknowledged that the signer for QC was no longer an officer of QC when she signed its certification. Qwest's testimony was that the controller position of QC was vacant at the time of the certification; therefore, the signer, who was also an officer of QC's parent, made the certification for QC. After AT&T's examination at Qwest's offices, Qwest replaced the certification with one signed by the person then serving as QC's controller.[138]

Proposed Conclusion: Fulfilling the requirement that an officer certify the accuracy of information such as that at issue here as an important element of providing a proper environment for controlling performance. It assures accountability at a level that is presumably sufficient to assure attention to accuracy. The record here shows that, whatever requirements may have applied in past periods when, as AT&T found, QC did not file certifications, QC does recognize the obligation to make such certifications. There is no basis for a predictive conclusion that QC is not likely to comply with applicable certification requirements.

The use of a QCC officer to sign the recent certification, since amended, is more questionable. It may be, given the vacancy in the QC controller position, that no other officer of QC had the requisite knowledge to make the certification, but Qwest did not testify to that, nor does it seem probable that such was the case. Even had it been, caution should have suggested that the certification signed by the QCC officer contain a disclosure regarding the reasons why a QC officer was unavailable to make the certification.

The primary significance of the evidence on this issue is that it tends to confirm the transitional nature of Qwest's handling of inter-affiliate relationships issues in the period in question (the certification in question was signed on March 20, 2001).[139] The effectiveness of the actions taken by Qwest during that transition would already be

[137] AT&T 272 Brief at page 22, citing the June 7, 2001 transcript at pages 253 and 254.
[138] June 7, 2001 transcript at pages 250 and 253.
[139] Exhibit S7-ATT-CWS-1, ¶ 61.

examined under a preceding recommendation of this report. That examination should confirm that QC continues to have adequate controls in place to assure that a QC officer who has the requisite knowledge provides the required certifications. Beyond this confirmation, this issue raises no other predictive concerns about Qwest compliance with the requirements of section 272.

F. Non-Discrimination

Section 272(c)(1) says that a BOC, when dealing with its section 272 affiliate:

> *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*

Much of AT&T's argument about Qwest's non-compliance with this provision concerns the failure to make timely payments.[140] In addition, AT&T presented testimony asserting that Qwest has not addressed a number of items that the FCC considers in examining compliance with this requirement.[141] Those items were:

- Whether QCC will be informed of planned network outages before public notice is given
- Whether Qwest will continue to participate in public standard-setting bodies
- Whether Qwest has committed not to discriminate in establishing interconnection or interoperability standards
- Whether Qwest has stated that it would not discriminate in the processing of PIC orders
- Whether Qwest has stated that it would comply with the FCC's prohibition against the use of its Official Services Network to provide InterLATA services
- Whether employee transfers between the BOC and the 272 affiliate create a concern that there will be an improper flow of confidential information between the two entities
- Whether Qwest has proved that it will provide nondiscriminatory access to its OSS.

Qwest responded that its testimony contained commitments to comply with the non-discrimination requirements of sections 272(c) and (e).[142]

Proposed Conclusion: AT&T's list of items ignores that the general issue of discrimination was addressed in depth at the preceding workshops, at which many of the items on the list were the subjects of testimony. In addition, Qwest's testimony for this

[140] AT&T 272 Brief at page 25.
[141] Exhibit S7-ATT-CWS-1, ¶ 81.
[142] Qwest 272 Reply Brief at footnote 6, citing Exhibits S7-QWE-MEW-1 at pages 5 and 6 and 29 and 30 and S7-QWE-JLB at page 23.

particular workshop did address a number of additional items on the list, e.g., OSS access. Finally, as was discussed above, the evidence here shows a moderate number of employee transfers to date, the existence of measures to protect against the improper use of sensitive information, and an ability to address future transfers and information use. Thus, the evidence before us shows that the kinds of issues AT&T says the FCC considers have been addressed, and that all participants have had an ample opportunity to present any evidence that bears upon the FCC's consideration of them.

G. Compliance With FCC Accounting Principles

AT&T's brief noted that the examples it testified to under issues relating to non-compliance with GAAP and the lack of internal controls also demonstrated a failure to comply with the section 272(c)(2) requirement that a BOC, in dealing with its 272 affiliate:

> *account for all transactions ...in accordance with accounting principles designated or approved by the Commission.*

Proposed Conclusion: This issue has already been dealt with in the discussion of Books and Records, relating to compliance with GAAP. The application of the 272(c)(2) standard does not add materially to the considerations already made there.

V. Track A Requirements

A. Background

47 U.S.C. § 271(c)(1)(A) sets forth what are known as the Track A requirements. This section says:

> *(A) PRESENCE OF A FACILITIES-BASED COMPETITOR. — A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A), but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.*

The FCC phrased the questions involved in interpreting this provision as follows in § 271 proceedings involving Ameritech:[143]

> *In response, numerous parties argue that Ameritech has failed to satisfy various aspects of the section 271(c)(1)(A) requirement. In particular, these parties contest:*
>
> *(1) whether Ameritech has signed one or more binding agreements that have been approved under section 252;*
>
> *(2) whether Ameritech is providing access and interconnection to unaffiliated competing providers of telephone exchange service;*
>
> *(3) whether there are unaffiliated competing providers of telephone exchange service to residential and business customers; and*
>
> *(4) whether the unaffiliated competing providers offer telephone exchange service exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities*

[143] Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Record 20543, 20577-99 (1997) (Ameritech Michigan Order) ¶¶ 62-104.

> *in combination with the resale of the telecommunications services of another carrier.*
>
> *We address these issues separately in order to determine whether Ameritech meets section 271(c)(1)(A).*

The workshop participants combined the testimony and briefing of Track A issues with their treatment of the public-interest standard. That standard is addressed at 47 U.S.C. § 271(d)(3)(C), which requires a conclusion that the requested authorization under § 271 "is consistent with the public interest, convenience, and necessity." Questions about the degree of local-exchange market entry by competitors arise here under both standards. However, the contexts for consideration of those questions differ somewhat. Moreover, we are addressing in separate workshops the question of the sufficiency of Qwest's plan for assuring that its markets remain open after its entry into in-region InterLATA service (that plan is called the QPAP). All participants agree that the QPAP is a central element of satisfying the public interest test of § 271(d)(3)(C). Therefore, it is premature to address the public interest test here. We will instead consider the public-interest aspects of market-share testimony and arguments combined here with Track A considerations when issuing the next workshop report, which will consider the QPAP.[144]

Qwest filed the testimony of David Teitzel on Track A and Public Interest on March 30, 2001 and the rebuttal testimony of this same witness on May 23, 2001. AT&T filed the Affidavit of Mary Jane Rasher on or about May 4, 2001. No other parties filed Track A testimony.

The following parties filed briefs that contained Track A arguments: AT&T, Sprint, WYCAS and Qwest. Both AT&T and Qwest filed reply briefs on this topic. The Iowa Office of Consumer Advocate filed a brief and reply brief on Public Interest, but some of the argument addressed Track A requirements. Similarly, the New Mexico Public Regulation Commission Staff submitted a brief on public interest that contained some Track A arguments.

This report examines the answers for the seven participating states to each of the four Track A questions framed by the FCC in the Ameritech Michigan Order.

B. Existence of Binding, Approved Interconnection Agreements

The FCC has stated that agreements approved under § 252 of the Act, relating to the negotiation and arbitration of interconnection agreements are considered binding for purposes of Track A, even if they contain interim prices, most-favored-nation clauses, or

[144] There are separate briefing requirements related to QPAP. There will be no further briefing of the public interest arguments already raised here; only the PAP will be addressed in subsequent briefs. Moreover, while the next report will comprehensively address the public-interest standard, it will separately address the sufficiency of the QPAP as it relates to that standard. This distinction is important for the states of Washington and Nebraska, whose commissions are participating in the QPAP portion of these workshops, but which are separately addressing the remaining elements of the public-interest standard, which have not been addressed on the record made here.

fail to include every possible checklist item. The FCC held that, for agreements to be binding, it is sufficient that they "specify the rates, terms, and conditions under which [the BOC] will provide access and interconnection to its network facilities."[145]

Qwest presented evidence demonstrating that, as of April 30, 2001, it had entered into 464 binding, approved interconnection agreements in the seven states, which Qwest summarized as follows:[146]

AGREEMENT TYPE	STATE							
	ID	IA	MT	NM	ND	UT	WY	Total
Wireline	33	44	28	35	21	39	22	222
Wireless, Paging, and EAS	19	27	10	26	9	14	11	116
Resale-Only	17	23	27	19	9	12	19	126
TOTALS	69	94	65	80	39	65	52	464

AT&T, while challenging other aspects of Qwest's satisfaction of the Track A requirements, did not contest the fact that Qwest has entered into these binding and approved agreements with competitive suppliers of local exchange services.[147] Moreover, while there was questioning about whether many of the listed CLECs remained in business in the claimed states, no other participant disputed the existence of a substantial number of interconnection agreements in each state, or otherwise challenged compliance with this element of Track A compliance.

Proposed Conclusion: Qwest has met the portion of the § 271(c)(1)(A) requirement that requires it to have signed one or more binding agreements that have been approved under section 252.

C. Provision of Access and Interconnection to Competitors

Satisfaction of this element of the Track A standard does not require that CLECs receiving access or interconnection have any given geographic service range in a state,[148] nor does it require that they have placed "a substantial commercial volume" of orders or achieved a minimum market share.[149] Qwest offered evidence that it is providing access

[145] Ameritech Michigan Order at paragraphs 72 and 73. Note, however, that interim prices may have relevance to satisfaction of the checklist requirements of § 271.
[146] Exhibit S8-QWE-DLT-9.
[147] Brief of AT&T Regarding Public Interest and Track A (AT&T Track A Brief), at page 24.
[148] Ameritech Michigan Order at paragraph 76.
[149] Ameritech Michigan Order at paragraph 77.

and interconnection in each of the seven states. Its testimony was that it had leased the following numbers of unbundled loops to the following numbers of CLECs in each state, as of April 30, 2001:[150]

STATE	ID	IA	MT	NM	ND	UT	WY
LOOPS	7,746	138,192	2,111	7,715	28,023	27,080	25,163
CLECs	11	14	11	10	12	20	6

AT&T, while challenging other aspects of Qwest's satisfaction of the Track A requirements, did not contest the fact that Qwest was providing access and interconnection to unaffiliated competing providers of telephone exchange service.[151] No other participant challenged compliance with this element of Track A compliance.

Proposed Conclusion: The § 271(c)(1)(A) requirement that requires Qwest to be providing access and interconnection to unaffiliated competing providers of telephone exchange service imposes neither geographic range, order volume number, nor market penetration requirements. Qwest's unrebutted evidence addressing unbundled loop leases demonstrates that it meets the requirement that it be providing access and interconnection to unaffiliated competing providers of telephone exchange service.

D. Existence of Competing Residential and Business Service Suppliers

The first two elements of the Track A test addressed the existence of agreements obligating Qwest to provide access and interconnection and the actual provision of services by Qwest to CLECs under those agreements. This element of the Track A test addresses whether the CLECs involved are actually providing telephone exchange services to residential and to business customers. The FCC has held that there need not be a CLEC that serves both residential and business customers. The test is whether collectively the CLECs in the state serve both customer types.[152]

1. Market Share of Competing Providers

The Ameritech Michigan Order made it clear that this element of the Track A test is satisfied where a competing carrier is serving more than a de minimis number of end users. However, it did not reach the question of what the result would be if the number of lines served by a competitor were de minimis. Neither did the FCC provide a quantitative indication of what would constitute more than a de minimis number of competitively served access lines. It had no need to address that question because Michigan had "three operational carriers, each of which is serving thousands of access

[150] Exhibit S8-QWE-DLT-9.
[151] Brief of AT&T Regarding Public Interest and Track A (AT&T Track A Brief), at page 24.
[152] Ameritech Michigan Order at paragraph 82.

lines in its service area."[153] The recent FCC Verizon Connecticut 271 Order does, however, suggest that the number of end users served by CLECs can be material to addressing the satisfaction of Track A requirements. In deciding that this aspect of the Track A standard was met, the FCC said:[154]

> *Our comparison of the record in the Kansas/Oklahoma application and the record in this proceeding indicates that residential customers served by competitive LECs on a facilities basis represents a somewhat greater proportion of all Verizon access lines in Connecticut than was the case for Southwestern Bell in Kansas.*

The SBC Kansas/Oklahoma Order cited BOC estimates that competitors served between 9.0 and 12.6 percent of total Kansas service-area access lines and between 5.5 and 9.0 percent of all Oklahoma service- Oklahoma access lines.[155]

AT&T cited the Ameritech Michigan Order as adopting the requirement that there be "an actual commercial alternative to the BOC" and as recognizing that "there may be situations where a new entrant may have a commercial presence that is so small that a new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a 'competing provider.'" AT&T said that even Qwest's own estimates demonstrate that CLECs are serving a miniscule number of residential customers in the seven states (0.3 percent overall). AT&T calculated this number by dividing Qwest's estimated number of CLEC-served residential access lines by the total state population numbers testified to by Qwest.[156]

Proposed Conclusion: The Ameritech Michigan Order's treatment of the question of the size of the market served by a BOC's competitors did not bear on the decision in that matter, because of the size of the customer base of the CLECs in that state. The FCC, in fact, said specifically in paragraph 77 of the order that "We also do not read section 271 (c)(1)(A) to require that a new entrant serve a specific market share in its service area to be considered a 'competing provider.'"

AT&T's calculation of the percentage of residential users served by CLECs is unsound. It merely divides access lines by population, which assumes that each person has an

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[153] Ameritech Michigan Order at paragraph 78. Paragraph 79 of this Order makes a distinction that is material here, given that this report addresses only Track A, preserving a discussion of the public interest to the subsequent report. The FCC held specifically in the Ameritech Michigan Order that a conclusion that the Track A requirement involving service to end users would not preclude it from considering "competitive conditions or geographic penetration" in its review of the public interest test. The next report's consideration of satisfaction of the public-interest standard will be similarly unconstrained.

[154] Memorandum Opinion and Order, *Application of Verizon New York, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc. and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Connecticut*, CC Docket No. 01-100 (Released July 20, 2001) (Verizon Connecticut Order), at paragraph 71.

[155] 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 Oklahoma*, CC Docket No. 0-217(Released January 22, 2001) (SBC Kansas/Oklahoma Order), at paragraphs 4 and 5.

[156] Reply Brief of AT&T Regarding Public Interest and Track A (AT&T Track A Reply Brief) at page 17, citing paragraph 75 and 77 of the Ameritech Michigan Order.

access line. The use of a more proper denominator, such as residential households, might alter the result, but it would certainly remain small. Yet, we know that the FCC has accepted small numbers of CLEC-served end users as satisfying the Track A test in Oklahoma, where the evidence was that competitors served as little as 5.5 percent (or as much as 9.0 percent) of the access lines in the BOC's serving area in that state.

The U.S. Census Bureau ranks Oklahoma as the 27th most populous state, which makes it significantly larger than each of the seven states participating here, with the exception of Iowa and Utah. As we will see below, the 90/10 method for allocating access lines between business and residential customers was similar to that accepted by the FCC in the SBC Kansas/Oklahoma Order. Therefore, we can conclude that, in a state more populous than all of the seven participating here and in some cases a number of times so, the FCC has already decided that the portion of the Track A test addressing competitive service to residential customers can be satisfied by numbers in the range of those that AT&T considered insufficient.

FCC information provided by the Iowa Office of Consumer Advocate shows that overall levels of local exchange competition across the country remain moderate, growing from 4.4 percent at the end of 1999 to 8.5 percent at the end of 2000.[157] That nationwide information includes states that are on average significantly more populous than those participating here. With the FCC having granted section 271 approval in so many states, there is not a sound basis for seeking here, effectively, to recast the test it has applied to this element of the Track A standard. We conclude that the decision on this aspect of the Track A test is not illuminated by the arguments that the number of residential customers being served by CLECs is small, or even "minimal." The FCC has already decided that it will not impose a market share test and it has deemed Track A to be satisfied at very low CLEC levels of penetration into the residential market. Therefore, in the event that Qwest can demonstrate that it is providing service at the levels shown in its testimony, it should be considered to meet this element of the Track A standard. The next paragraphs discuss that evidence.

2. Estimates of Bypass Lines

In addition to the amount of leased unbundled loops discussed above, Qwest presented estimates of end users, as of April 30, 2001, served through facility bypass, by state, divided between residential and business users. These estimates are summarized below:[158]

[157] Iowa OCA Brief at page 7.
[158] Confidential Exhibit S8-QWE-DLT-8.

STATE	ID	IA	MT	NM	ND	UT	WY
Bypass Lines	5,546	15,428	3,154	11,596	1,050	58,252	839
Residential	277	1,543	158	580	840	2,913	42
Business	5,269	13,885	2,996	11,016	210	55,339	797

Qwest argued that an estimating technique was necessary because it did not have access to confidential CLEC information about their market shares, and it could not secure the information through discovery against the many CLECs in the seven states who are not participants in these workshops.[159] Qwest estimated the total bypass lines shown in the preceding table by using the known number of lines that it ports to CLECs. Qwest testified that this method provided a reliable indicator of access lines served by competitors, because Qwest ports numbers to CLECs in only two cases: (a) where a CLEC serves a former Qwest customer with the same number but over the CLEC's own network, or (b) where a CLEC serves a former Qwest customer over a stand-alone loop leased from Qwest and connected to the CLEC's own switch.

The Qwest method for making the estimate (which also included subtracting out the lines already counted as CLEC UNES) was to divide ported numbers in half, on the assumption that CLECs might not be continuing to serve the customers whose numbers were ported to them.[160] Qwest said that two specific factors served to make its approach conservative: (a) this division of ported numbers, and (b) the decision not to consider in its estimate the fact that CLECs were serving customers through non-ported numbers. Qwest then generally split the resulting estimate into residential and business lines by assuming that 95 percent of the bypass lines served business customers; the factor was 90 percent for Iowa. Qwest also said its estimation method was much more conservative than the SBC method on which the FCC relied in the Kansas/Oklahoma proceeding. There, SBC estimated that there were 2.75 bypass lines for each CLEC interconnection trunk. Depending upon the state, Qwest said, estimates of bypass lines using the SBC method would be from 200 to 800 percent higher than the estimates that Qwest offered here under its alternate method.[161]

AT&T argued that there is no statistical basis for accepting the linkage that Qwest made between number porting and bypass lines. AT&T also said that the method Qwest used in Washington was demonstrably the same arithmetically, but that Qwest explained differently the steps involved in applying it. AT&T said that the differences in the explanation here produced "a needed air of mystery and obfuscation to an already questionable methodology."[162] AT&T also said that the SBC method fails to pass what it termed a "straight-face test, otherwise Qwest would have relied upon it to the exclusion of its own methodology." AT&T said that the correct inference to be drawn is that

[159] Qwest's Brief in Support of Its Compliance With the Track A Entry Requirements of 47 U.S.C. § 271(c)(1)(A) and the Public Interest Test of 47 U.S.C. § 271(d)(3)(C) ("Qwest Track A Brief"), at page 28.
[160] Qwest Track A Brief at pages 29 and 30, citing numerous confidential exhibit and transcript references.
[161] Qwest Track A Brief at pages 30 through 33.
[162] AT&T Track A Brief at page 4.

competition in the seven states is "pathetically low" when compared to what existed in Kansas or Oklahoma.[163]

Qwest argued that AT&T merely concluded, without providing any supporting evidence or argument, that there is no relationship between number porting and the number of access lines being served by CLECs.[164]

The Staff of the New Mexico Public Regulation Commission filed a brief addressing public interest issues. That brief contained arguments relevant to Qwest's fulfillment of the Track A standard. The New Mexico Staff criticized the lack of actual numbers of end users served by competitors in the state, noting with some concern the timing and contestability of Qwest's proposal to secure firmer numbers through the service of data requests on CLECs by state commissions. The New Mexico Staff noted that Qwest has the burden of proof and that it has control over the timing of its section 271 application.[165]

Qwest responded that the FCC has relied upon estimates in every section 271 application that it has granted. Qwest said that it must use estimates of bypass lines because only CLECs, who have no motive to assist Qwest, know what self-provisioned facilities they have. Qwest said that it did use actual, not estimated, information for all facilities and services that CLECs take from it, limiting its estimates to bypass.[166]

In addition to criticizing generally the use of estimates, the New Mexico Staff also argued that Qwest's estimation methods were unsound. New Mexico Staff noted that Qwest used a different estimation method for North Dakota and Wyoming, because the method used elsewhere yielded "nonsensical" results for those two states. The New Mexico Staff also argued that Qwest witness Teitzel's claim that his estimates were conservative should be taken as an admission that they were inaccurate. New Mexico Staff also recited problems that existed in some arithmetic aspects of the original Qwest calculations and in underlying support data provided by Qwest in discovery.[167]

Qwest responded by noting that the problem with the data provided in discovery was the omission of a field (interim number portability quantities) that had actually been used in the calculations provided in testimony. Qwest also explained that some of what the New Mexico Staff called calculation errors were in fact recalculations based on updated information that was not available when the testimony calculations were made. Finally, Qwest noted that the mistakes cited were in the preparation of demonstrative exhibits, not in the underlying data or calculations.[168]

New Mexico Staff also cited testimony that it said proved that Qwest had no sound basis for assigning 10 percent of estimated bypass lines to residential customers, noting that Qwest supported the allocation by saying that it was in the range used in the SBC filing for Kansas and Oklahoma.[169] Qwest responded by noting that its method for allocating

[163] AT&T Track A Reply Brief at page 20.
[164] Qwest Track A Reply Brief at page 4.
[165] Brief of New Mexico Staff on Public Interest Issues (New Mexico Staff Brief), at page 12.
[166] Qwest Track A Reply Brief at pages 5 and 6.
[167] New Mexico Staff Brief at pages 13 through 19.
[168] Qwest Track A Reply Brief at pages 9 and 10.
[169] New Mexico Staff Brief at page 20.

bypass lines between residential and business customers was consistent with that accepted by the FCC in the SBC Kansas/Oklahoma application.[170]

Proposed Conclusion: It must first be observed that Qwest does not use estimates for all counts of access lines served by competitors. It has substantial direct information about loops that CLECs secure as UNEs from Qwest, for example. Its need for estimation is in determining access line numbers in cases where CLECs bypass Qwest's network, thereby having no reason to divulge to Qwest information from which access line counts can be derived. The FCC is accustomed to using estimates of the number of bypass lines. It has in fact used methods that would have produced much higher counts (and in accord with a method that has withstood objection in prior FCC section 271 proceedings) than what Qwest proposes here.

Qwest has said that it chose to use ported numbers as its estimation base, because the reasons why CLECs have numbers ported bear a substantial relationship to the access lines that they serve. Qwest's explanation of the relationship was logical. More importantly, despite a broad claim by AT&T that there was no relationship, no participant provided any reason to dispute the Qwest evidence about why numbers are ported. There was no evidence or argument that numbers are not ported for each of the two reasons that Qwest cites, nor were other reasons for porting (particularly reasons that do not have a relationship to CLEC access lines) offered.

Qwest's approach produced results that were substantially less than what it could have claimed, had it chosen to use the interconnection trunk multiplier approach, which the FCC has already considered in its section 271 reviews. Moreover, Qwest's use of ported numbers applied two important additional limitations. First, it substantially discounted the resulting number to account for customers no longer served by the CLEC that initially made the porting request. Second, it did nothing to account for CLEC customers who took service under entirely different numbers, thus producing no ported numbers.

This method is certainly not perfect, but it is reasonable, and it has not been subjected to any but the most general and unpersuasive challenge. AT&T's criticism about obfuscation was particularly unfair. There is no mystery in the Qwest formula that middle-school algebra cannot unravel. AT&T, despite figuring out that (N-2U)/2 =N/2 - U (the mathematical representation of the two different ways that Qwest explained its calculation), went on to criticize Qwest anyway. Equally unconvincing was the argument that Qwest's use of an estimation method more conservative than the SBC one shows that the SBC test cannot even be taken seriously. Suffice it to say that the FCC has taken it seriously. Finally with respect to AT&T's arguments, it also far overstates the case in saying that we can infer that competition is "pathetically low" by comparison to Kansas or Oklahoma. To the contrary, especially after considering population rankings, the levels of competition appear to be comparable.[171]

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[170] Qwest Track A Reply Brief at page 9, citing paragraph 42 and note 96 of the *SBC Kansas/Oklahoma Order*.

[171] AT&T's far over-the-top exaggeration on these three claims (arithmetic obfuscation, misuse of the SBC test, and pathetically lower levels of competition) ultimately did little to persuade. AT&T's contribution to these proceedings has been consistently material and positive; this stretching of the limits of proper advocacy was anomalous, but *unfortunate*.

The New Mexico Staff criticisms of the method and calculations also did not undercut its usefulness, particularly in the absence of any alternative. The criticism that the Qwest method's conservatism proved its inaccuracy actually highlighted not its failure, but only the need to be careful in the use of indirect estimation methods.

Similarly, the New Mexico Staff's criticisms of omissions and errors in Qwest's presentation of the results of its calculations were not persuasive. The problem with the data request ultimately was shown to be the result of a failure to include in the response information actually used in the calculations. This omission was clearly the reason why the calculations could not be recreated from the discovery response. Qwest corrected the omission after cross examination uncovered it and the parties were given time to study the correction and to cross examine again. The Qwest witness showed at this subsequent cross examination that the calculations worked to produce the testified to results when the information missing from the data request response was used. Moreover, Qwest's recalculations to account for new CLEC data (obtained after the calculations were originally performed) cannot be construed as demonstrating error in the original work.

Qwest's business/residential allocation was certainly unsophisticated, but it too has been used before by the FCC in the section 271 context. It will serve here, provided that there is other substantial evidence of record to support the conclusion that any residential service at all is being provided. Qwest's evidence, much of which came from CLEC responses to its data requests, shows that a substantial number of CLECs are providing only business services in those of the seven participating states where those CLECs operate. Given that fact, it would be presumptuous to apply an admittedly rough tool in any individual state unless other evidence supports the conclusion that there are competitors seeking and serving residential customers. In other words, we will not presume the existence of residential competition and merely use the method to determine what portion of it is for residential end users. Rather, we will require an independent showing that there is actual service to residential end users. Only after such a showing will the Qwest estimation method be used to provide a rough measure of its size.

Finally, had the Qwest formula produced results that stray far from actual circumstances, it would seem unusual that none of the CLECs here responded with evidence of their own. While theirs was certainly not the burden of proof, this was their opportunity to present contrary evidence to rebut Qwest's evidence. Only in the event that Qwest had not made a credible showing would there be significant merit in general argument unaccompanied by the presentation of any competing facts. Qwest did make such a showing, and it was one that, moreover, had a foundation in prior FCC decisions. Against that evidence, the general and in many cases outlandish arguments of AT&T cannot stand, unaccompanied as they are by no contrary evidence or any specific demonstration of why the use of ported numbers as an estimate base has no foundation.

4. Number of CLECs Serving End Users

In addition to its itemization of unbundled elements leased and its quantitative estimates of access lines served by competitors, Qwest presented qualitative information about competition. This latter evidence consisted predominately of a state list of the

competitors serving end users. AT&T did not address the individual CLECs cited by Qwest, but did argue that none of the competitors cited by Qwest could be considered a "commercial alternative" to Qwest until it can handle order volumes at commercial levels or until those competitors can provide service at the same level as Qwest can. AT&T said that Qwest had the evidence available to answer whether such competitors existed, but did not present any such evidence. Moreover, AT&T said that even Qwest's own method demonstrated that CLECs were serving only a de minimis number of residential customers.[172]

Qwest's state-by-state evidence, and the responsive testimony and arguments presented to respond to it, are summarized by state below:

CLEC	IDAHO[173] SERVICES BEING PROVIDED
Electric Lightwave, Inc.	Local, long distance, private network, advanced data, and Internet access focused on medium to large communications-intensive businesses
Time Warner Telecom	Local, long distance, data, and Internet services through its own facilities, after acquisition of GST Telecommunications in 2000
Project Mutual Telephone	Local cooperative services to residential and business customers in Burley; announced in 1998 plans to invest in a combined cable/telecom network
Avista Communications	Voice, data, and Internet services to businesses in Lewiston through its own switch and fiber optic network

CLEC	IOWA[174] SERVICES PROVIDED
McLeod USA	Acknowledged in data request responses service to residential and business customers
Cox Cable	Residential and business services in Council Bluffs, including residential service through its cable system
Hickory Tech	Facilities-based residential and business services in areas including Urbandale, Clive, Adel, And West Des Moines, overbuilding Qwest network in West Des Moines to provide local, long distance, and DSL services

[172] AT&T Track A Brief at page 26.
[173] Qwest Track A Brief at pages 10 through 12, citing a number of exhibit and transcript references.
[174] Qwest Track A Brief at pages 12 through 15.

Goldfield	Independent telco providing, as a CLEC, out of territory local, long distance, data, and Internet access service to business and residential customers in small exchanges in Goldfield, Eagle Grove, Clarion, and Humboldt
AT&T Broadband	Cable modem service, with plans to expand to telephony this year through a cable system in the western suburban Des Moines metropolitan area

The Iowa Office of Consumer Advocate (Iowa OCA) responded to Qwest's evidence about service in Iowa. The Iowa OCA noted that Qwest had provided evidence that there were 41 competitive local exchange companies in Iowa, and that Qwest later corrected that list to remove five companies and noted that two others had filed for Chapter 11 bankruptcy protection.[175] The Iowa OCA presented evidence that 21 of the companies listed by Qwest had no tariffs on file with the Iowa Utilities Board, thus meaning that they were not empowered to provide local exchange service in the state. The OCA testimony also indicated that 11 companies provided service in isolated, often geographically narrow areas, 3 provided service only to businesses, and 3 provided services only to high-risk customers.[176] Qwest conceded that it did not know how many of the companies on its list were actually providing local exchange service in Iowa.[177]

The Iowa OCA appears to have agreed, based on information that it presented, that Iowa actually has somewhat more than the national level of market penetration by CLECs: competitors held 10 percent of the local telephone lines in Iowa at of the end of 2000.[178] This figure compares to the 14.2 percent estimated by Qwest.[179] There is other evidence of competition in Iowa as well, with McLeod USA claiming that it has captured 46 percent of its "addressable market" in the state.[180] The Iowa OCA elicited evidence demonstrating that there is only one CLEC in Iowa that has as many as 10,000 lines.

The OCA placed significant emphasis on the 10,000-line measure, indicating that the FCC had established it, for reporting purposes, as the "level that we expect will allow us to detect emerging market participants when they achieve a fairly significant presence in a given market."[181] There was evidence from one competitor indicating that it provided many times more than this number of both residential and business lines. Qwest's testimony claimed far less than this number of residential customers as being served by all competitors combined.[182]

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[175] Exhibit S8-QWE-DLT-8.

[176] Exhibit S7-IOCA-DSH-2, at page 7.

[177] June 26, 2001 transcript, at pages 276 through 280.

[178] *Local Telephone Competition at the New Millennium* (summarizing December 31, 1999 data from Forms 477 and 499-A), Federal Communications Commission, August 2000, Table 4. "Local Telephone Competition: Status as of December 31, 2000", Federal Communications Commission, May 2001, Table 1. These reports can be found at http://www.fcc.gov/ccb/local_competition/welcome.html.

[179] Opening Brief: Public Interest, Office of Consumer Advocate ("OCA") Iowa Department of Justice, (Iowa OCA Public Interest Brief) at page 8, citing Qwest's Confidential Exhibit S8-QWE-DLT-8.

[180] Teitzel Direct Testimony, Confidential Qwest Exhibit S7-QWE-DLT-7, at page 19; Exhibit S7-IOCA-DSH-4; Exhibit S7-IOCA-DSH-4.

[181] *In the Matter of Local Competition and Broadband Reporting*, at paragraph 42.

[182] Confidential Exhibits S8-QWE-DLT-25 and 26; Confidential Exhibit S8-QWE-DLT-8.

MONTANA[183]	
CLEC	SERVICES PROVIDED
Touch America	As subsidiary of major state electric company, purchased Qwest pre-merger long distance operations; providing long distance, Internet access, private line, data, and wireless service; entered contract to allow Electric Lightwave to provide competitive private line and other telecommunications services across its network in Montana
Mid-Rivers	Telecom cooperative providing services as a CLEC outside its region; overbuilt Qwest network in Terry, offering business and residential customers local, long distance, data, and Internet access services; expanded recently to other cities, such as Glendive, Wibaux, Sidney, and Fairview
Blackfoot Communications	Providing business and residences with local, long distance, paging, and Internet access services outside its territory in Missoula, using its own facilities and services leased from Qwest
Avista Communications	Providing business customers in Bilings with local, data, and Internet services

NEW MEXICO[184]	
CLEC	SERVICES PROVIDED
Confidential	Confidential
Confidential	Confidential
e.spire	Service in Albuquerque
Time Warner Telecom	Service in Albuquerque

The New Mexico Staff brief argued that: (a) Qwest had listed as New Mexico competitors a number of companies (other than the ones identified in the immediately preceding table) that were not in fact operating in New Mexico, (b) Qwest had conceded that it had no evidence of competition outside Albuquerque, and (c) the competitors listed as confidential above were providing service only to business customers.[185]

NORTH DAKOTA[186]	

[183] Qwest Track A Brief at pages 15 through 17, citing a number of exhibit and transcript references.
[184] Qwest Track A Brief at pages 17 through 19, citing a number of exhibit and transcript references.
[185] New Mexico Staff Brief at pages 9 through 11.
[186] Qwest Track A Brief at pages 19 through 21, citing a number of exhibit and transcript references.

CLEC	SERVICES PROVIDED
Halstad Telephone	Rural cooperative providing residential and business service through an overbuild of Qwest's network in Halstead, a community of 1,500
Confidential	Confidential
Consolidated Communications	Provision of residential and business service through an overbuild of Qwest's network in a community with approximately 10,000 access lines
Dakota Central Telecom	Subsidiary of a telephone cooperative providing high-speed Internet services to customers in Jamestown and Valley City
Idea 1	Service in the Fargo area through its own digital switch and fiber facilities
McLeod USA	Residential and business local, long distance, data, and Internet access services in a number of communities
Dakota Carrier Network	Consortium of 15 independent telcos that serve in 85 percent of the state's exchanges

CLEC	UTAH[187] SERVICES PROVIDED
AT&T	Service to residential and business customers through TCG and the purchase of TCI, with a cable system passing 600,000 of Utah's 728,000 households; serving in Salt Lake City, Ogden, and Provo/Orem
Confidential	Confidential
Electric Lightwave, Inc.	Local, long distance, private network, advanced data, and Internet access focused on medium to large communications-intensive businesses through its own fiber network
XO Utah	Service to small-medium businesses, with residential services in selected areas

CLEC	WYOMING[188] SERVICES PROVIDED
Silver Star	Service to residential and business customers in Afton and Jackson with its own facilities
Confidential	Confidential

[187] Qwest Track A Brief at pages 22 through 24, citing a number of exhibit and transcript references.
[188] Qwest Track A Brief at pages 22 through 24, citing a number of exhibit and transcript references.

McLeod USA	Services to residential and business customers in Casper and Cheyenne

Qwest noted that the preceding state-by-state list constituted a "small sampling" of the competitive markets in the seven states, stating again that its efforts to secure data were hampered by the "few" responses it received to its data requests to CLECs.

Proposed Conclusion: There was much questioning and some substantial criticism of the state-by-state list of CLECs that Qwest presented. However, the list cited above generally excludes those CLECs whose continuing existence or empowerment to serve in a given state was questioned or criticized. There was no argument that the CLECs listed here do not provide the services claimed. Those services, based upon a strict reading of Qwest's brief, include the provision of facilities-based business and residential services by CLECs in all but two states: Idaho and New Mexico. In the other five states, the Qwest evidence demonstrates that at least two CLECs are providing residential service.

The record supports a conclusion that the Track A requirement that service be provided to residential customers is established in Iowa, Montana, North Dakota, Utah, and Wyoming. It is not established for Idaho and New Mexico.

Therefore, Qwest's estimates of residential access lines served by competitors may be accepted for all states except for New Mexico and Idaho. In those states, Qwest should be found not to have met Track A standards, for reason of its failure to provide substantial evidence that competitors are serving residential end users.

D. Existence of Facilities-Based Competitors

We have addressed the first three questions raised by the test established in the Ameritech Michigan Order, which are the existence of agreements, the provision of services under those agreements, and the provision of service to business and residential customers. We reach now the last question, which is whether competing telephone exchange service is being provided: (a) exclusively over CLEC telephone facilities, or (b) predominantly over such facilities in combination with the resale of the telecommunications services of another carrier. The FCC has held that a CLEC's "own" facilities include UNEs that it leases from the incumbent provider.[189]

Qwest's estimation of access lines served by CLECs and its survey of services provided by CLECs in each state also addressed the question of what facilities were being used. The responsive testimony and argument focused on the issue of the estimated total numbers and on the allocation of those numbers of access lines between residential and business customers. That testimony and argument did not address the facilities issue.

Proposed Conclusion: Because of the commonality of the evidence presented and the lack of specific challenge to what facilities were being used, the proposed conclusion set

[189] Ameritech Michigan Order at paragraph 99.

forth under the preceding issue, *Existence of Competing Providers of Residential and Business Service*, is equally applicable here.

BEFORE THE NEW MEXICO 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

PUBLIC INTEREST REPORT

OCTOBER 22, 2001

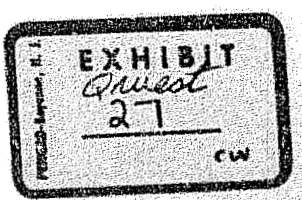

TABLE OF CONTENTS

I. Background 1
II. Summary of Public Interest Conclusions 2
III. Public Interest Issues Raised 5
A. UNE Prices 5
B. Intrastate Access Charges 6
C. Post-Entry Assurance Plan 7
D. Lack of Competition 7
F. Prior Qwest Conduct 9
G. Structural Separation 10
H. Sustained Checklist Compliance 11
I. Inducing Competition 12
J. Other Issues 13

I. Background

In addition to the competitive checklist items enumerated at 47 U.S.C. Section 271 (c)(2)(B), the Telecommunications Act requires an applicant to show that "the requested authorization is consistent with the public interest, convenience, and necessity."[1] The FCC has emphasized that public interest is a separate inquiry from that to be occasioned by the competitive checklist, and addresses this matter separately in its decisions.[2]

The FCC has said that compliance with the competitive checklist provides a strong indication that long distance entry is consistent with the public interest. Citing the FCC, AT&T has pointed out for us, however, that checklist compliance is not conclusive as to the public interest requirement:

> *In making our public interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC's local telecommunications market to competition. If we were to adopt such a conclusion, BOC entry into the in-region interLATA services market would always be consistent with the public interest requirement whenever a BOC has implemented the competitive checklist. Such an approach would effectively read the public interest requirement out of the statute, contrary to the plain language of section 271, basic principles of statutory construction, and sound public policy.*[3]

The FCC's SBC Kansas/Oklahoma Order provides a discussion of the factors that are to be considered in addressing public interest:

> [W]*e view the public interest requirement as an opportunity to review the circumstances presented by the applications to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. Among other things, we may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of these applications. Another factor that could be relevant to our analysis is whether we have sufficient assurance that markets will remain open after grant of the application. While no one factor is dispositive in this analysis, our overriding goal is to ensure that nothing undermines our conclusion, based on our analysis of checklist compliance, that markets are open to competition*[4].

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[1] *47 U.S.C. Section 271(d)(3)(c).*

[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 Oklahoma*, 16 FCC Rcd 6237 273 (2001) ("SBC Kansas/Oklahoma Order")

[3] Reply Brief of AT&T Regarding Public Interest and Track A. (AT&T Reply Public Interest Brief).

[4] SBC Kansas/Oklahoma Order at paragraphs 272 and 273.

The New Mexico Advocacy Staff, among others, has generally argued that Qwest bears the burden of proof on matters relating to section 271,[5] but we think that a distinction must be made here. Given the FCC's conclusion that checklist compliance is a strong indicator of the satisfaction of the public interest test, we think that it is appropriate to ask those who make public interest assertions to demonstrate the existence of the facts necessary to support their claimed reasons why the public interest would not be served by granting Qwest 271 authority. If nothing else, a simple reliance on the need for order compels the conclusion that those who make specific allegations should be required to prove them.

Thus, while Qwest must bear the burden of proving checklist compliance and the satisfaction of Track A and B requirements generally, we would not accept a rule that upon allegations by a third party Qwest must bear the burden of disproving them in order to demonstrate that the public interest would be served by granting it 271 authority. In saying this, however, we do not intend to ask any of the participating commissions to constrain their ability to take notice of conditions in their jurisdictions – conditions as to which their long experience in regulating telecommunications services gives them more than sufficient basis for taking notice of them.

Thus, while the inquiry into the public interest, convenience, and necessity is necessarily open-ended, a number of decision criteria are clear:

- Should checklist compliance be shown and should the existence of an adequate PAP be demonstrated, Qwest need make no further affirmative showing to support a conclusion that the public interest has been met
- Beyond these two preceding showings, as to which Qwest bears the burden of proof, those who would oppose the grant of section 271 compliance should be obliged to allege and prove the existence of the unique circumstances that may bear additionally on the public interest question (excluding the participating commissions' powers on their own initiative to take notice of such conditions as they determine to be relevant in their jurisdictions)
- Any allegation that merely serves to restate a checklist test in a manner that would impose a greater burden should not be looked upon with favor; to have distinct significance in examining the public interest an allegation and the evidence or argument that support it must rest at least in part on grounds independent from compliance with the checklist; otherwise, we would be misreading the plain intent of Congress in adopting the checklist and in allowing separate consideration of public interest matters.

II. Summary of Public Interest Conclusions

The workshop participants raised a number of public interest issues. Discussed below are the conclusions reached upon consideration of them.

UNE Prices

[5] Brief of New Mexico Staff on Public Interest Issues (New Mexico Advocacy Staff Initial Public Interest Brief) at page 4.

Several CLECs argued that monthly and non-recurring UNE prices were too high to permit CLECs to enter the local exchange market in a profitable way. AT&T's evidence to support this conclusion was that TFR rates were lower than UNE prices. This evidence was not persuasive: it failed to address other revenue sources (e.g., vertical features, intraLATA toll, and bundling with non-telecommunications services such as cable television) that would contribute to profitability. It also did not address business lines or resale. Moreover, the FCC has noted the difficulty that would arise were it to be required in the 271 context to address retail rate issues, which the FCC has conceded to be matters subject to state authority.

Intrastate Access Charges

Even where Qwest's affiliate pays the same access charges, or they are somehow imputed, concern can arise from access charges that exceed costs. There was CLEC evidence that such charges are in excess of costs in at least some of the participating states. However, the evidence did not address the uses served by the portion of those charges that exceed costs. That evidence also did not address which carriers have access to the above-cost portions. We believe that each participating state can best decide whether current access charges are: (a) in excess of costs, and (b) available for Qwest use in a way that squeezes competitors out of the intraLATA toll market.

Post-Entry Assurance Plan

A sound plan is necessary for assuring that local markets would remain open should Qwest receive 271 approval. The QPAP, which is Qwest's means for providing that assurance, is addressed thoroughly in a companion report (*QPAP Report*) to this one. That report recommended substantial changes to the plan as filed by Qwest and, should Qwest agree to those changes, the plan would be sufficient to provide the necessary assurances.

Lack of Competition

The thrust of the arguments made on this issue was that competition has not reached a level that is sufficient to meet the public interest. We followed the FCC precedent, expressed often in prior 271 application proceedings, that there is no minimum market-entry level required. It would be wrong to apply the general public interest standard in a way that would effectively re-write section 271 Track A or Track B requirements. Competition in the seven states is generally commensurate with levels already deemed adequate by the FCC.[6] We believe that the correct use of competition levels as evidence is in the consideration of whether entry has been suppressed by a failure to make local markets open to competition. Issues related to that potential problem have been fully addressed in prior workshops. No new and unique circumstances have been demonstrated to exist here.

Prior Qwest Conduct

AT&T argued that Qwest's history of non-compliance with the section 272 separate affiliate requirements and with its obligations to serve CLECs under sections 251 and 252

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[6] *Report on Group 5 Issues: General Terms and Conditions, section 272 and Track A*, issued September 21, 2001 (Group 5 Report).

compels a conclusion that the public interest would not be served by granting 271 authority now. In the workshop report preceding this one,[7] we already concluded that the predictive value of Qwest's prior 272 performance was not substantial. The section 251 and 252 examples cited here by AT&T were largely either based on CLEC complaint allegations not yet accepted as true by the authority trying them, insufficiently described to allow us to determine their significance, or addressed through recommended resolutions of issues that were raised in earlier workshops. To the extent that legitimate claims of problems existed, they were not of a magnitude sufficient to give concern about the ability of a soundly crafted post-entry assurance plan to deter them.

Structural Separation

Several CLECs offered structural separation as a means for mitigating the effects of Qwest actions to favor affiliates. Its proponents failed to show how structural separation would at all affect the need for the same efforts (as would be necessary in the absence of structural separation) to deter, detect, and sanction self-dealing or discrimination. Structural separation would certainly burden Qwest with higher internal transaction costs; the lack of any evidence to show that it would provide competitive benefits argues strongly against continuing claims that it is a useful remedy for assuring or allowing more facile verification of the existence of arms-length dealing.

Sustained Checklist Compliance

The carrier group ASCENT argued that Qwest should have to show checklist compliance for a sustained period before the public interest would be served by granting it 271 approval. This argument, aside from writing into federal law a requirement not seen there by the FCC, does not take account of two important factors: (a) that prior workshops have addressed claims made by CLECs regarding the problems shown by past performance, and (b) that a soundly crafted post-entry assurance plan is to be preferred over history as the proper means for assuring that current performance will not slide after 271 entry.

Inducing Competition

We agree with the general conclusion that 271 entry, where all pre-conditions are met, promotes the public interest. We also believe that both common sense and the evidence presented demonstrate that such 271 approval tends to further induce local market entry by CLECs. These factors militate in favor of 271 entry.

Other Issues

Several other issues raised concerns that either have been addressed in earlier workshop reports, are being addressed through other procedures, or are not possible to address here due to lack of evidence:

- *Advanced Services, including DSL:* These issues were fully addressed in the prior workshop report that addressed emerging services; there are no public interest concerns left open by the resolution of the issues proposed there
- *OSS Test:* The results of the test now being conducted under the auspices of the ROC will come before the commissions individually after test completion

[7] Group 5 Report.

- *Change Management:* As we said in the preceding report, which addressed general terms and conditions of the SGAT, we have insufficient evidence to address this issue, given the state of flux that existed in Qwest's proposed change management processes during the prior workshop that was to consider the issue.

III. Public Interest Issues Raised

A. UNE Prices

An AT&T witness testified that recurring and non-recurring UNE prices exceed Qwest's retail rates, which is a primary cause of the failure of Qwest retail markets to be open to competition. The evidence that AT&T cited in support of this conclusion came from a state-by-state comparison of IFR rates against established wholesale prices. AT&T said that this comparison showed that local entry was unprofitable on its face at prevailing UNE prices.[8] Sprint joined in AT&T's argument about UNE prices.[9] ASCENT, an industry group formerly known as the Telecommunications Resellers Association, also joined in the concern about cost-based UNE prices.[10]

Qwest argued that the FCC has already determined that the ability of CLECs to profit after leasing UNEs is irrelevant – the only test being whether the prices for UNEs are cost based.[11]

Discussion: It is clear that checklist compliance requires UNE pricing to meet the standards of the Act. However, as we noted many times in the preceding reports of these workshops, we have not taken evidence on or given consideration to the satisfaction of the applicable standard by Qwest wholesale prices. Therefore, we have pointedly avoided any conclusion about those wholesale prices in connection with checklist compliance. That issue remains one for the states to address through some other means.

CLECs such as AT&T demonstrated at the workshops that they did have concerns about whether Qwest's wholesale prices satisfied the checklist requirements, and they recognized that those issues would be addressed elsewhere. The parallel and perhaps interrelated argument that they have made here is that the IFR rate comparison demonstrates that Qwest's local markets are closed to competition.

That analysis failed to persuade for many reasons. First, it did not recognize that local rates consist of much more than the basic monthly charge for service. Vertical features and intrastate toll revenues must be considered, as another CLEC, WorldCom, pointed out when criticizing Qwest's analysis of lost CLEC profits in connection with consideration of the QPAP.[12] AT&T conceded that it had made no effort to measure or

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[8] Brief of AT&T Regarding Public Interest and Track A, (AT&T Initial Public Interest Brief) at pages 6 and 7.

[9] Sprint Communications Company L.P.'s Brief Regarding Track A and the Public Interest (Sprint Initial Public Interest Brief) at page 4.

[10] Comments of the Association of Communications Enterprises Regarding Qwest Corporation Compliance with the Public Interest Requirements of Section 271 of the Telecommunications Act (ASCENT Comments) at page 21.

[11] Qwest's Reply Brief Regarding its Compliance with the Track A Entry Requirements of 47 U.S.C. §271(c)(1)(A) and the Public Interest Test of 47 U.S.C. §271(d)(3)(C)

[12] Comments of WorldCom, Inc. in response to Qwest Corporation's Proposed Performance Assurance Plan, 7/27/2001.

to take account of such other revenues. Second, AT&T's analysis did not consider the existence of resale as an option for certain service classes that do not lend themselves to economical competition through the use of UNEs. Third, AT&T did not provide any evidence of business rates; it did not even provide its simple comparison of basic rates for such service. Fourth, AT&T did not address the issue of what "subsidies" might be available to it in the event that it should serve qualifying residential lines through facilities-based competition.[13]

Having conducted, advised in, or otherwise participated in numerous arbitrations, many of them involving AT&T, we have seen substantially more robust and useful analyses of revenues to be secured through leasing UNEs. Moreover, those came generally before efforts by CLECs, AT&T included, to bundle yet additional services (such as cable television) with basic monthly service. The revenue analysis that AT&T presented here was by comparison so incomplete as to render it of inconsequential value in assessing the state of local markets in Qwest's local exchange serving areas. Whether or not Qwest's UNE rates meet the checklist remains a question not resolved by these workshops. We can say, however, that the dimensions of that question have not been altered by AT&T's simplistic comparison of basic IFR rates with UNE prices.

Even were it founded on substantial evidence, AT&T's argument would still be of questionable relevance, given the FCC's holding at paragraph 92 of the *SBC Kansas/Oklahoma Order*, which provides:

> *The Act requires that we review whether the rates are cost-based, not whether a competitor can make a profit by entering the market. Were we to focus on profitability, we would have to consider the level of a states' retail rates, something which is within the state's jurisdictional authority, not the Commission's.*

B. Intrastate Access Charges

AT&T presented testimony that Qwest's intrastate access charges in the seven participating states range from a low of 1.25 to 4.91 cents per minute, while the FCC has established rates at 0.55 cents per minute (assuming single carrier origination and termination) as a cost-based target for interstate access rates. AT&T said that, even with imputation of these access rates to Qwest retail revenues, CLECs would be squeezed out of the local market.[14] Qwest said that it should be sufficient that its 272 interLATA affiliate pay the same access rates as Qwest charges to competitors.

Discussion: We begin by questioning Qwest's view that it is sufficient that its affiliate pays the same access charges that competitors do. The difference, and it can be a material one, is that the access charges paid by the Qwest affiliate inure to the family of companies to which Qwest and that affiliate belong. CLECs do not pay those access charges to an entity with whom it shares an interest in bottom line results; instead, it pays them to Qwest as a competitor. A proper inquiry into this issue must go beyond equality

[13] AT&T did say in its brief that other services would not change its analysis, and that the resold services discounts were inadequate. These assertions by its lawyers, unsupported by any cited evidence whatsoever, have no foundation in the record before us.

[14] AT&T Initial Public Interest Brief at pages 12 through 14.

of payment; it must address the uses to which the access charges paid by or imputed to a Qwest affiliate are put. Whether they go to a universal service fund or offset facilities costs (for purposes of retail and wholesale rates), for example, has much to do with whether competitors are squeezed out of certain local markets.

Since the adoption of the Telecommunications Act of 1996, there has been recognition that the introduction of competition and the maintenance of cases where rates were set substantially in excess of costs would be very problematic. The challenge has been to assure that those "subsidies" that remain important (ability to pay, rural service cost premiums, and service to public institutions being most often cited among them) are structured in a way that makes them more compatible with competitive pricing. It would be overly generous to say that the FCC has fully met this challenge in interstate service pricing; we expect that the seven participating states have, at least for the most part, significant ground to cover as well.

Our problem here is that there is no evidence before us to examine this issue as it absolutely must be examined, on a state-by-state basis. The size of any argued "subsidy" in intrastate access costs is not the only issue. For one example, how the fruits of any revenues that exceed full economic costs are allocated is equally relevant. Imputation can substantially mitigate the competitive barriers that above-cost services can create, provided that they are distributed and accounted for in ways that reflect the needs of competition and of competitors.

The lack of evidence in this record on these related questions leaves us limited to a general observation that a sensitive examination of how intrastate costs are recovered and how any added margins are distributed is self-evidently critical to assuring that undesirable barriers to competition are avoided. We must leave to each of the participating commissions an analysis of how far they feel that their states have come in leveling the competitive playing field in a manner that they consider to be consistent with public policy in their jurisdiction.

C. Post-Entry Assurance Plan

A number of participants have addressed the need to assure that there exists a sound performance assurance plan. That issue was addressed in the accompanying *QPAP Report*. As that report found, with the changes recommended, the so-called QPAP will provide adequate incentives to assure that Qwest's local-exchange-service markets remain open after it may receive 271 approval from the FCC.

D. Lack of Competition

The New Mexico Advocacy Staff has argued that Qwest's New Mexico local market has been shown not to be open due to the lack of competition in sizeable amounts.[15] A number of other parties have made similar arguments, citing the same evidence that we examined in considering satisfaction of Track A requirements.[16]

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[15] New Mexico Advocacy Staff Initial Public Interest Brief at page 6.

[16] See for example the AT&T Initial Public Interest Brief at page 3 and the Sprint Initial Public Interest Brief at page 2.

The initial brief of the Iowa Office of Consumer Advocate has discussed generally the difference between expectations and current reality about the growth of local exchange competition, the difficulties that CLECs (and BOCs who have made some inroads into local markets outside their local serving regions), about its view that high profits are being earned by Qwest in Iowa, about Qwest's failure to compete against other local exchange carriers in its region, about the lack of cable television to emerge quickly as a facilities-based alternative, about an uneven distribution of competition that is weighted toward high-end customers, and about the struggles of CLECs to thrive financially. It then asks that 271 authority not be granted until greater and "sustainable" entry by CLECs into the local exchange market occurs.

Discussion: We must be careful not to confuse the issue of whether the door to the "room" where CLECs will compete is open with the issue of whether it is occupied by them. The Track A and B construct established by the Congress clearly implies that the more precisely defined requirements of section 271 can be met in an empty room, provided we are certain that the door has been unlocked.

It would not serve the intent of Congress properly to read into a general requirement specific thresholds that Congress did not write into the more specific elements of the tests that it established. The generality of the public interest requirement is shown by its consistency with the public convenience language that is common to statutes empowering public service commissions to regulate utility prices and service all across the country. It cannot be seriously argued there, and it should not be here, that such language should serve as a ratchet wrench for tightening specific requirements. This conclusion is entirely consistent with what the FCC has told us on a number of occasions in addressing section 271; i.e., there is no explicit or implied minimum market penetration test, which we discussed at length in the last report of these workshops, addressing Track A.[17]

The relevance of market penetration to the public interest test in our view is whether low levels of market penetration provide evidence that Qwest has not taken sufficient actions to allow CLECs free entry in accord with statutory and regulatory requirements of the federal and state governments.

We have already concluded that Qwest's entry in these seven states (subject to the lack of convincing Qwest evidence about residential service, whether facilities based or through resale, in Idaho and New Mexico) is lower than a number of states where 271 authority has been given, but is not out of line with the level of entry shown by evidence in some states (e.g., Kansas and Oklahoma). We must therefore look to other allegations and evidence that bear more directly on the question of whether Qwest has opened the markets in question.

What the Iowa Office of Consumer Advocate says argues either against the merits of the federal act itself or against what is at least implicit in the FCC's implementation of it. Moreover, the office's own evidence shows that local exchange competition in Iowa exceeds significantly what was shown to exist in other cases where the FCC granted 271 authority. It is difficult to see what is to be gained by placing Qwest under a standard that varies significantly from the one being routinely applied by the FCC. Whether that

[17] Group 5 Report.

standard is to our personal liking or not is not the issue: what is material is that Qwest meets the law and the precedent established by the FCC insofar as market penetration is concerned.

Finally, we address the issue of the turbulent financial times that CLECs face. Evidence of CLEC failures or of shrinking profit margins is not without interest, but it is ultimately even more tangential than market share data. That data, while itself not determinative under FCC precedent, shows according to Qwest's unrebutted evidence that CLEC market share early in 2001 was actually increasing.[18]

F. Prior Qwest Conduct

AT&T cited what it saw as a pattern of past and continuing Qwest conduct that violated: (a) the pre-271 approval limits on in-region, interLATA service and (b) Qwest's obligations to provide wholesale services to CLECs.[19]

Discussion: We have already addressed the significance to be attached to Qwest's past provision of services deemed by the FCC to constitute in-region, interLATA service, under the second unresolved *Separate Affiliate Requirement* issue in the immediately preceding report in these workshops.[20] As we recommended there, we continue to say here that we do not believe that the nature of those violations should be predictive of Qwest conduct after 271 approval may be granted. We do not view the public-interest standard to be a punitive one, but rather a forward looking, or predictive one. Consequently, we do not believe that the prior history of Qwest's performance in this regard demonstrates the kind of unique circumstances that the FCC believes it takes to support a finding that Qwest's entry into the in-region, interLATA market would contravene the public interest.

AT&T also cited a number of instances that it claims demonstrate that Qwest does not meet its section 251 and section 252 requirements in providing wholesale services to CLECs. For the reasons set forth below, we find that these examples do not provide substantial evidence of a predictive, patterned refusal or inability of Qwest to comply with its wholesale service obligations in the past:

- *Minnesota example:* AT&T cites to no final order but only interim relief, and that on a question that remained the subject of a good-faith dispute in our workshops, and on which we have recommended a clear resolution that should preclude such a dispute in the future
- *Washington NID and inside wiring example:* That issue related to sub-loops, an area of network access that remained unsettled as late as our workshops addressing the subject. AT&T and Qwest took in our workshops positions similar to those apparently taken earlier in Washington: we recommended a solution that was different from and in between the positions that each considered appropriate.

[18] Qwest Public Interest Reply Brief at pages 25 and 26.
[19] AT&T Initial Public Interest Brief at pages 15 through 18.
[20] Group 5 Report.

We find nothing predictive in this example, particularly given the clear resolution of the sub-loop access disputes in the prior workshop report.[21]

- *Sun West Example:* This example is particularly unpersuasive: AT&T cites to the allegations of a complaint by a third party in a non-participating state: moreover, its witness did not claim any personal knowledge of the facts there – facts which have not been provided in any case at a level of detail sufficient for us to make an assessment of their significance here, even if we were to anticipate the results of litigation by presuming those allegations to be true.
- *MCI Metro Example:* The testimony providing this example similarly failed to provide a substantial enough description of the underlying facts to allow us to determine the significance of the example here or what we may or may not have done to preclude its occurrence here.
- *Rhythms Example:* Again, only the allegations of a complaint by a third party are provided and with no indication that the AT&T witness has any independent knowledge regarding their truth.

Consequently, we find these examples insufficient to demonstrate a pattern of past abuse that is either: (a) insufficiently mitigated by our resolution of disputed issues in prior workshops, (b) so severe as to give reason to doubt the ability of an otherwise effective QPAP to mitigate, or (c) otherwise so pervasive and significant as to call into question the public interest of permitting Qwest to enter the in-region, interLATA market.

G. Structural Separation

AT&T said that structurally separating Qwest's wholesale and retail operations is the only solution to what it called the[22]

> *fundamental conflict of interest between Qwest's relationship with its retail customers, on the one hand, and its relationship with its wholesale customers on the other.*

Sprint joined in the AT&T structural separation argument.[23]

Qwest said that there is no statutory authority allowing forced structural separation, and that neither the FCC nor any state has required it.[24]

Discussion: The ability to order structural separation is not the one before us: the question is whether, in the absence of structural separation, Qwest's 271 approval would meet the public interest test. We must be mindful, however, that there would be a knotty statutory construction problem should we reach a point where structural consideration were to be considered a matter of substantial public interest. Specifically, we would have to consider what to make of the Section 272 specification of services for which a separate affiliate is required. That list of services is quite specific, and does not include the

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[21] See the *Report on Emerging Services*, under the *Subloop Unbundling Issue* titled *Requiring LSR's for Access to Premise Wiring at MTEs*, at page 30. (Subloop Unbundling)
[22] AT&T Initial Public Interest Brief at page 23.
[23] Sprint Initial Public Interest Brief at page 4.
[24] Qwest Reply Public Interest Brief at page 31.

provision of wholesale services (after 271application approval) to both affiliated and non-affiliated carriers serving end-users.

That said, it is moot because we believe that structural separation would do nothing to change the motivations in question, nor would it mitigate the consequences of acting on those motives. Only a spin-off of an incumbent's wholesale and retail operations will do that. AT&T's reply brief (at page 14) shows a misunderstanding of the difference between structural separation and spin-off. AT&T divestititure under compulsion was an example of spinning off, not mere structural separation; analogizing it to what was recommended here or to what the Pennsylvania Public Utility Commission did provisionally (but not finally, it is important to note) is inapt.

The principal effect of structural separation would be to make the Qwest interfacing entities separate corporations rather than separate departments of the same corporation. Such a change will fail to influence materially, if at all, the natural motivation to favor an entity with the same ultimate owners. It will also have no effect on the efforts that are necessary to deter, detect, and sanction inappropriate interactions. As would be true before structural separation, what will continue to be necessary are:

- Rules and procedures to govern interaction
- Training in what those restrictions require
- Instilling an acceptance of the high importance of complying with them
- Routine, ongoing, and comprehensive outside auditing and other review of interactions, including but not limited to transactions between departments or corporate entities
- Sanctions against individuals for failing to comply with requirements
- Redress of harm to third parties and appropriate sanctions against violations that provide inappropriate benefit to the perpetrating entity or harm to third party competitors.

When one examines these efforts, it is clear that changing the Qwest entities that interface with each other from work groups, departments, or divisions, on the one hand, to separate corporate entities, on the other hand, will occasion no change in the nature or the extent of the diligence required. All that structural separation will do is increase the transaction costs that will inevitably follow corporate separation (or for that matter, separation at any increased level of organizational hierarchy.) The point here is not to occasion a general increase in Qwest's costs of doing business and thereby to increase CLEC competitiveness automatically. Rather, the point is to deter, detect, and sanction failures to conform to rules about self-dealing. Structural separation having no connection therewith, we recommend categorically that it be rejected as a solution.

H. Sustained Checklist Compliance

ASCENT commented that a public interest showing requires that Qwest be required to sustain compliance with the checklist over a period that is characterized by "a robust and thriving competitive local market."[25]

[25] ASCENT Comments at page 4.

Discussion: We have already addressed the inappropriateness of applying a test that relies upon the amount of competition, as opposed to the maintenance of open market conditions. Here we must address whether there need be a minimum period of time across which Qwest should have to demonstrate checklist compliance. We are unaware of any such requirement's adoption by the FCC. Moreover, it is both adequate and preferable to rely instead upon a sound PAP, as opposed to a history of compliance as the means for assuring that markets will remain open.

I. Inducing Competition

Qwest cited a report of the New York Public Service Commission, which noted that CLEC market share increased by 130 percent (to 20 percent of the state market) in the year following the FCC's granting of 271 approval there.[26] Qwest also cited the FCC conclusion expressed in paragraph 428 of the Bell Atlantic – New York (Verizon) 271 order, which was that additional competition in interLATA telecommunications markets generally promotes the public interest.

The witness for the Iowa Consumer Advocate testified that we should consider the facts that Qwest has a long-standing relationship with its customers and that carrier-changing transaction costs will create an impediment for CLECs in securing customers. He then said that in overcoming barriers like these, it would be helpful to continue to limit to CLECs the ability to bundle local and interLATA long distance services, which means denying Qwest 271 approval.[27]

Discussion: The market size, demographics, and geography of New York differ from those of the states participating in these workshops. It would be speculative to extrapolate quantitative results from there. However, there is reason to believe that the opening of the in-region, interLATA market to Qwest will have the effect of inducing carriers in that market to accelerate their efforts to enter the local exchange market. The service bundling concept that so many carriers espouse will require response by CLECs. If all other things be appropriate in terms of market openness, we would be correct to consider the potentially beneficial effect that Qwest 271 approval will have on growing competition in the local exchange market.

The Iowa Consumer Advocate's position regarding Qwest's advantages makes correct factual statements, but fails to recognize that those advantages will always exist at the outset of in-region, interLATA competition, whenever it begins. They form an inevitable part of competition, as do competitive advantages that CLECs have. It is not the goal of the Congress to equalize commercial advantages, but merely to neutralize those that are unduly gained from a competitive perspective. Reputation and service-transfer costs are not among those.

As to the issue of permitting bundling by both CLECs and Qwest, the Iowa Consumer Advocate's testimony essentially begs the same question Congress asks the FCC to answer with the consultation of state commissions and the U.S. Department of Justice. We cannot decide that it is categorically wrong to allow bundling because it will deter

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[26] Qwest Initial Public Interest Brief at page 44.

[27] Opening Brief Public Interest, Office of Consumer Advocate, Iowa Department of Justice at page 22.

local market entry; it is the evident result that the Act itself anticipates, when applicable conditions have been met. The role of those who would participate in implementing the Act is to decide whether those conditions have been met. On that question, the evidence and argument of the Consumer Advocate is most welcome; on the merits of the Act itself, that office's judgment is, like our own, irrelevant.

In sum, the thrust of the Consumer Advocate's testimony on the conditions that are arguably material here is that competition has not reached sufficient levels, nor have CLECs shown sufficient financial strength to provide confidence that local markets are or are likely to remain open. Those arguments have already been addressed.

J. Other Issues

The participants raised a number of other issues, which have been addressed in other workshops. These issues include the OSS test,[28] DSL and advanced services,[29] and change management.[30] The results of the OSS test that is being conducted under the auspices of the ROC will come before the participating commissions later. We spent considerable time on advanced services, including DSL, in the emerging services workshop and the report thereon addresses the issues raised in detail.[31] The Group 5 Report addressing general SGAT terms and conditions discusses the lack of evidence that precludes us from addressing the sufficiency of Qwest's change management processes.

[28] ASCENT Comments at page 19.
[29] ASCENT Comments at pages 16 through 18; New Mexico Advocacy Staff Initial Public Interest Brief at pages 23 and 24.
[30] Sprint Brief at page 4.
[31] Group 5 Report.

BEFORE THE NEW MEXICO 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

REPORT ON QWEST'S PERFORMANCE ASSURANCE PLAN

OCTOBER 22, 2001

EXHIBIT Qwest 28 CW

TABLE OF CONTENTS

I. Introduction 1
A. Background to These Proceedings 1
B. Significance of PEPP Collaborative Results 2
C. Scope of These Proceedings 3
II. Standard of Review 4
III. Summary of Recommended QPAP Changes 6
IV. Meaningful and Significant Incentive 12
A. Total Payment Liability 12
1. The 36 Percent of Net Revenues Standard 12
2. Procedural Caps 16
3. Qwest's Marginal Cost of Compliance 20
4. Continuing Propriety of a Cap Based on 1999 Net Revenues 21
5. Likely Payments in Low Volume States 22
6. Deductibility of Payments 22
B. Magnitude of QPAP Payout Levels 23
C. Compensation for CLEC Damages 26
1. Relevance of Compensation as a QPAP Goal 26
2. Evidence of Harm to CLECs 28
3. Preclusion of Other CLEC Remedies 30
4. Indemnity for CLEC Payments Under State Service Quality Standards 33
5. Offset Provision (Section 13.7) 34
6. Exclusions (Section 13.3) 36
7. SGAT Limitation of Liability to Total Amounts Charged to CLECs 41
D. Incentive to Perform 41
1. Tier 2 Payment Use 41
2. Three Month Trigger for Tier 2 Payments 42
3. Limiting Escalation to 6 Months 44
4. Splitting Tier 2 Payments between CLECs and the States 45
V. Clearly Articulated and Pre-Determined Measures 46
A. Measure Selection Process 46
B. Adding Measures to the Payment Structure 47
1. Requiring Payments for Canceled Orders 47
2. Requiring Payments for "Diagnostic" UNEs 48
3. Cooperative Testing 49
4. Adding PO-15 D to Address Due Date Changes 49
5. Including PO-1C Preorder Inquiry Timeouts in Tier 2 50
6. Adding Change Management Measures 50
7. Adding a Software Release Quality Measure 51
8. Adding a Test Bed Measurement 51
9. Adding a Missing-Status-Notice Measure 52
C. Aggregating the PO-1 A and PO-1B Performance Measures 52
D. Measure Weighting 53
1. Changing Measure Weights 53
2. Eliminating the Low Weighting 54
3. LIS Trunks Weighting 55

E. Collocation 56
F. Including Special Access Circuits 56
G. Proper Measure of UNE Intervals 58
H. Low Volume CLECs 58
VI. Structure to Detect and Sanction Poor Performance as It Occurs 59
A. 6-Month Plan Review Limitations 59
B. Monthly Payment Caps 62
C. Sticky Duration 62
D. Low Volume Critical Values 63
E. Applying the 1.04 Critical Value to 4-Wire Loops 65
F. Measures Related to Low Volume, Developing Markets 66
G. Minimum Payments 67
H. 100% Caps for Interval Measures 68
I. Assigning Severity Levels to Percent Measures 70
VII. Self-Executing Mechanism 71
A. Dispute Resolution (Section 18) 72
B. Payment of Interest 73
C. Escrowed Payments 73
D. Effective Dates 74
1. Initial Effective Date 74
2. "Memory" at Initial Effective Date 75
3. PAP Effectiveness if Qwest Exits InterLATA Market 76
E. QPAP Inclusion in the SGAT and Interconnection Agreements 76
F. Form of Payment to CLECs 76
VIII. Assurances of the Reported Data's Accuracy 77
A. Audit Program 77
B. PUC Access to CLEC Raw Data 82
C. Providing CLECs Their Raw Data 83
D. Late Reports 84
IX. Other Issues 86
A. Prohibiting QPAP Payment Recovery in Rates 86
B. No-Admissions Clause 87
C. Qwest's Responses to FCC-Initiated Changes 87
D. Specification of State Commission Powers 87

I. Introduction

A. Background to These Proceedings

Group consideration of a post-entry performance plan began in August 2000, with the creation of a collaborative process by the Qwest Regional Operating Committee (ROC). Eleven of the 14 state public service commissions with responsibility for regulating Qwest local exchange service invited interested parties to participate in a "ROC PEPP collaborative." The PEPP Collaborative process included five multi-day workshops, a number of conference calls from October of 2000 to May of 2001, and numerous exchanges of proposals, supporting data, and other information designed to seek the creation of a consensus plan. The PEPP Collaborative participants included staff members, AT&T, WorldCom, Z-Tel, McLeod, Eschelon, other CLECs, Southwestern Bell and Qwest.[1]

The statistical methods and the payment structure of the Texas PAP approved by the FCC served as the starting point for the PEPP collaborative. The collaborative reached agreement, however, that benchmark measures would change from a statistical approach to a direct "stare and compare" method. The PEPP collaborative also agreed to change a number of the statistical methods applicable to the parity measures. The QPAP adopted the two-tiered Texas payment approach, under which Tier 1 payments go to CLECs and Tier 2 payments go to the states. The QPAP also changed the Texas approach by adding to the payment escalation method (for consecutive months of missed performance) a corresponding stepped de-escalation process. The QPAP also eliminated the Texas plan payment caps on individual performance measures (excepting billing), restructured collocation payments, and raised Tier 1 performance measures classified as "medium" to "high."[2] The QPAP differs from the Texas plan in a number of other respects as well.

These multi-state 271 workshops have been proceeding in parallel with the activities of the PEPP collaborative. After it appeared in May of 2001 that further PEPP Collaborative efforts were in substantial doubt, the seven commissions then participating in these multi-state workshops decided that the section 271-affecting aspects of the performance assurance plan expected to be filed by Qwest (QPAP) would best be considered in these workshops. Later, the commissions of Nebraska and Washington also decided to participate in these workshops, insofar as they would address the public-interest aspects of the QPAP. Our multi-state 271 workshop scope now includes consideration of the QPAP in the 271 context.

A telephonic procedural conference ensued on August 3, 2001. We solicited participation in that conference through an e-mail invitation that was sent to the service lists being used for these workshops and for the PEPP Collaborative. There was broad participation in that procedural conference, which included state commission staffs, CLECs, and public counsel not already involved in the workshops. Most of the new participants were either involved in the PEPP Collaborative efforts, or in 271 proceedings before the Washington or Nebraska commissions; however, some either had been

[1] Qwest Initial PAP Brief at page1.
[2] Qwest Initial PAP Brief at page 5.

inactive participants in these workshops or sought intervention in them after the decision to include QPAP consideration in our scope.

The results of that conference were used to establish a set of procedures and schedule for producing a report that would provide the nine commissions with a series of proposed conclusions and recommendations addressing the public interest issues raised by the QPAP. The procedures allowed all participants to file comments and testimony in response to the QPAP, which Qwest filed on or about July 16, 2001 and in substantially the same form with all nine commissions. Qwest was then permitted to file pre-hearing responses to those comments.

Hearings were scheduled for and held during the weeks of August 13, and August 27, 2001. Those hearings included direct, rebuttal, and sur-rebuttal testimony. In all, 11 witnesses testified during seven days of hearings. We heard testimony from Carl Inouye, Michael Williams, Karen Stewart and Nancy Lubamersky of Qwest, George Ford of Z-Tel, John Finnegan of AT&T, Chad Warner of WorldCom, Marlon Griffing of the New Mexico Advocacy Staff, Rex Knowles of XO Utah, Tim Kagele of Time Warner, and Timothy Peters of ELI. Main briefs, due to be filed by September 13, 2001 came from the Wyoming Consumer Advocacy Staff, Washington Public Counsel, Z-Tel, Covad, ELI/Time Warner/XO Utah, New Mexico Advocacy Staff, WorldCom, AT&T and Qwest. Reply briefs, due by September 20, 2001, came from the Wyoming Consumer Advocacy Staff, Z-Tel, Covad, ELI/Time Warner/XO Utah, New Mexico Advocacy Staff, WorldCom, AT&T and Qwest.

B. Significance of PEPP Collaborative Results

The evidence here demonstrates that the PEPP Collaborative process was comprehensive, well conducted, subject to wide participation, and thorough in addressing the broad range of issues and subjects appropriate to a post-entry assurance plan of the type expected by the FCC. The participants, despite their widely diverging views and mutual impatience with each other's positions, evidently succeeded in reaching a large number of agreements. Our purpose here was not to revisit agreements already made. Neither was it to provide an open forum for introducing propositions or arguments that had not been raised before but should have been, considering the comprehensive and open nature of the PEPP Collaborative process.

We did not establish a firm rule that would preclude new or inconsistent positions or proposals; however, we did inform the parties that such positions or proposals would require a strong showing of propriety and need, lest we risk disrupting important balances reflected in provisions agreed to either unanimously or nearly so in the PEPP collaborative process. Clearly, where agreement was reached through compromise, we needed to be careful not to support an improvement in what party got without considering what had been given in return. This report largely addresses issues on their individual merits, but there are a significant number of cases where maintaining the general balance that resulted from the PEPP collaborative contributed to conclusions and recommendations.

Where a participant could show that substantial or complete agreement was reached during the efforts of the collaborative, we gave that agreement significant but not

determinative weight, when examining previously unraised proposals or positions in opposition to those taken earlier. At the time of that ruling, it appeared from the last report issued by those administering the PEPP Collaborative process[3] that there was a comprehensive and fairly complete listing of the areas where agreement was reached and of the areas where disputes remained. However, the evidence in the workshops made it clear that the collaborative process reached an abrupt end, with no ability to conclude with certainty that it had yet run its full and natural course with respect to allowing new issues to be raised. It also became clear from the evidence that the report, while clear and well prepared, did not reach the level of underlying detail that proved necessary to explore fully all of the numerous and complex subject areas involved.

There was also significant change still taking place at the close of the PEPP Collaborative efforts. As AT&T noted, the PEPP collaborative not only left many issues unresolved, but its progress was halted abruptly -- just two days after Qwest submitted a new PAP proposal. Moreover, the QPAP filed by Qwest in these proceedings contains material changes from that last one provided to the PEPP collaborative.[4]

C. Scope of These Proceedings

ELI/Time Warner/XO Utah argued that we should conduct separate workshops to develop detailed QPAP language, much as we have been doing with respect to the SGAT in the 271 workshops, citing the fact that even Qwest does not even know what all of the language means.[5]

Discussion: We have heard detailed evidence and argument about the QPAP's objectives, approaches, and implementation details. We consider the record sufficient to allow a reasonably full understanding of what the language of the QPAP will accomplish and how, should it be adopted. Certainly the parties commented on the document at a very fine level of detail when there were provisions of concern to them. It was clear in the rules governing this proceeding that all issues of concern were includable in comments, testimony, and argument. Certainly, the conduct of all the parties appeared to reflect an understanding of those rules. Moreover, we allowed all participants to seek from Qwest interpretations of any language considered vague, contradictory, or otherwise of concern.

The fact that no one Qwest witness could speak to the meaning of all the QPAP's provisions is testament not to its vagueness, but to its breadth and complexity. We find the record adequate to render conclusions on all material issues respecting the document's satisfaction of the relevant portion of the public interest test to which the FCC subjects 271 applications. We do not find language or drafting workshops to be necessary or appropriate.

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[3] *Post Entry Performance Plan Final Collaborative Summary*, June 5, 2001, Maxim Telecommunications Group (MTG) and the National Regulatory Research Institute (NRRI), introduced as Exhibit S9-ATT-JFF-5.

[4] AT&T Reply PAP Brief at page 2.

[5] ELI/Time Warner/XO Utah Initial PAP Brief at page 3.

II. Standard of Review

The FCC sets forth five general characteristics as part of its "zone of reasonableness" test for evaluating a section 271 performance assurance plan:[6]

- Meaningful and significant incentive to comply with designated performance standards
- Clearly articulated and pre-determined measures and standards encompassing a range of carrier-to-carrier performance
- Reasonable structure designed to detect and sanction poor performance when and if it occurs
- Self-executing mechanism that does not open the door unreasonably to litigation and appeal
- Reasonable assurance that the reported data are accurate

Qwest's reply brief argued that a number of CLECs strayed far from the FCC's established "zone of reasonableness" approach. Qwest accused them of arguing instead that the QPAP should be designed to assure a competitive post-entry local market or to maximize incentives for Qwest to comply with its wholesale service obligations. Qwest argued that it would be incorrect to approach the evaluation of a PAP's adequacy from the viewpoint that more is necessarily better. Qwest urged that payments not be set at a level that would encourage CLECS to seek windfall payments, to the detriment of investment in their own facilities.[7] Qwest argued that the FCC has repeatedly found similar BOC PAP proposals to fall within this zone of reasonableness standard.[8]

In supporting the overall reasonableness of its QPAP, Qwest cited the fact that it began the PEPP collaborative with the Texas plan as a starting point, and then changed it significantly and positively to address discussions occasioned by that collaborative. Qwest cited the following specific "improvements:"[9]

- Increasing payments by omitting the Texas plans' K-Table
- Providing less forgiving de-escalation of payments when non-compliant performance should improve
- Eliminating the caps on all individual performance measurements except for billing
- Restructuring collocation payments
- Raising Tier 1 "medium" measurements to "high"

The simple test in assessing the adequacy of the QPAP should, according to Z-Tel, be whether a recommended change would improve the incentives to provide conforming service.[10] In applying this test, Z-Tel would prefer "robust" procedures to "potentially

[6] Qwest Initial PAP Brief at page 2.
[7] Qwest Reply PAP Brief at page 2.
[8] Qwest Reply PAP Brief at page 3.
[9] Qwest Reply PAP Brief at page 3.
[10] Z-Tel Initial PAP Brief at page 6.

adequate" ones. Z-Tel said that the "only" appropriate standard to apply in examining CLEC-proposed changes to the QPAP is whether the changes would improve the goal of giving Qwest adequate incentive not to discriminate against CLECs, and that caps on payment levels are antithetical to creating such incentives.

Discussion: Z-Tel's argument is unsound. The FCC has repeatedly made clear that payment level caps are appropriate for inclusion in PAPs. The very existence of those caps and other limitations in PAPs that exist under FCC approved 271 applications show that the FCC takes a substantially less restrictive view. Our task is not to decide how to increase incentives, but to decide upon the sufficiency of those proposed, which includes at least a full consideration of their comparability with those already reviewed by the FCC. Whatever incentive conditions we come up with, more stringent ones will, as Z-Tel puts it, further the goal of giving Qwest adequate incentive to provide nondiscriminatory service. That statement may be true within reason on a factual basis, but it does not capture the review standard that we should apply.

The goal is clearly not to place on in-region, interLATA entry a price tag that is so onerous that a reasonable business acting in good faith to meet its public responsibilities would refuse to pay it. To do so would be to thumb our nose at Congressional intent to increase competition in all telecommunications markets. To do so would also be to turn a blind eye to the general boundaries that the FCC has placed around the terms and conditions of PAPs. Those boundaries are becoming more clearly marked as the number of PAPs reviewed increases. We should begin our consideration of the QPAP with at least a general understanding and acceptance of those boundaries, if for no other reason than that the consultation to be provided is not likely to have much effect if it is outside the range of what the FCC will consider reasonable and feasible.

It is certainly appropriate to consider unique circumstances that make the case here different from those already examined by the FCC.[11] It is interesting to note that no party -- Qwest, CLEC, or commission advocacy staff -- has argued that the question of payment limitations is materially different here because of unique factual circumstances. Given the lack of such contentions, there is all the more reason to start from the premise that preceding FCC decisions on 271 applications provide us with sound overall guidance and, to a large degree, boundaries.

Blind adherence to every aspect of approved plans is certainly not required, because this is a relatively new area of inquiry, even for the FCC. However, arguments that call for radical departures from cornerstone elements common to the plans already included in approved 271 applications should be considered a distraction. That said, however, it remains true that each plan addressed heretofore by the FCC, and the one before us, contains unique elements. Some give more to CLECs in some areas, and some give the BOC greater advantages in others. All presumably reflect the kind of balancing that results from cooperative efforts to develop them. As the CLECs have stated articulately and persuasively here, arguments that QPAP burdens on Qwest are equal to or greater than those of some other plan in some respect must be tempered by recognition of those areas where the QPAP eases burdens that BOCs elsewhere are bound to carry. The

[11] One example is the multi-state nature of these proceedings and of the efforts taken to date and possibly in the future to address the questions that the Telecommunications Act of 1996 burdens states to answer.

ultimate decision on the QPAP's sufficiency, as the FCC addresses the matter, should be one that takes into account the following considerations:

- Does it comport with the cornerstone elements common to previous plans existing under approved 271 applications
- Do the gives and takes that distinguish it from those other plans balance out on a net basis
- Does the plan provide adequate compensation for actual harm for which CLECs could reasonably expect to be compensated if their relationship with Qwest were more typical of commercial arrangements of similar size, complexity, and mutual risk and opportunity
- In the final analysis, will the plan (considering not just those elements designed to compensate CLECs for harm) provide sufficient incentive for Qwest to "continue to satisfy the requirements of Section 271 after entering the long distance market," as the FCC put it in paragraph 275 of the SBC Kansas/Oklahoma Order, after it may receive 271 approval
- Will the plan provide that incentive in a manner that does not place any more strain than is necessary on the sound principle that damages should bear a reasonable relationship to harm caused
- Do the incentive aspects of the plan (i.e., those that go beyond compensating CLECs for actual harm) impose a price on in-region, InterLATA entry that it would be irrational for a BOC to pay for the privilege of such entry, recognizing that the range of expected values of potential payments, not a theoretical maximum with minimal likelihood of occurring, is much more meaningful
- Does the plan adequately respond to any unique circumstances proven by the evidence to be applicable here
- Are there administrative or procedural details in the plan that are not sufficiently functional, and that can be repaired without a major shift in balance

These questions pointedly do not ask whether greater burdens on Qwest would increase its incentives to comply with its service obligations. The answer to that question is as irrelevant as it is self-evident. In no fathomable commercial setting is that question material to the mutual agreements that come to fruition between vendors/suppliers and customers. Making it relevant here not only fantastical, it is beyond any rational conception of fairness and propriety.

III. Summary of Recommended QPAP Changes

The following list summarizes the changes that this report recommends be made to the QPAP to make it sufficient to meet its goals and to fall within what we construe as the FCC standards applicable to such plans.

Provisions for Changing the Cap

The hard 36 percent cap as proposed by Qwest is generally consistent with what exists in other plans now in effect after FCC 271 approvals. However, the lack of substantial

experience with PAP operation across the country suggests the propriety of allowing a balanced and limited span of variability in response to actual experience. If Qwest exceeds the cap by at least 4 percentage points for any consecutive 24-month period, the QPAP should provide for an increase of up to 4 percent in the cap, upon order of a state commission after notice and hearing. Performance producing payments at least 8 percent below the cap for the same length of time should allow reductions of 4 percent in the cap. The total cap movement should be limited to 8 percentage points upward and 6 percentage points downward. See the discussion under the *Procedural Caps* section of this report.

Foreclosing Recovery for CLEC Harm Occurring Late in the Year

If the yearly cap is met before a CLEC is harmed, it will not get any recovery at all under the QPAP, even though CLECs suffering harm earlier receive both base and escalated payments. The QPAP should be changed to create a mechanism that equalizes compensation to CLECs and the states under those circumstances. See the discussion under the *Procedural Caps* section of this report.

Allowing CLEC Recovery of Non-Contractual Damages in Other Proceedings

In seeking to preclude double recovery of damages and the ability to recover damages under other actions, the QPAP goes too far. It should be changed in a manner that will make it more clear that CLECs will be able to: (a) institute actions not based on contractual theories of liability and (b) avoid QPAP offsets for the portions of damages that was not awarded to compensate for contractual measures of damages. See the discussion under the *Preclusion of Other CLEC Remedies* section of this report.

Offsetting QPAP Payment Liabilities by Other Awards

The language of QPAP Section 13.7 requires change in order to assure that Qwest is not entitled to reduce QPAP payments on account of damage awards for injury to persons or physical property, even in cases where those awards arise from actions or omissions in providing wholesale service to CLECs. The language also needs to be changed in order not to undercut the ability of CLECs to recover non-contractual damages awarded in other allowed causes of action, as the preceding issue addresses in more detail. See the *Offset Provision (Section 13.7)* section of this report. A change to SGAT Section 5.8.1 is also required to prevent an inappropriate limit from being placed on Qwest's liability for injury to persons or physical property. (See the *SGAT Limitation of Liability to Total Amounts Charged to CLECs* section of this report..

Excluding Qwest Payment Responsibilities in the Case of CLEC Bad Faith

It is appropriate that the QPAP set forth explicit provisions about CLEC bad faith. Nevertheless, QPAP Section 13.3 needs to be amended to avoid excusing Qwest performance in cases that do not actually constitute bad faith, but merely CLEC foresight regarding an inability of Qwest to perform as required. See the *Exclusions (Section 13.3)* section of this report.

Differing SGAT and QPAP Force Majeure Provisions

The QPAP and the SGAT include separate and somewhat different force majeure provisions. There having been no good reason offered to justify the difference, we should mitigate the potential for controversy and litigation by applying to the QPAP the

SGAT's provision, which has been established to be suitable. See the *Exclusions (Section 13.3)* section of this report.

Timing of Force Majeure Event Notices
It should not be possible for Qwest to defer force majeure event declarations until after it knows whether it is in jeopardy of meeting monthly performance standards. It should be required to provide CLECs with notice of such events within 72 hours of the time that they occur or that it could first have been reasonably expected to learn of them. Such a provision will allow CLECs timely notice of the need to validate such declarations while events are fresh. It will also preclude reconstructions of past events to identify performance-excusing conditions. See the *Exclusions (Section 13.3)* section of this report.

Impact of Force Majeure Events on Interval Measures
AT&T proposed changes to the force majeure language, in order to assure that the performance excuse is appropriately limited to the time during which such an event disrupted performance. That language should be included in the QPAP in order to assure that Qwest's performance excuse is limited. See the *Exclusions (Section 13.3)* section of this report.

Applying Force Majeure Provisions to Parity Measures
It is arbitrary for the QPAP to provide that force majeure events be permitted to excuse performance under measures where parity between wholesale and retail services is the standard. The QPAP should not include force majeure events among the excuses for meeting parity measures, because such a provision gives Qwest a highly unbalanced right to excuse substandard performance. See the *Exclusions (Section 13.3)* Section of this report.

CLEC Failures to Forecast as a Qwest Performance Excuse
The SGAT identifies those CLEC forecasts that are necessary and appropriate for Qwest to require in order for it to be able to provide adequate service. It would not be sound to excuse Qwest performance for failure to provide any other type of forecast. The QPAP should be changed to limit performance excuses to failures by CLECs to provide forecasts as required by the SGAT or interconnection agreement under which they interact with Qwest. See the *Exclusions (Section 13.3)* section of this report.

Tier 2 Payment Use
It is neither necessary nor appropriate to impose a QPAP limit on the use of Tier 2 payments. The QPAP should be changed to ease the use restrictions. See the *Tier 2 Payment Use* section of this report.

Funding Commission Qwest/CLEC Oversight Activities
It will be beneficial for Qwest, CLECs, and the state commissions to adopt and operate under a common system for administering responsibilities and resolving disputes involving wholesale service. Experience with arbitrations, UNE price dockets, SGATs, 271 reviews, as well as the likelihood of substantial disputes in the future indicates that it will take significant state resources to fulfill commission responsibilities. The Congress and the FCC expect states to carry out much of the regulatory and administrative responsibility under the federal act, but have not funded those activities.

It is appropriate to make a portion of Tier 2 and Tier 1 escalated payments available for supporting administration and dispute resolution activities. One third of Tier 2 payments and one-fifth of Tier 1 payments should be made to a special fund for these purposes. On an annual basis, Tier 1 payments not needed for these purpose could be returned to the CLECs from whose payment calculations they came. See the *Tier 2 Payment Use* section of this report.

Three-Month Trigger for Tier 2 Payments

The QPAP does not provide for Tier 2 payments to begin for any measure unless Qwest has failed to meet it for three consecutive months. This standard allows Qwest to avoid payment by performing in only one month of every three, thereby setting a loose a standard of performance. Some Tier 2 measures have Tier 1 counterparts, which also create payment risk for Qwest. For those that do not, Qwest's Tier 2 payment responsibility should begin with the next month of non-compliance in any case where, within the prior 12 months, there has been non-compliance for the measure in any two of three consecutive months. For those Tier 2 measures already subject to Tier 1 payments, the same trigger should be the second consecutive month of non-performance after there has been, within the prior 12 months, non-performance in any two of three consecutive months. See the *Three-Month Trigger for Tier 2 Payments* section of this report.

Changing the Weights of Some QPAP Measures

The QPAP provides for three classes of measures; the higher the weight class the higher the payment required in the event of non-performance. CLECs requested that a number of measure weights be increased, because they considered those measures to relate to services that had relatively higher value than was reflected by the QPAP's assigned weight class. Qwest agreed, but argued for compensating reductions in other weights, in order to keep payments in proportion to the value of services, as measured by the prices charged for them.

The CLECs did not express approval of Qwest's rebalanced weights; they argued instead for acceptance of higher weights without reducing any others. We found that approach to be imbalanced and inappropriate. Qwest made a change to address CLEC concerns; CLECs said that the change did not meet those concerns and at least one CLEC said that the change actually moved in the wrong direction entirely. Therefore, the weights Qwest agreed to change should return to the weights proposed in the QPAP filed originally in these workshops. See the *Changing Measure Weights* section of this report.

Collocation

Qwest agreed to a changed collocation proposal, which it said was based upon the approach adopted in Michigan. Qwest should include the appropriate language in the QPAP. See the *Collocation* section of this report.

Rounding Problems with Small Order Volumes

If a standard is 90 percent and order volumes are five, then Qwest must perform without flaw to meet the monthly standard. Qwest would solve the problem by in effect allowing "one-miss" per month performance to be considered as compliant. This approach unduly disadvantages CLECs with small volumes. Qwest could perform under standard in every month of the year without making payments. The QPAP should be changed to adopt a much more balanced process. Qwest should calculate the yearly rolling average

performance. In any month where that average was less than the standard, payments should begin with the first miss. Moreover, from that month forward, escalation should apply in each successive month where the standard is not met through strict application of the monthly formula (e.g., if in the next month Qwest misses 1 out of 8 opportunities on a 90 percent measure, escalation should apply). See the *Low Volume CLECs* section of this report.

Limits on QPAP Amendments

In order to give Qwest a reasonable degree of certainty about the exposures to which it will be subjected, the QPAP in general constrains appropriately the ability to amend it. However, the limits go further than is necessary to accomplish this objective, with the result that the QPAP is at undue risk of becoming nonfunctional in a marketplace that may be expected to remain dynamic. It requires amendment in several ways to accommodate change without disturbing the overall level of certainty Qwest rightfully expects under the circumstances. The QPAP should: (a) apply normal SGAT dispute resolution procedures to disagreements over the proposed addition of new measures to the QPAP payment structure, (b) support a Tier 2 payment funded (backed up if necessary by a small, capped portion of Tier 1 escalated payments), multi-state dispute resolution and administrative structure, and (c) provide for biennial reviews that will provide an assessment of the QPAP's continuing effectiveness. See the *6-Month Plan Review Limitations* section of this report.

Minimum Payments

Substandard Qwest performance can have particularly harsh consequences for small CLECs. The QPAP should assure that the yearly amount it pays to CLECs with small annual order volumes is sufficient to address this problem. The QPAP should be amended to include an annual minimum payment calculation. Qwest should multiply the amount of $2,000 by the number of months in the year that it failed to meet one or more Tier 1 performance measures for CLECs with annual order volumes of less than 1,200. Qwest should then subtract from this amount all payments made or to be made to the CLEC for the same year. Qwest should then make up any shortfall between the minimum payment calculation and those actual payments. See the *Minimum Payments* section of this report.

Dispute Resolution

Qwest offered a QPAP amendment that would make SGAT dispute resolution procedures available only for selected QPAP sections. This proposal left unanswered how other disputes about the SGAT should be resolved. Some mechanism covering those other sections is necessary; there is no reason to question the adequacy of the SGAT's general dispute resolution procedures for addressing all disputes about how the QPAP should be interpreted. The QPAP should be changed to make the SGAT dispute resolution procedures applicable to all disputes regarding interpretation and application of the QPAP. See the *Dispute Resolution* section of this report.

Assuring Continuing Data Accuracy

The QPAP needs to be changed to provide for a more structured process for making changes to performance measurement calculation methods more transparent and for planning and conducting tests and examinations (collectively referred to as "audits" by the participants) to assure continuing data accuracy. The program for meeting these

needs should be planned and implemented by the state commissions acting in concert, with the assistance of such outside auditing and other expertise as they determine appropriate and which they select after consultation with all interested parties. Portions of the Tier 2 payments, backstopped, if necessary, by a capped portion of Tier 1 payment escalation amounts, should fund that program. See the *Audit Program* section of this report.

PUC Access to CLEC Data

Public service commissions should not be required to undertake cumbersome, time-consuming processes for asking CLECs to provide such data about their service as Qwest already maintains. However, the QPAP should be changed to assure that Qwest supports the preservation of the confidentiality of such data by providing it only upon commission order and only after initiating the procedures necessary to maintain confidentiality. See the *PUC Access to CLEC Data* section of this report.

Retention Period for CLEC Data

The QPAP should adopt specific provisions that will obligate Qwest to retain CLEC data for specific periods and in certain forms. There should also be a provision allowing recalculation of QPAP payments for three years. See the *Providing CLECs Their Raw Data* section of this report.

Late Reports

The QPAP fails to provide a payment for incomplete reports. An incomplete report is the same as a late report for the excluded measures; therefore, the QPAP should be changed to provide a payment for reports that are not complete. Also, the QPAP late report payments adequately address very short delays, but should be changed to provide for escalation in the case of more significant delays. See the *Late Reports* section of this report.

Payment of Interest

The QPAP does not provide for interest on delayed payments. Qwest agreed to an interest factor, but would set it at the one-year U. S. Treasury rate. The parties to this agreement cannot borrow at that rate; the prime rate posted daily by a reputable source better reflects their short-term borrowing costs. The QPAP should be amended to include a clause calling for interest at that rate on payments delayed for any reason. See the *Payment of Interest* section of this report.

Performance Reports Pending 271 Approval

We recommended against making the QPAP effective prior to 271 approval dates. However, we believe that there should be an obligation to provide for the immediate initiation of monthly reports of what payment obligations would have been assuming immediate approval. Such reports will increase the visibility of performance pending 271-application consideration and they will help CLECs and commissions become familiar with the reporting formats and data content in a timely way. See the *Initial Effective Date* section of this report.

Incorporating the QPAP into SGAT and Interconnection Agreements

For the sake of clarity, Qwest's 10-day comments to this report should address in more detail how the QPAP will be incorporated into the SGAT, and should specify the SGAT sections that would accompany QPAP election for incorporation into an existing

interconnection agreement. See the *QPAP Inclusion in the SGAT and Interconnection Agreements* section of this report.

Billing Credit Format

Qwest presented a sample billing credit format at the workshops in order to demonstrate that CLECs would be able to identify the sources of credits given. The QPAP should require Qwest to provide credit information in substantially the form of that sample, absent commission consent to change it. See the *Form of Payments to CLECs* section of this report.

Uncontested Qwest Changes to the QPAP

Qwest made several QPAP changes, which it said were initiated by FCC concerns. No participant objected to them; they should be incorporated. See the *Qwest's Response to FCC-Initiated Changes* section of this report.

State Commission Powers

No party raised the issue; however, we were concerned that the QPAP says that state commissions may recommend to the FCC that Qwest be prohibited from taking on new in-region long distance customers in the event that the cap is reached. Because commissions can already do so without allowance from the QPAP and because this specification of a limited power may be read as constraining commission options otherwise available under law, this provision should be eliminated. See the *Specification of Commission Powers* section of this report.

IV. Meaningful and Significant Incentive

A. Total Payment Liability

1. The 36 Percent of Net Revenues Standard

The QPAP places at risk each year a total of $306 million, which represents 36 percent of Qwest's 1999 ARMIS return for local services in the nine states combined. The ARMIS return is measured as total operating revenue less operating expenses and operating taxes. Qwest agreed to remove from this total a downward adjustment for "Commission Rate Orders." The effect of this change is to increase in several states the amount at risk, as compared with what would have been the case without such an adjustment.

Qwest argued that the FCC has found this measure of net revenue a "meaningful incentive" to maintain adequate performance in 271 orders in New York, Texas, Kansas, and Oklahoma.[12] The 36 percent factor represents $306 million for the nine states, which compares to the following amounts already approved:[13]

Table 1: Total Amounts at Risk in Other BOC PAPs

State	Kansas	Massachusetts	New York	Oklahoma	Texas
Amount	$45 million	$155 million	$269 million	$44 million	$289 million

[12] Qwest Initial PAP Brief at page3.
[13] Qwest Initial PAP Brief at page 11.

Qwest cited the Colorado Special Master's Report addressing Qwest's performance assurance plan in that state as supporting a similar cap of 36 percent of 1999 Colorado ARMIS net return.[14] The plan discussed in that report uses a somewhat different structure, as compared with the QPAP being considered here. Both have three segments, but they are described differently. The following table shows a simplified comparison of the two plans.

Table 2: Comparison of QPAP and Colorado Special Master's Report Payments

PLAN	QPAP	Colorado
Base Payments to CLECs	Tier 1	Tier 1X
Escalated Payments to CLECs	Included in Tier 1	Tier 1Y
Payments to States	Tier 2	Tier II

Both Qwest and many of the participating CLECs made liberal reference to the Colorado Special Master's Report; each claimed that it supported their positions on the question of caps on total payments. The Colorado report describes Tier 1.X payments as providing compensatory payments to CLECs, and as being designed to make them whole. The Colorado report analogized them to liquidated damages. That report, which was issued during the first half of this year, recommended that parties claiming damages to be different from the rough approximations adopted in the report make submissions documenting the kinds of payments and amounts that would better reflect actual harm. Interestingly, despite this report's invitation and the passage of significant time between its issuance and hearings in these workshops, no such submissions have been made.[15]

The Colorado Special Master's Report described its Tier 1.Y payments as creating an incentive for Qwest, by escalating payments in cases where deficient performance continued for successive months. The Colorado report would provide for payment of only a portion of the Tier 1.Y payments to CLECs, recognizing that this payment segment, while it may serve in part to compensate CLECs for additional harm, is also intended to deter inadequate performance. It serves this latter purpose by imposing on Qwest payment obligations that exceed the amount of harm caused to CLECs. The Colorado Special Master's Report then described Tier II payments, which were designed to require Qwest payments for failing to meet standards that were either aggregate (i.e., not CLEC-specific) in nature, or that related more to general support of competition as a whole. The report recommended the following monthly payment cap calculation method:

- Determine the amount equal to $1/12^{th}$ of the annual cap, which becomes the monthly cap

[14] Qwest Initial PAP Brief at page 12, citing section III.D. of the report.

[15] Final Report and Recommendation by the Special Master *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Docket No. 011-041T (Colorado Special Master's Report), provided as Exhibit S9-WCM-CEW-3. See pages 12 through 16 for a discussion of the structure of the payments proposed in that report.

- Apply all Tier 1.X amounts against the monthly amount, but pay them even if they exceed that amount
- Pay Tier 1.Y and II payments to the extent that the monthly cap was not exceeded by Tier 1.X payments
- Carry forward any unpaid Tier 1.Y and II payments until they can be paid from monthly amounts remaining after payment of Tier 1.X amounts.
- Allow the public service commission to increase the annual cap (and therefore the monthly amounts derived thereunder) in the event that Qwest should reach the cap for two consecutive years or owe 1/3rd of the cap at the end of each of two consecutive months.

ELI/Time Warner/XO Utah argued against the QPAP's adoption of the 36 percent cap, citing several grounds, which included:[16]

- That this figure was not comparable to the caps in the PAPs of other BOCS, because the QPAP is much more favorable to Qwest in other respects
- That the 36 percent figure is less than Qwest's profits from intrastate service in Washington and Utah, which would allow Qwest to continue profiting from local exchange service even after making payments at the cap.

ELI/Time Warner/XO Utah said that a small market share in the in-region, InterLATA market (i.e., less even that the 25 percent that Verizon initially captured in New York), would justify surrendering 36 percent of its other net revenues to protect its local exchange market from competition.[17]

AT&T argued that Qwest's reliance upon the FCC's acceptance of the 36 percent total payout in other proceedings was misplaced. AT&T said that Qwest's commitment to the 36 percent amount was undercut by many other self-serving changes Qwest had made in other material provisions of the plans accepted in those proceedings, citing specifically the following QPAP provisions:[18]

- Broad offset provisions
- Broad exclusion provisions
- Limits on use of dispute resolution procedures
- Tier 2 payment limitations
- Lower late report payments
- Six-month PAP review limitations
- Narrow audit provisions

Discussion: We do not operate here in a vacuum. The FCC has already made it clear that 36 percent of net interstate revenues is sufficient to provide an adequate incentive in

[16] ELI/Time Warner/XO Utah Initial PAP Brief at page 12.
[17] ELI/Time Warner/XO Utah Initial PAP Brief at page 7.
[18] AT&T Reply PAP Brief at page 7.

other contexts. The Colorado Special Master's Report, issued after the input of many of the same CLECs participating here, applied that same basic standard to the Qwest region. Qwest presented evidence to support the economic significance of a sum based on that calculation. The participating CLECs had full opportunity to present evidence that would show that the particular facts about Qwest or their own services already being taken and to be taken from Qwest raise considerations or concerns not already addressed by the FCC in those other cases. Instead, we heard only more general objections to the use of a 36 percent standard.

Were we the first to consider this issue, such general objections might have carried more weight. However, we must conclude that such general objections cannot stand against the growing weight of decisions by FCC, which has apparently considered similar objections already. Qwest correctly noted a central gap in what a number of participants argued on the question of the adequacy of the 36 percent cap. While criticizing the sufficiency of the payments provided by QPAP, they failed to answer the fundamental question raised by such an attack, i.e., how much would be sufficient. Absent sympathy to a "more is necessarily better" viewpoint, such general criticism just does not move the ball.[19]

In so concluding, we are cognizant of the prevident caution sounded by AT&T and ELI/Time Warner/XO Utah; i.e., that we not look in isolation at this standard. The FCC certainly had in mind the entire contents of the PAPs before it when deciding whether the 36 percent standard was sufficient to create a meaningful and significant incentive to other BOCs asking for the same relief as Qwest seeks here. The conclusion we reach here is only that the standard represents an appropriate starting point, which needs to be examined again as all of the other QPAP provisions affecting Qwest's incentive to perform are addressed.

Another ELI/Time Warner/XO Utah argument about comparability, however, can be resolved at this juncture. It misses the point to argue that the QPAP may be distinguished from other PAPs because it would leave Qwest's local exchange business profitable even when payments reached the cap. The use of any ARMIS net intrastate revenue percentage that is less than 100 percent will produce the same results. That all the plans in question have used 36 percent of net intrastate revenues makes the QPAP similar to and not different from them in this particular respect. Similarly, ELI/Time Warner/XO Utah presented no basis for supporting their conclusion that the intraLATA market share initially gained by Verizon in New York is worth more than the amount at risk here. They provided no calculation to equate Qwest's long distance and local market net revenues, nor is their conclusion at all self-evidently true. Moreover, it ignores another, more obviously relevant question; i.e., could Qwest keep both any newly found long distance profits and all or most of the 36 percent of cap money at risk by acting to comply with the performance standards subject to payment consequence in the QPAP.

[19] Qwest Reply PAP Brief at page 11.

2. Procedural Caps

AT&T and Z-Tel supported the adoption of a procedural rather than an absolute or "hard" cap.[20] WorldCom supported this approach, citing that a procedural cap makes it more difficult, as compared with a hard cap, for Qwest to make a calculating decision whether it is more economical to continue bearing the costs of non-compliance, rather than to bring its performance up to standard. WorldCom also observed that a procedural cap would give state regulators the power to modify the plan where circumstances would warrant a change.[21] AT&T also argued that a hard cap would operate to deny a CLEC full compensation in cases where the cap was reached before an individual CLEC suffered substandard performance. For example, under the QPAP, if Qwest reached the cap in October, but in that same month first failed to meet standards in the case of CLEC "X", CLEC X would be entitled to no payments at all.[22]

Discussion: There was an overabundance of ultimately unimportant urgings about whether this QPAP is voluntary or not. Whatever its nature, the issue before us is not changed. That issue is whether the participating commissions should tell the FCC that they think the QPAP sufficient to satisfy the public interest. Despite the confusion engendered by that debate, however, one cornerstone conclusion is extremely clear: Qwest offers it as the toll it is willing to pay to cross the bridge to in-region, InterLATA competition. Just as CLECs have the opportunity to decide whether the costs of entering the local exchange market are too great, so should Qwest have a similar ability before exercising its end of the Telecommunications Act of 1996 "bargain." The FCC and the states have gone a long way to providing a reasonable degree of economic assurance (as far as any business in an essentially free economy has a right to ask) about the costs of using incumbent facilities to enter that market.

Providing that assurance in reasonable measure is proper, because the Congress, as events have shown us, has asked CLECs to take large financial, operating, and customer-perception risks if they want to compete with the BOCs who are entrenched in their individual local exchange markets. There should be a compensating kind of certainty for the BOCs as they face similar business decisions about the markets of other carriers. A procedural cap that leaves others free to escalate without limit the risk that Qwest must take in entering the in-region InterLATA market makes a decision to enter the market much more speculative than it need or should be.

Our concern in this regard does not arise from the fact that the "others" who will make such escalation decisions are public service commissions; our faith in their ability to make such decisions carefully and wisely does not underlie this conclusion. However, the concerns of those who make the decisions, which include not only Qwest, but those who provide the company with capital, must also be taken into account. We should ask three questions and we must rely upon the answers to all in order to decide this issue:

- How much would we undercut the purposes and goals of the QPAP by failing to incorporate the economic "opener" that a procedural cap represents

[20] AT&T Initial PAP Brief at page 19; Z-Tel Initial PAP Brief at page 19

[21] WorldCom Initial PAP Brief at page 8.

[22] AT&T Initial PAP Brief at page 20.

- How likely will it be that CLECs will be under-compensated or that Qwest will be making a calculated decision to under-perform, should the caps be reached
- How much should we concern ourselves that a decision not to enter the in-region, interLATA market may follow.

The answer to the first question is that there will be no material weakening of the QPAP, given the other methods and processes available to redress an inability of Qwest to stay below the cap. These things include root-cause analyses, other enforcement proceedings, and the ability to revisit InterLATA authority itself. In light of that last power, we see the particular value of caps at all as assuring that: (a) Qwest not benefit from the delay it would take to exercise that power, and (b) that there be no reward in walking just this side of the line at which the exercise of that power becomes a real risk. A cap high enough to provide assurances in those two regards should be sufficient.

The answer to the second question is that there is not a basis in the record before us to conclude that a failure to properly control performance is at the root of continuing, high PAP payments. The analysis underlying this conclusion is set forth under the subject of *Limiting Escalation to Six Months*, which is addressed later in this report.

The answer to the third question is that the risk, while perhaps not "clear and present," is not immaterial. The FCC has made it clear that validly authorized in-region, interLATA market entry serves the public interest. Our own view is that the public benefits of true competition in the local exchange market are disproportionately much greater, but that relative disparity does not render unimportant the goal of increasing competition in other markets.

The answers to the first two questions serve to reduce to a minimum the value that would be added by introducing a procedural cap. The answer to the third confirms what the first two answers tell us, which is that there is no established foundation for including in the QPAP a re-opener of the question of how much local economic risk Qwest should be exposed to as a condition of its in-region, interLATA market entry.

Too much reliance has been placed on the Colorado Special Master's Report as supporting a procedural cap. It does unarguably provide for one, but it proposes very difficult standards for triggering a review. It requires one of two conditions to be met:

- Exceeding the annual cap for two years running
- Producing payments for two consecutive months in amounts that, when annualized, equate to twice or four times the annual cap amount.[25]

Should the cap be exceeded for two years running, other provisions and mechanisms should already have come into play to address and respond to the underlying problems. As to the two-month trigger, it would take results that, while producing substantial penalties in their own right, could well even out across the remaining 12 months of the year. The QPAP, should it come into existence, is designed for a life whose length

[25] The language of page 17 of that report may suggest that the annualized amount be equal to twice the annual cap amount, or perhaps even some other amount, in any case, the statutory notice of observations about amounts determined for 12-month periods that can be drawn across 14[th] of such periods still applies, as is discussed immediately below

makes it inappropriate to revisit its major economic underpinning on the basis of performance over so short a period.

More intriguing is the WorldCom proposal to set as a procedural cap the 44% of net local revenue established by the New York Public Service Commission in post-271 proceedings to address the now well-known problems that arose after Verizon (Bell Atlantic - New York) received 271 approval from the FCC.[24] The initial application of that level is clearly not justified by the circumstances present here: the New York Commission raised the level to 44 percent only in response to problems observed later. We cannot presume that there will be such problems; in their absence, the 36 percent initially set by the New York Commission may be taken as equally reasonable.

What is intriguing about the WorldCom proposal is the fact that, while not offered in that form by WorldCom, it does nevertheless suggest a targeted and measured increase, as opposed to the unlimited one generally proposed by CLECs here. Such an increase would moderate the uncertainty, discussed below, that an unlimited re-opener would place upon Qwest. Signaling the amount of an increase in exposure, accompanied by clear and complete statement of the conditions that cause it can better serve to provide appropriate incentives without making business entry decisions unduly speculative.

Because we have yet to accumulate substantial experience under a broad range of PAPs across the country, we consider it prudent to consider the possibility of allowing movement of the cap within a reasonably confined range and for a defined set of circumstances. Coming experience will tell us much more about whether a 36 percent cap is or is not appropriate. Take just four of what are probably numerous examples of how our knowledge will increase in the next several years:

- BOC performance baselines will become more established
- Root cause analyses will identify the actual causes of persistent, substandard performance
- What needs to be measured and how those measurements should be used will be enriched by growing competition
- The trend in local market penetration by CLECs will tell us whether 1999 remains an appropriate year to use as the foundation for setting total financial exposure.

We believe that the combination of factors such as these could support movement of the 36 percent limit in either direction. Therefore, we recommend the inclusion of the following cap movement principles in the QPAP:

> *A. An increase in the cap of a maximum of 4 percentage points at any one time (i.e., first to 40 percent) shall occur upon order by a state commission that it is appropriate to do so in cases where performance the cap would have been exceeded for any consecutive period of 24 months by that same 4 percent or more, provided that:*

[24] WorldCom Initial PAP Brief at page 8.

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a. the commission shall determine that the preponderance of the evidence shows Qwest could have remained beneath the cap through reasonable and prudent efforts, and

b. the commission shall have made that determination after

1. having available to it on the record the results of root cause analyses, and

2. providing an opportunity for Qwest to be heard.

B. A decrease in the cap of a maximum of 4 percentage points at any one time shall occur upon order by a state commission that it is appropriate to do so after performance for any consecutive period of 24 months which produces calculations of total payment responsibility that is 8 or more percentage points (i.e., 26 percent or less) below the cap amount for that period, provided that:

a. the commission shall determine that the preponderance of the evidence shows the performance results underlying those payment calculations results from an adequate Qwest commitment to meeting its responsibilities to provide adequate wholesale service and to keeping open its local markets, and

b. the commission shall have made that determination after providing all interested parties an opportunity to be heard.

C. The provisions of (A) and (B) above shall be applicable to the next 24 month period commencing at the completion of the first, provided that the maximum increase in the cap amount shall be 8 percentage points; the maximum decrease shall be 6 points.

A more important problem remains with the design of the cap. In years where the cap may be exceeded, the QPAP could operate severely and unfairly against CLECs who suffer disproportionately from Qwest under performance late in the year. When the cap is reached, CLECs who have already suffered harm are compensated fully; those yet to suffer harm will not be compensated at all. This result is completely arbitrary and it could have devastating consequences for a CLEC that has given up its other rights to compensation in return for electing the QPAP provisions. There is a compelling public interest in assuring that compensation does not become a matter of one's place in the line – a position, by the way, that is not determined by the CLEC but by the performance that Qwest delivers. Therefore, when the cap is reached, each CLEC shall, as of the end of the year, be entitled to receive the same percentage of its total calculated Tier 1 payments. In order to preserve the operation of the cap, the percentage equalization shall take place as follows:

1. The amount by which any month's total payments exceeded 1/12th of the annual cap shall be calculated and apportioned between Tier 1 and Tier 2 according to the percentage that each bore of total payments for the year to date. The result of this calculation shall be known as the "Tracking Account."

2. *The Tier 1 excess shall be debited against the next ensuing payments due to each CLEC, by applying to the year-to-date payments received by each the percentage necessary to generate the required total Tier 1 amount.*

3. *The Tracking Amount shall be apportioned among all CLECs so as to provide each with payments equal in percentage of its total year to date Tier 1 payment calculations.*

This calculation shall take place in the first month that payments are expected to exceed the annual cap and for each month of that year thereafter. Qwest shall recover any debited amounts by reducing payments due from any CLEC for that and any succeeding months, as necessary.

3. Qwest's Marginal Cost of Compliance

A number of participants supported the argument of the New Mexico Advocacy Staff that one sound way to examine the propriety of a firm payment cap would be to compare: (a) Qwest's marginal cost of complying with the performance standards against (b) the payments to which it would be exposed for not complying. As the Staff's brief put it:[25]

> *A cap such as the annual cap proposed by Qwest permits Qwest to calculate the net cost of discriminatory service to CLECs and weigh that cost against potential gains to Qwest of poor service to competitors.*

Z-Tel said that there is a "substantial risk" that Qwest will decide that paying 36 percent of its 1999 measured revenues is preferable to keeping its local market open.[26]

Qwest argued that there is no evidence to show that its marginal cost of compliance is greater than 36 percent of its net revenues. Moreover, Qwest said that the FCC has rejected the notion that such a balancing is appropriate in the first place. Qwest added that, even were it appropriate to use as a benchmark, the calculation of marginal cost is not straightforward, because Qwest would face enforcement risks beyond the monetary payments imposed under the PAP, were it to reach maximum payment levels.[27] Qwest also argued that any such analysis would have to consider not just a single year's payments. The reasoning was that Qwest would have an incentive to make very high cost investments that would produce benefits for numerous years, because those investments would reduce recurring QPAP payments in every year that the investment (e.g., additional trucks or network facilities) yielded benefits. In other words, in terms of examining Qwest's incentives, it would be necessary to look not only at one year's payback (e.g., reduced QPAP payments), but rather to value the stream of annual reductions that would result from an investment.

Discussion: There is certainly theoretical appeal in the marginal cost analysis that the New Mexico Advocacy Staff's witness explained. However, there are a number of insurmountable problems in applying it:

[25] New Mexico Advocacy Staff Initial PAP Brief at page 15.
[26] Z-Tel Reply PAP Brief at page 11.
[27] Qwest Initial PAP Brief at page14.

- As its proponent stated, neither he, Qwest, nor any other party presented evidence of what Qwest's marginal costs of compliance were, thus making the equation he espoused impossible to perform from this record, and perhaps at all
- Were there such evidence, there would remain the need, again as the witness agreed, to add to the calculation the expected values of other risks faced by Qwest, such as revocation of section 271 approval, or parallel enforcement proceedings
- Long-term investments by Qwest would reduce payments for a number of years; therefore, the necessary equation could not be performed by a simple comparison of a single year's costs and reduced QPAP payments.

Thus, while the proffered equation had theoretical appeal, it was ultimately not a solution here, because there was no evidence to enable its use. Moreover, it is unlikely that an attempt to gather evidence and to use it in an analytical model would yield particularly reliable results anyway, given the subjective nature of the other applicable risks and the judgments that would be necessary to value on a present basis the multi-year benefits that long-term investments would yield. We believe that the New Mexico Advocacy Staff witness's thoughtful and candid testimony recognized these unfortunate limitations. To claim now that his analysis supports the notion that the 36 percent limitation is too low is not useful. We, like he no doubt, would have preferred to see more effort placed on quantifying the relationship and less on arguing that a point made theoretically had somehow become proof of certain error in the design of the QPAP.

4. Continuing Propriety of a Cap Based on 1999 Net Revenues

ELI/Time Warner/XO Utah also criticized the freezing of the cap amounts that would result from continuing to use 1999 net revenues into the future.[28]

Discussion: This argument appears to rest upon the implicit premise that net intrastate operating revenue will continue to increase despite growth in competition for local exchange business. This premise is quite speculative. All other things being equal, the effects of access line growth would have to exceed those that result from loss of market share to CLECs. Moreover, it is not at all clear that all other things will remain equal. Many examples demonstrate the uncertainty:

- Local-exchange business retention strategies may produce broadly-based price concessions that lower per-access line net revenues
- If there is cross-subsidization in certain elements of local-exchange service, current tariff prices that contain a premium above costs may not remain sustainable as competition increases[29]
- Financial, accounting, and operational restructuring of interstate versus intrastate services, which are by no means unlikely in the fluid marketplace and regulatory

[28] ELI/Time Warner/XO Utah Reply PAP Brief at page 7.

[29] While similar to the first example, this one distinguishes itself by its application to a specific and narrower range of services that may be affected particularly because of historical regulatory pricing decisions.

environments now existing, may alter materially how intrastate return is calculated and how much it ends up being in the future.

There are probably a number of additional examples. These, however, are sufficient to demonstrate that there is no reason to conclude that the ongoing use of 1999 net intrastate revenues is more likely to increase or decrease Qwest's net financial exposure. On the whole, it appears preferable to rely upon the firm dollar amounts that the QPAP provides for, as opposed to taking a ratcheting risk of unknown direction and unknowable magnitude.

5. Likely Payments in Low Volume States

The New Mexico Advocacy Staff questioned the importance to be placed on the total cap amount in its state – arguing that very low CLEC local-exchange-service business volumes would make it impossible to generate payments at or near the New Mexico limit.[30] Qwest responded that its burden is not to produce CLEC business volume, but to respond to the orders that it receives.[31]

Discussion: The New Mexico Advocacy Staff argument, assuming its underlying factual basis to be sound, does not bear directly on the sufficiency of the cap. If low CLEC order volumes comprise the reason that the cap would not be reached, then a higher hard cap or a procedural cap would be unresponsive. Those higher triggers would not be met either. In the circumstances postulated, the issues become whether the PAP will: (a) adequately compensate CLECs with low order volumes, and (b) induce Qwest not to provide substandard service in a state with low overall order volumes. The QPAP does contain a provision for minimum payments, which will be discussed below. Such a provision is the direct way to address the New Mexico Advocacy Staff concern about how low order volumes might dilute the compensatory and incentive goals of the QPAP.

6. Deductibility of Payments

WorldCom questioned whether we should find comfort in the cap's adequacy in light of the fact that Qwest may be able to deduct payments for income tax purposes.[32] Qwest noted that the likely consequence of adopting WorldCom's suggestion, i.e., to declare the payments penalties in order to make them non-deductible by Qwest, would be that the CLECs receiving them would not have to declare them as income.[33]

Discussion: It should probably come as no surprise that parties who have described much of their opponents' positions as bald-face attempts to move payments in a self-serving direction, should bring the Internal Revenue Service into the argument. However, we consider it safe to presume that the prior plans considered by the FCC were also conceived in the shadow of our ever-watchful federal government revenuers. We see no reason unique to Qwest that would justify a tax-netting factor here. Neither, by the way, do we see any reason why the nomenclature of the QPAP, as opposed to the substance of the payments contemplated, would put the hounds off the scent in any case. We have

[30] New Mexico Advocacy Staff Initial PAP Brief at page 25.
[31] Qwest Reply PAP Brief at page 15.
[32] WorldCom Initial PAP Brief at page 4.
[33] Qwest Reply PAP Brief at page 27.

confidence that what the thing is, as opposed to what those interested in the result call it, is the more material fact bearing on the question of taxability.

B. Magnitude of QPAP Payout Levels

Total economic exposure addresses only part of the broader issue of the sufficiency of payments under the QPAP to provide a meaningful and significant incentive to Qwest. Equally material is the question of what level of event-specific payments apply. A total exposure of even much more that 36 percent of net intrastate revenues might not deter substandard performance, if payments per event of non-compliance are so low that:

- They do not compensate CLECs, as a baseline consideration, for the harm that poor performance causes them
- Their accumulation is at so slow a rate as to make it improbable that they will rise to economically significant levels, no matter how bad performance becomes
- They fail to communicate to Qwest that compliance is preferable to defiance.

Qwest presented an analysis of the payments that the QPAP would have produced for the months of February through May 2001, on the basis of the assumption that the QPAP had been in effect for at least six months prior to that February. The calculations to which Qwest testified showed that payments would have been ***CONFIDENTIAL*** and would have produced the equivalent of ***CONFIDENTIAL*** free years of service for CLECs. Qwest considered these payment levels to be very substantial in light of the fact that Qwest measured its overall performance level under the applicable performance measures at 92 percent during this period. A principal premise underlying Qwest's belief in the utility of this analysis is that the prices that CLECs pay reflect a relevant measure of the value of the services that they receive for paying those prices. This premise takes the view that the price of goods or services in a free economy is a persuasive measure of their value.[34]

Qwest also presented analyses of the combined Tier 1 and Tier 2 payments it would have made for the 2001 months of February through May for unbundled loops and coordinated cuts. Qwest's analysis showed that its QPAP payments for those measures would have exceeded the total revenue it would have received for the services measured by them.[35]

Qwest addressed as well the "significance" of payments for individual occurrences where it failed to meet the standards for which the QPAP requires payment. Qwest said that the individual payments were significant in their own right, but it was also necessary to recognize that the same order or activity could produce multiple payments.[36] Thus, even if there were concern that the payments set for an individual measure were insufficient to compensate CLECs for damages, Qwest felt that the QPAP's provision of multiple payment opportunities for the same activity or closely related activities would assuage it.

CLECs broadly attacked this analysis, asserting, for example that:

[34] Qwest Initial PAP Brief at pages 7 and 8.
[35] Qwest Initial PAP Brief at page 9.
[36] Exhibit S9-QWE-CTI-5, page 6.

- AT&T was among the CLECs who said that the fact Qwest would still have been paying substantial amounts even after escalation of payments for six-months (see the discussion of payment escalation under the subject *Limiting Escalation to Six Months* below) shows the inadequacy of the payment structure[37]

- ATT testified to a calculation that there was only a one in 96 billion chance that Qwest's claimed 10 separate payments would occur for a single activity or set of related activities[38]

- AT&T also argued that the Qwest analysis of sample payouts for the February-March 2001 period should have assumed that the QPAP began in February, which would have eliminated the accelerated payments and reduced the sample payouts by over 60 percent.

- Qwest escalated payment amounts for misses for more than six months, but the QPAP limits escalation in payments to only six consecutive months[39]

- The total payment amounts shown by Qwest were paltry when compared with its third-quarter projected total revenue.[40]

The New Mexico Advocacy Staff said, as was addressed above under the discussion of *The 36 Percent of Net Revenues Standard*, that the proper inquiry was not the size of the payments provided to CLECs, but Qwest's marginal costs of not complying with the standards, which the staff's testimony presented as the alternative course of action that the QPAP should seek to discourage.[41]

Qwest responded that the calculations showed the effects of full implementation, and therefore did account for escalation properly.[42] Qwest also argued that no CLEC had presented any evidence to show that the sample payout levels testified to by Qwest failed to fully compensate CLECs for their damages.[43] Qwest also said that CLECs did not support a more direct assessment of their losses; they declined to provide to Qwest information that would have allowed such an exercise.[44]

AT&T responded to the claim that there was no CLEC evidence of damages. An AT&T brief contained an extensive list of qualitative factual assertions about areas of damage.

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[37] AT&T Initial PAP Brief at page 23.
[38] AT&T Initial PAP Brief at page23; WorldCom Initial PAP Brief at page 6, citing the fact that Qwest's purported combination of payments was "statistically unlikely;" Covad Initial PAP Brief at page 16, terming the maximum $750 payment cited by Qwest as difficult to get.
[39] Covad Initial PAP Brief at page 11.
[40] Covad Initial PAP Brief at page 12.
[41] AT&T Initial PAP Brief at page 22.
[42] Qwest Reply PAP Brief at page 7.
[43] Qwest Reply PAP Brief at page 6.
[44] Qwest Reply PAP Brief at page 8.

The brief did not cite to the portions of the transcript where evidence in support of those assertions could be found.[45]

Discussion: The arguments made against the relevance or the accuracy of Qwest's calculations were inapplicable or incorrect. First, the argument that the Qwest payout calculations show the ineffectiveness of the QPAP as a motivator of compliant performance is illogical. The presumed payments were, of course, not actually made. They were modeled for an historical period of time during which payments were not required. Not having been payable or paid, they obviously could not have motivated performance as they might have had they been payable.

Second, AT&T's statistical calculation of the probability of multiple payments from single or related activities was flawed, because it failed to recognize a central aspect of Qwest's argument, which was that the variables affecting payment levels are not independent; i.e., the same failing that causes one measure to be missed can cause another to be missed. AT&T's strict multiplication of probabilities can only be applied to independent variables.[46] AT&T's simple exercise could be very far from the mark in this case, where the variables are not all independent. Even if we do not reach the maximum coincidence of payment opportunities from the same or related activities, we can nevertheless accept as established the fact that causally linked payment opportunities and resultant increases in payment levels are proper to assume.

Third, it is curious for AT&T to argue that Qwest's sample calculations should not have assumed that the QPAP had been in existence for at least six months. AT&T, among others, has placed strong emphasis on the need for escalating QPAP payments. It is not consistent to argue that payments need to be escalated to provide a proper inducement, yet to suggest that the effects of that escalation should be ignored when assessing whether payments are sufficient to provide the inducement being sought. The QPAP will start only once; we can presume that it would continue indefinitely in the event of 271

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[45] AT&T Reply PAP Brief at page 4. Footnote 9 of that brief indicated that AT&T was prohibited from exploring additional areas of cost. That statement is disingenuous. First, AT&T was not prohibiting from bringing any evidence into these proceedings in proper order. The objection sustained was to a question that went well beyond the bounds of the rebuttal testimony to which AT&T's witness was responding. By that time AT&T had already passed on two fully unconstrained opportunities to tell us what its additional costs were. It was merely denied an opportunity to go beyond the clear and pre-established bounds of questioning to get into new subjects. Moreover, a review of the transcript indicates that the question sought yet more qualitative, not quantitative, evidence. See the August 29, 2001 transcript, starting at page 51.

[46] For example, assume that: (a) it must be cloudy and less than 32 degrees for snow to happen, (b) the random chance of clouds for a given locale is 20 percent, (c) the random chance of temperatures below 32 degrees for a given day is 10 percent, (d) it snows 50 percent of the time that such conditions are met, and (e) we want to know the odds that it will snow on any given day at that locale. If we calculate the odds of snowfall as if these variables were independent, then the chance of snow is 0.2 times 0.1 times 0.5, which equals 1 percent. However, we can note that clouds affect temperature; therefore, there is a greater coincidence between cloudiness and temperature than the previous arithmetic would suggest. Let us suppose that it is more often sunny in the summer in this locale, and that it is in fact cloudy on 75 percent of the days when the temperature is less than 32 degrees. We would now more accurately calculate the odds of snowfall on cloudy days of less than 32 degrees as being six times more likely; the arithmetic follows. 0.75 times 0.1 times 0.5, which equals 6 percent. Obviously, if we are dealing with more than two linked variables among many, the effects of accurately depicting the linkages with arithmetical accuracy would be much more dramatic.

approval. It cannot be true that the best way to assess the operation of an ongoing plan is to examine its inception period, where that inception period will not allow for the full display and impacts of features that will be ongoing.

Fourth, the record does not show that Qwest increased payments beyond the six-months of escalation that is provided for in the QPAP. The evidence shows that the Qwest analyses accounted for escalation, where appropriate, up to and including, but not in excess of six months.

Fifth, how the QPAP payments relate to consolidated Qwest net income does not bear upon the issue addressed in the analysis or the issue before us. There was no proposal for payments that are a function of revenue sources that have nothing to do with local exchange service; moreover, none would be appropriate. The proper base for assessing overall exposure is, as the FCC appears repeatedly to have accepted, intrastate net revenue. Moreover, at the overall level of performance Qwest reached in serving CLECs during the period in question, it is not clear why Covad would suggest that significantly higher payments would have been anticipated. Surely Covad would not argue that payments not be made a function of performance to CLECs, but rather a parent's consolidated income.

Qwest offered the payout information to show that its costs of noncompliance would be substantial under a fully operational and mature QPAP. The evidence was useful, its intent and its characteristics were overtly demonstrated, and its application of memory was appropriate to the use that the sponsor intended.

C. Compensation for CLEC Damages

1. Relevance of Compensation as a QPAP Goal

Z-Tel discounted substantially the relevance of the goal of compensating CLECs for damages incurred as a result of non-compliant Qwest wholesale performance. In fact, Z-Tel said that the point of a performance assurance plan is to create incentives to detect and sanction poor wholesale performance, not to compensate CLECs for harm. Apart from the question of whether the QPAP should address CLEC compensation at all, Z-Tel also argued that it is not appropriate to subject such compensation to a liquidated damages test, because Qwest has not shown that the legal standard applicable in deciding the propriety of allowing liquidated damages has not been met here.[47] In support of its position with respect to the insignificance of the question of damages in connection with the QPAP, Z-Tel asserted that the FCC has not yet faced an application that specifically requires CLECs to waive their other contractual claims and other rights of action.[48]

Discussion: Many participants disputed the centrality of actual CLEC harm to the question of determining payment levels to CLECs, but none so strongly as Z-Tel. All of the other participants at least implicitly made the sufficiency of the QPAP to compensate CLECs for harm they suffered a matter of interest to these proceedings. The FCC does speak its test in terms of incentives, but an elementary legal principle in the field of

[47] Z-Tel Initial PAP Brief at page 27.
[48] Z-Tel Initial PAP Brief at page 33.

remedies is the public interest in holding contract parties, tort feasors, and other culpable perpetrators of injury responsible for the damages they cause to induce them to behave in ways that will avoid such harm. There certainly exist, in some cases, additional remedies not related directly to harm but designed to provide strong incentives to avoid certain forms of conduct. Punitive damages are one example; the escalation of Tier 1 payments (in part) here and the Tier 2 payments here are others. However, the existence of those added remedies does not signify that the award of compensatory damages at law or equity has no relationship to the inducement of publicly acceptable behavior.

Moreover, even if the case were otherwise, there is sound reason for addressing the recovery of traditional damages together with the inducement features of a QPAP. Quite obviously, if one were to ask how much it takes to cause a BOC to act in manners considered acceptable, it would be incongruous to ignore substantial payments that are reasonably certain to be ordered by other authorities for the same behaviors or activities.

Despite the common sense of the matter, there does remain the question raised by Z-Tel's suggestion that one cannot read prior FCC decisions as embodying the belief that those PAPs going before this one contain a significant CLEC compensatory element. The Michigan Public Service Commission Opinion and Order on the Ameritech Michigan PAP,[49] which the Commission noted was based on the Texas plan, for example, did the following:

- Talked about the plan's "remedies" for "violations" [page 4]
- Called the Tier 1 payments "liquidated damages" [page 5]
- Responded to CLEC arguments that Tier 1 payments would not "adequately compensate them for the harm they suffer" in some cases [page 5]

The Texas PAP[50] that was part of the 271 application approved by the FCC says the following about damages:

- The BOC will pay CLECs 'liquidated damages" [Section 5.2]
- The parties agree that damages are liquidated because proof of them would be difficult to ascertain and because the provisions of the PAP reasonably approximate contractual damages [Section 6.1]
- The only remedies explicitly preserved for CLECs are "noncontractual" ones [Section 6.1]

Even the joint CLEC performance incentive plan submitted to Qwest recognizes the compensatory nature of material portions of Qwest payments.[51] Page 1 talks about a "system of self-enforcing consequences for discriminatory ILEC performance" and about the inability of CLECs to rely upon the "extensive delays inherent in the adjudication and appeals process." Page 4 talks about the need to minimize litigation and regulatory delays associated with imposing "financial consequences." Page 6 expresses the joint

[49] Provided as WorldCom Exhibit S9-WCM-CEW-7.
[50] Exhibits S9-ATT-JFF-7 and 8.
[51] Exhibit S9-ATT-JFF-9.

CLEC view that "Tier I provides a form on non-exclusive liquidated damages payable to individual CLECs."

History demonstrates that state public service commissions, the FCC, and other CLECs all recognize the compensatory nature and the liquidated damages elements of performance assurance plans. In fact, it could be construed as generous even to say that Z-Tel stands alone in its position on this issue. Z-Tel itself suggested on several occasions that, should certain of its QPAP adjustment proposals be viewed as overcompensating CLECs, the added payments could be transferred to Tier 2. Were the sole purpose of the QPAP unrelated to compensating CLECs or limiting their outside damage recovery opportunities, it is not clear why Z-Tel was proposing that any compensation at all go to CLECs, in whatever tier it be placed. We can be reasonably comfortable that even Z-Tel accepts at some level the CLEC-compensatory nature of the QPAP.

It is appropriate for the QPAP to address the question of compensating CLECs for contractual damages, and it is appropriate that the QPAP liquidate such damages, given the difficulty in measuring them precisely, and given that the QPAP payments approximate such damages. A central feature of this QPAP, like others before it, is its ability to replace costly and protracted litigation and its uncertain results with a system that is more appropriate to creating and maintaining an efficient and balanced commercial relationship. If the intention of the FCC for a PAP were otherwise, we might well wonder just what litigation and uncertainty would be avoided. Nearly all of it would loom under Z-Tel's approach, yet we know avoiding such clouds to be a central purpose of performance assurance plans.

2. Evidence of Harm to CLECs

Covad said that a cap would necessarily leave CLECs less than whole for the harm that they suffer from Qwest conduct. Covad did not present any quantitative evidence that would correlate the harm it suffers either with the amounts it would receive under the QPAP, or with the 36 percent revenue cap.[52]

WorldCom objected to the CLEC lost-profits analysis presented by Qwest because it was based on a one-line business analog service rate. WorldCom said that Qwest's analysis failed to include the loss of profits that would come to CLECs when other services were bundled or when customers had more than one line. WorldCom also argued that Qwest failed to consider customer acquisition, local-service-request, maintenance and repair, or coordinated-cut costs in its analysis. WorldCom also said that the commissions could consider Qwest's labor rates as surrogates for CLEC costs in assessing damage resulting from poor Qwest performance.[53]

AT&T noted that intangible CLEC losses were "impossible to quantify;" therefore, they should not be limited.[54]Qwest said that Covad failed to support its argument that Tier 1 payments did not compensate it sufficiently; as Qwest noted,[55] there was no Covad

[52] Covad Initial PAP Brief at page 29.
[53] WorldCom Initial PAP Brief at pages 5 and 6.
[54] AT&T Initial PAP Brief at page 23.
[55] Qwest Reply PAP Brief at page 10.

accounting of the tangible or intangible costs or damages it suffered through substandard performance from Qwest. Qwest argued further that no CLEC presented any evidence that would verify any customer loss due to Qwest's performance or that would address the frequency with which they would lose customers for such reasons. Qwest also said that there was no CLEC evidence about the expenses or investments that they incurred due to poor Qwest performance.[56]

Discussion: There certainly was extensive criticism of Qwest's attempt to relate QPAP payments to the level of damage or harm suffered by CLECs as a result of poor Qwest performance. However, Qwest was correct in arguing that CLECs did not present substantial evidence to show what their damages had been or would be. Covad presented no such evidence. AT&T, in fact, appeared to say that a quantified assessment of all CLEC damages could not be undertaken by anyone, because of the inability to quantify intangible damages at all.

This AT&T argument actually supports liquidating such damages, as opposed to merely abdicating the responsibility to prove an "unprovable" to some other decision maker. Because such damages will prove no easier to quantify after the fact or by some other trier of fact, we should address them here: they fit precisely the kinds of liquidation needs for which such damage provisions are intended. It may not often be admitted candidly, but if judges and juries in the civil system were better at pondering the magnitude of damages of this type, we would not need liquidated damages clauses. We conclude that such a clause is indeed appropriate here, given the nature of the harm and the disagreement not only about how to measure it, but also about whether it can be measured at all.

The question therefore remains whether the QPAP payments represent a reasonable approximation of the harm that CLECs suffer. Qwest's principal evidence of consequence on that question was not lost CLEC profits, or a direct analysis of CLEC costs. Rather it was an approximate equation of service price with service value. Lost CLEC profits, while comprising another line of Qwest evidence, was not alone, or in our judgment, even weighty. The CLEC community is, we suspect, probably nearly unanimous in arguing that Qwest's UNE prices substantially exceed its economic costs. In light of that consensus, it would be curious to argue that price is not, in fact, a very generous representation of value.

Turning then to the lost profits analysis, we first noted that, while criticizing Qwest for not addressing a variety of charges, WorldCom failed to present an analysis seeking to quantify harm. Moreover, it would appear that Qwest's analysis did implicitly consider all CLEC costs by translating QPAP non-recurring-charge payments into equivalent months of service. If there is a more direct way of considering these payments, neither WorldCom nor any other participant has chosen to provide even a gross quantitative measure of it. Certainly, it has not been shown to be sound merely to layer a refund of those payments on top of the QPAP payments proposed by Qwest. What else we might constructively do with the WorldCom evidence is not at all clear. Covad similarly failed to provide its own evidence of lost profits, choosing to stand on a criticism of Qwest's method.

[56] Qwest Initial PAP Brief at page 10.

We found Qwest's analysis to be largely based not on its own knowledge, but upon what another party said about CLEC profits. It was not compelling testimony and it had only marginal weight in our analysis. In its complete absence, we would conclude that the suitability of the QPAP payment levels as an approximation of CLEC damages was sufficient. Thus, the CLEC criticisms, which in any event did little to change the weight to be given to Qwest's evidence, would have made little difference even had they been better developed. We might have faced another situation had CLECs chosen to present their own quantification of lost profit and other harm for comparison to the QPAP payments. The record clearly would have benefited from CLEC presentations of a structured and comprehensive attempt to measure their harm. Uniformly, however, they chose not to do so.

Moreover, in the final analysis, we note that any particular CLEC can decide that the QPAP payments are insufficient; they will then retain the opportunity to choose not to elect them.

3. Preclusion of Other CLEC Remedies

Sections 13.5 and 13.6 of the QPAP treat Tier 1 payments as liquidated damages, which are designed to provide, for CLECs that opt into the QPAP, an exclusive remedy to compensate for damages resulting from Qwest service in fulfilling its wholesale performance obligations. Qwest said that Sections 6.1 of the Texas, Oklahoma, and Kansas plans make the same provision. In return for the right to such payments without the necessity to prove harm, Qwest in return would secure what it considers a commonly provided consideration; i.e., that other damages arising from the same, or analogous performance will be waived.[57]

ELI/Time Warner/XO Utah said that one of the distinguishing features of the QPAP from other PAPs that have formed part of 271 applications that the FCC approved is Qwest's insistence that CLECs waive other remedies for recovery of damages.[58] ELI/Time Warner/XO Utah argued that a CLEC should not be foreclosed from opting to take other remedies, such as those available under state public service commission rules, even where it has chosen to avail itself of QPAP remedies.[59]

AT&T proposed the approach of the Colorado Special Master for addressing other remedies. AT&T described that approach as allowing CLECs to seek contract remedies even after accepting PAP payments, in those cases where CLECs could demonstrate to an arbitrator or mediator a reasonable damage theory that would show that the PAP payments it has received were not fully compensatory.[60] Qwest did agree that the QPAP would not preclude CLEC claims based on non-contractual causes of action, nor would it limit federal enforcement action under section 271(d)(6). However, Qwest did say that the offset provision of the QPAP (Section 13.7) would apply to non-contractual remedies.[61]

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[57] Qwest Initial PAP Brief at page 66.
[58] ELI/Time Warner/XO Utah Initial PAP Brief at page 12.
[59] ELI/Time Warner/XO Utah Initial PAP Brief at page 23.
[60] AT&T Reply PAP Brief at page 9.
[61] Qwest Initial PAP Brief at page 68.

Discussion: The Texas plan does in fact place substantial limitations on other remedies. It provides as follows:[62]

> *5.2. SWBT will pay Liquidated Damages to the CLEC according to the terms set forth in this Attachment.*
>
> ...
>
> *6.1. SWBT agrees that the application of the assessments and damages provided for herein is not intended to foreclose other nonContractual legal and regulatory claims and remedies that may be available to a CLEC. By incorporating these liquidated damages terms into an interconnection agreement, SWBT and CLEC agree that proof of damages from any "noncompliant" measure would be difficult to ascertain and, therefore, liquidated damages are a reasonable approximation of any contractual damage resulting from a non-compliant performance measure. SWBT and CLEC further agree that liquidated damages payable under this provision are not intended to be a penalty.*

The Texas plan is intended to limit additional recovery under causes of action that sound in contract. Such a provision is reasonable as a means of precluding double recovery, while at the same time allowing for recovery of damages that result from other theories of liability, such as those grounded in tort or anti-trust law.[63] The Colorado Special Master's Report generally would produce a similar result: i.e., suits under noncontractual theories will be allowed. That report provides that:[64]

> [T]*he PAP shall not limit alternative remedies available to CLECs under (1) Section 251/252 remedies that supplement the PAP (as opposed to those which overlap with the PAP) and are subjected to the procedural pre-filing requirement set out below; (2) state law regulatory enforcement actions that are not redundant with the PAP (e.g., any action by the state that does not result in payment of money to a CLEC would not be redundant to the PAP); (3) federal enforcement action under Section 271(d)(6); or (4) any applicable antitrust, tort, or consumer protection remedies.*

However, the pre-filing requirement cited in that report does appear to allow a CLEC to seek leave to file an action based in contract law where it can show a reasonable damage theory that would Qwest payments do not fully redress the competitive harm suffered by a CLEC. It is this provision that AT&T focuses on in supporting the approach recommended by the Colorado Special Master's Report.

Qwest's reply brief reflected a general commitment not to preclude noncontractual actions. Qwest cited the last sentence of QPAP Section 13.5, which provides that:

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[62] Exhibit S9-ATT-JFF-8, at pages 19 and 20.

[63] Note that there is an issue, which is to be addressed subsequently, that is related to but distinct from the narrow question at issue here, which is whether noncontractual causes of action are and should be prohibited by the QPAP. That separate question is the degree to which payments under the QPAP should offset any damages that may be awarded in such other, noncontractual proceedings.

[64] Exhibit S9-WCM-CEW-3.

> *The application of the assessments and damages provided for herein is not intended to foreclose other noncontractual legal and non-contractual regulatory claims and remedies that may be available to a CLEC.*

Taken by itself, this section provides protection that is comparable to that set forth in the Texas plan and in the Colorado Special Master's Report. However, Section 13.6 contains language that could be construed as contradictory:

> *To elect the PAP, CLEC must adopt the PAP in its entirety, in its interconnection agreement with Qwest in lieu of other alternative standards or relief. In no event is CLEC entitled to remedies under both the PAP and under rules, orders, or other contracts, including interconnection agreements, arising from the same or analogous wholesale performance. Where alternative remedies for Qwest's wholesale performance are available under rules, orders, or other contracts, including interconnection agreements, CLEC will be limited to either the PAP remedies or the remedies available under rules, orders, or other contracts and CLEC's choice of remedies shall be specified in its interconnection agreement.*

These provisions cannot be interpreted clearly and consistently when read together. The second provision extends beyond prohibiting double recovery for the same damages: it precludes any alternative remedies, whether they encompass broader or different damages. It is essential that we not confuse two related, but distinct legal concepts: (a) the theory of liability, which identifies the conduct to which liability attaches, and (b) the nature of the damages that flow from such liability. A tort remedy, for example, might include some of the same damages recoverable in a contract action, while allowing additional types of recovery. What we need to do ultimately is to preserve the ability to allow CLEC recovery for those additional forms of recovery, whatever the action brought to secure them. At the same time, we need to make sure that from any such recovery there is deducted in one way or another the contract damages amount, for which the QPAP should provide. We should therefore seek here language that does the following:

- Prohibits all causes of action based on contractual theories of liability
- Prohibits the recovery of amounts related to the harm compensable under contractual theories of liability under non-contractual causes of action that also permit the recovery of damages recoverable under contractual theories of liability
- Allow for the recovery under noncontractual theories of liability those portions of damages allowed by the applicable theory that are not recoverable under contractual theories of liability.

Anti-trust law provides a useful example of the application of these three principles. The QPAP should allow anti-trust actions. If an anti-trust action produces a base damage award of $200,000 for direct harm for contract breach, and a tripling of that amount, the base $200,000 should be considered as duplicative of the QPAP payments, while the $400,000 adder should not.

To make the QPAP conform to these principles, all the quoted portions of Section 13.6, following the phrase "in its interconnection agreement with Qwest" should be stricken.

Qwest may replace them with a simple provision requiring a CLEC to elect either: (a) the remedies otherwise available at law, or (b) those available under the QPAP and other remedies as limited by the QPAP. Those limits are the bar on other contractual remedies and on double recovery (although the propriety of the latter remains to be discussed).

The Colorado Special Master's Report, as AT&T interprets it, would produce a substantially imbalanced result. That interpretation would allow a CLEC added compensation under contract theories where it could prove that its harm exceeded its payments. It would, not, however, allow Qwest to take back any of the PAP payments, even where it could show that they exceeded CLEC harm. It would be one thing to delete the Tier 1 payments altogether, requiring CLECs to show harm and to demonstrate its amount. This approach could be accompanied by moving the Tier 1 accelerated payments to Tier 2. However, it is not reasonable to allow CLECs to keep Tier 1 base payments and Tier 1 accelerated payments when it suited them, but to seek more when it did not.

One of the things that make liquidated damages appropriate is that they liquidate them for both sides. There is no reasonable basis for requiring one party to take the risk that payments will exceed actual harm while allowing the other party to avoid the risk that the payments will be less than actual harm.

We are similarly not persuaded of the reasonableness of the ELI/Time Warner/XO Utah recommendation that CLECs retain the right to choose to take other remedies even after electing to take advantage of QPAP payments. It is reasonable to require CLECs to choose to take all or none of the QPAP remedies. Otherwise, we would invite debate about which specific QPAP payment elements correspond to those otherwise available remedies. The QPAP represents a comprehensive payment structure for compensating CLECs for harm. They have the right to elect all of it or none of it. It would not be reasonable to allow them to select those portions of it that are on balance more favorable than other remedies, while choosing to take other remedies in cases where they are more favorable. Qwest has no right to do so: a proper sense of balance with respect to liquidated damages should require the same of CLECs.

4. Indemnity for CLEC Payments Under State Service Quality Standards

AT&T proposed that Qwest be required to compensate CLECs for any payments that CLECs must make for failing to meet state or federal service quality rules, provided that Qwest wholesale service deficiencies cause the CLEC failures.[65] ELI/Time Warner/XO Utah noted that the issue of Qwest indemnity for CLEC payments for failing to meet state service quality standards was addressed earlier in these workshops. ELI/Time Warner/XO Utah believed that this provision, which could involve dispute and litigation, should therefore be addressed elsewhere in the SGAT, not in the QPAP. ELI/Time Warner/XO Utah sought to assure that the QPAP not preclude such indemnification.[66]

Qwest objected to an added requirement that it compensate CLECs for assessments that state commissions make against CLECs for violating state service quality standards. Qwest noted that the QPAP's liquidated damages provision contemplates full payment

[65] AT&T Initial PAP Brief at page 18.
[66] ELI/Time Warner/XO Utah Reply PAP Brief at page 11.

for harm arising from the same performance; therefore, there should not be any added payment for this element of damages. Moreover, Qwest observed, such a provision would engender litigation about whether Qwest's performance did or did not lead to the failure of a CLEC to meet retail standards.

Discussion: The merits of requiring such indemnification were fully addressed in prior workshops.[67] AT&T's reasons for supporting such indemnification here are not materially different from those it advanced in earlier workshops. There is sufficient justification for precluding such indemnity in the QPAP, as it was precluded elsewhere in the SGAT.

5. Offset Provision (Section 13.7)

Qwest changed Section 13.7 to respond to concerns about its breadth. After the change, QPAP Section 13.7 provides that:[68]

> *13.7 If for any reason Qwest is obligated by any court or regulatory authority of competent jurisdiction to pay to any CLEC that agrees to this QPAP compensatory damages based on the same or analogous wholesale performance covered by this PAP, Qwest may reduce such award by the amount of any payments made or due to such CLEC under this PAP, or may reduce the amount of any payments made or due to such CLEC under this PAP by the amount of any such award, such that Qwest's total liability shall be limited to the greater of the amount of such award or the amount of any payments made or due to such CLEC under this QPAP. By adopting this QPAP, CLEC consents to such offset.*

AT&T objected to this section as revised on several grounds:[69]

- That no FCC order has allowed a BOC a unilateral right to make an offset and that the right to an offset is the province of the finder of fact under common law
- That there was confusion about the intent of the language about "analogous performance."

With respect to the question of who should determine an offset entitlement, Qwest was concerned about continuing to allow a compensating reduction in PAP payments where an outside decision maker, e.g., a court, would not permit QPAP payments to offset any damages it might award. With respect to the question of analogous performance, Qwest explained that the intent of this section was to preclude the construction of the term "performance" as meaning a "standard" rather than an "activity." Qwest added the word "analogous" to make it clear that Qwest was entitled to an offset where the same Qwest wholesale service or activity, "even though it may be measured or accounted for in different manners," produced compensatory damage awards.[70]

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[67] See the Report on Checklist Items 1, 11, 13, and 14, issued on May 15, 2001.

[68] See Attachment 1 to Qwest Corporation's Response to Oral Questions by the Arizona at the August 16-17, 2001 Hearings, which changed this and a number of other QPAP sections that were included in the original QPAP filing.

[69] AT&T Initial PAP Brief at pages 4 and 5.

[70] Qwest Initial PAP Brief at pages 68 and 69.

WorldCom did not object to precluding double recovery, but argued that the term "analogous performance" was too ambiguous, undefined, and likely to cause litigation, citing the fact that the Qwest witness presented to explain this provision could not define what the term meant. WorldCom asked that the phrase be stricken.[71]

ELI/Time Warner/XO Utah argued similarly to AT&T that the awarder of the damages in question, whether or not it were a commission with responsibility for administering the SGAT or interconnection agreement involved, should decide the propriety of an offset and that the offset should be only for the same performance, not analogous performance.[72] Qwest responded that the CLEC provision limiting Qwest's offset rights to an agreement before the trier of fact would foment litigation.[73]

AT&T proposed the adoption of offset language from the Texas plan.[74] ELI/Time Warner/XO Utah said that the term analogous should be eliminated, and that Qwest should not have finally the right unilaterally to determine offset rights, but should be required to seek any requested offset from the "trier of fact."[75] Covad argued generally against the need for and the propriety of including an offset provision in the QPAP.[76]

Discussion:

(a) Unilateral Right to Offset: It is ultimately not helpful here to cast the issue in terms of allowing Qwest a unilateral right to offset QPAP payments. If Qwest's language is adopted, nothing in it gives Qwest the right to make an unreviewable decision about whether an offset is allowable. The issue is more accurately described as one of determining where any dispute about offsets will be resolved. AT&T would prefer that it be resolved by the authority that assesses "damages" that are similar to or parallel with payments due under the QPAP. Sometimes that will be a court and sometimes it will be a utility regulatory commission. The QPAP's dispute resolution provisions should give adequate opportunity to challenge a decision by Qwest to reduce its QPAP payments under the offset language. Adequate interest provisions would address any time-value-of-money issues associated with delays in payments while disputes get resolved.

There is little practical difference, other than who has the money while the dispute is being heard, in the case where the same commission that assessed the damages in question later would hear a dispute about the applicability of offset rights. In the first instance, that commission likely would already have considered the question of offset. The material issue arises in cases where an outside authority, such as a court, makes the damage assessment in question. In theses cases there is a meaningful difference in the contrasting approaches. The AT&T approach would have a judicial authority, which we may presume to be much less familiar with the QPAP's context, purpose, and contents, decide how its intent can best be implemented in the circumstances. Under the Qwest approach, a commission much more familiar with the goals and features of the QPAP

[71] WorldCom Initial PAP Brief at page 18.
[72] ELI/Time Warner/XO Utah Initial PAP Brief at pages 23 and 24 and ELI/Time Warner/XO Utah Reply PAP Brief at page 11.
[73] Qwest Reply PAP Brief at page 46.
[74] AT&T Reply PAP Brief at page 25.
[75] ELI/Time Warner/XO Utah Reply PAP Brief at page 11.
[76] Covad Initial PAP Brief at page 42.

would make that decision. There can be no doubt that the decision to be made can be best made by the regulatory commission.

Qwest's language would permit it the advantage of the time value of money while any dispute is resolved. The AT&T approach would transfer that advantage to the CLEC. This issue is best resolved by assuring that any dispute resolution include provision, where deemed appropriate by the commission, for interest on awards.

(b) Same or Analogous Performance: Qwest's revised language is generally appropriate. It does limit the offset provisions to the portion of damages that represent compensatory recovery by CLECs. Tier 1 payments are already designed to provide such recovery; therefore, it is proper to preclude double recovery of damages resulting from the same incident of activity. However, Qwest's language remains confusing, both in its use of the terms "analogous" and "performance." Double recovery is only an issue where the conduct that gives rise to it is the same; the use of the term "analogous" introduces vagueness and uncertainty. For example, an activity can be entirely distinct, but, for some purposes, analogous.

If the activity is distinct, it may well produce separate harm or damage, some of which, as we discussed under the subject *Preclusion of Other CLEC Remedies* earlier in this report, should not be precluded. Not precluding such awards in certain cases includes not offsetting QPAP payments to reflect them. There should be consistency between the language allowing other damages and the language addressing offsets. Changing the phrase "same or analogous wholesale performance" to "same underlying activity or omission for which Tier 1 assessments are made under this QPAP" would solve the problem.

(c) Injury to Persons or Physical Property: There remains one other technical problem with the Qwest language. The same performance might produce liability for: (a) CLEC business loss and incentives for Qwest to perform, and (b) physical damage to property or personal injury. The QPAP has nothing to do with compensation for physical property damage or personal injury, but other SGAT provisions recommended in an earlier report from these workshops do.[77] In order to preserve the effect of those sections, QPAP Section 13.7 should contain a provision stating that:

> *Nothing in this QPAP shall be read as permitting an offset related to Qwest payments related to CLEC or third-party physical damage to property or personal injury.*

6. Exclusions (Section 13.3)

QPAP Section 13.3 contains a list of circumstances that excuse Qwest from Tier 1 and Tier 2 payments in the event that certain listed events occur. Qwest said that these QPAP exclusions are similar to those of the Texas PAP, under which SBC has invoked a payment excuse only once to date. Observing that the QPAP requires it to prove the

[77] *Report on Group 3 Issues, General Terms & Conditions, Section 271 and Track A*, issued on September 21, 2001.

entitlement to invoke exclusions, Qwest generally considered the CLEC-proposed changes to this section inappropriate[78]

(a) CLEC Bad Faith: AT&T wanted to strike the exclusion for bad-faith CLEC acts or omissions on the grounds that it was ambiguous.[79] ELI/Time Warner/XO Utah wanted to strike it for being unnecessary, because good faith by all parties is an implicit requirement of commercial relationships such as this one.[80] Qwest argued that this provision was appropriate to protect Qwest against actions that have the "foreseeable effect of causing Qwest to miss a performance standard."[81] ELI/Time Warner/XO Utah countered that neither a CLEC's ability to foresee Qwest's inability to respond nor the fact that a CLEC could somehow have reduced Qwest's burden in responding to CLEC requests should be determinative of whether the CLEC had exercised bad faith. Otherwise, such a standard could be used to exclude Qwest from its clear obligation to perform reasonably. ELI/Time Warner/XO Utah argued that bad faith, should it remain an exclusion, should be limited to cases where CLECs deliberately manipulated their orders with intent to cause Qwest to miss performance standards.[82]

(b) Duplicative Force Majeure Provisions: ELI/Time Warner/XO Utah also said that SGAT Section 5.7 already deals with equipment failure as a force majeure event. Qwest agreed to make changes to that section in our earlier workshops. Therefore, these CLECs argued, the QPAP should simply only refer to Section 15.7; it should not set forth a broader exclusion, which would weaken the standard set forth in the SGAT.[83] WorldCom also supported the use of the force majeure language from SGAT Section 5.7.[84] AT&T sought to strike the equipment failure exclusion from Section 13.3 as ambiguous, broad, and duplicative of the Section 5.7 force majeure provision.[85] WorldCom proposed to use the Colorado Special Master's Report language for third-party and vendor exclusions.[86]

Qwest said that a separate QPAP force majeure provision was appropriate, in order to eliminate the need for extensive cross-referencing to other SGAT provisions.[87]

(c) Resolving Disputes Over Force Majeure Events: AT&T noted that the QPAP was silent about who would determine whether Qwest had met its burden to show that non-performance under the QPAP resulted from an allowable exclusion. Qwest did say in testimony that the public service commission should decide any disputes about causation. AT&T requested the inclusion of a specific reference to commission authority to resolve such disputes.[88] SGAT Section 5.7 does not contain such a reference. WorldCom proposed detailed language to address the meeting of Qwest's burden of proof.[89]

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[78] Qwest Initial PAP Brief at page 73.
[79] AT&T Initial PAP Brief at page 6.
[80] ELI/Time Warner/XO Utah Initial PAP Brief at page 22.
[81] Qwest Initial PAP Brief at page 75.
[82] ELI/Time Warner/XO Utah Reply PAP Brief at page 13.
[83] ELI/Time Warner/XO Utah Reply PAP Brief at page 14.
[84] WorldCom Initial PAP Brief at page 16.
[85] AT&T Initial PAP Brief at page 6.
[86] WorldCom Initial PAP Brief at page 17.
[87] Qwest Initial PAP Brief at page 74.
[88] AT&T Initial PAP Brief at page 6.
[89] WorldCom Initial PAP Brief at page 7.

WorldCom also proposed that the QPAP require contemporaneous notice of a Qwest force majeure claim -- not merely a notice (which could come long after the fact) with the applicable bill credit statement.[90]

(d) Nexus Between Force Majeure Events and Qwest Performance: AT&T would add language explicitly requiring the demonstration of a nexus between an allowable force majeure event and Qwest performance, requiring further that the event render performance by Qwest "impossible." AT&T would also include language limiting any time extension on Qwest performance to the duration of the force majeure event.[91] Z-Tel proposed that any force majeure condition related to equipment failures be limited to a 72 hour duration.[92] Qwest pointed out that QPAP Section 13.3 requires that the failure of wholesale performance to be "the result of" the force majeure event.[93]

(e) Applicability of Force Majeure to Parity Measures: AT&T argued that force majeure should not be an excuse for failing to meet parity measures, because Qwest should still be able to meet the standard, which is that CLEC service be no worse. AT&T cited the Colorado Special Master's Report as supporting this conclusion. WorldCom made a similar argument.[94] Qwest said that a force majeure exclusion was appropriate for parity measures, because the extensive geographical range of Qwest's operations could cause an external event to have differential impacts on Qwest customers and CLEC customers.[95]

(f) CLEC Forecast Exclusion: WorldCom and Covad would limit the exclusion for CLEC failures to forecast to failures to provide those forecasts required by the SGAT.[96] Qwest would agree to language limiting the triggering forecasts to those "reasonably required under the SGAT or state rules to provide services or facilities."

Discussion:

(a) CLEC Bad Faith: That good faith by all parties is to be generally presumed in contractual undertakings cannot be disputed. However, this general principle may not serve to address the specific concerns that are at issue here. There is merit in an explication of the circumstances in which CLEC efforts (not that we in any measure predict them) to manipulate performance results will be to no avail. The stakes are high for all the participants in the marketplace that Congress has sought to induce; it is neither surprising nor inappropriate that the measure of those stakes in the case of this QPAP are in the several hundreds of millions of dollars annually.

The QPAP should therefore not be criticized for specifying when Qwest may be relieved of payment responsibility by virtue of such theoretically possible manipulative conduct. We should turn therefore, not to the arguments about presuming good faith, but to those that seek to define more precisely what it means in this context. ELI/Time Warner/XO Utah have properly alerted us to the fact that a CLEC should not be penalized for conducting its

[90] WorldCom Initial PAP Brief at page 16.
[91] AT&T Initial PAP Brief at page 7.
[92] Z-Tel Initial PAP Brief at page 33.
[93] Qwest Initial PAP Brief at page75
[94] AT&T Initial PAP Brief at page 7; WorldCom Initial PAP Brief at page 16.
[95] Qwest Initial PAP Brief at page 74.
[96] WorldCom Initial PAP Brief at page 18; Covad Initial PAP Brief at page 55.

business in an otherwise reasonable way, merely because Qwest might be incapable of operating at an acceptable performance baseline, solely because that CLEC knows that Qwest suffers such an inexcusable weakness.

Having described its intent in designing the QPAP section in question, we are now forewarned about how Qwest may intend to apply it, and we are wary of the fact that our failure to respond to such a foreseeable application could be construed as an acceptance of a particular construction of the words that the provision uses. Therefore, we find it necessary to state an agreement with the position of ELI/Time Warner/XO Utah that:

> *Notwithstanding any other provision of this QPAP, it shall not excuse performance that Qwest could reasonably have been expected to deliver assuming that it had designed, implemented, staffed, provisioned, and otherwise provided for resources reasonably required to meet foreseeable volumes and patterns of demands upon its resources by CLECs.*

The insertion of such a provision as a new subsection following QPAP section 13.3 is therefore appropriate to assure that there is not a material dilution of the operation of the QPAP as a meaningful and significant incentive to Qwest.

(b) Duplicative Force Majeure Provisions: Qwest has not made a convincing argument that the QPAP requires its own separate and different force majeure provision. The issue is not at all about whether cross-referencing to other QPAP sections will be "extensive." It will not; what would suffice is a simple replacement of clause (1) of QPAP Section 13.3 with the following phrase: "a Force Majeure event as defined in Section 5.7 of the SGAT." More than this has been commonly done in the SGAT on other subjects, in order to provide proper cross-referencing.

The more material issue is whether something about payments for non-compliant service calls for force majeure provisions that differ form those SGAT provisions that define what the underlying service obligations are in the first place. Qwest did not provide sound support for making a distinction, nor is any self-evident to us. To the contrary, if the SGAT creates an expectation of service subject to specific qualifications, there should be a strong presumption that the economic consequences for failing to meet the expectation should rest upon the same exclusions. Otherwise, we would face a question that represents an imponderable one on the record before us. That question, quite simply, is whether the performance standard or the consequence standard is the one that is too high.

(c) Resolving Disputes Over Force Majeure Events: It is appropriate to clarify the entity to whom Qwest must make and defend, against dispute if necessary, its determination that force majeure events have occurred. In examining Qwest's proposed new dispute resolution language, however,[97] we find that Qwest has in fact identified the resolver of disputes, which is the public service commission of each state. We consider that approach appropriate, with other changes that are not material here (see the *Dispute Resolution* section of this report). However, Qwest should be required by the QPAP to provide notice of its claims of the occurrence of force majeure events within 72 hours of learning of them, or after it reasonably should have learned of them. It would not be

[97] See the proposed QPAP Section 18.0 language proposed at page 79 of Qwest's Initial PAP Brief.

appropriate to allow Qwest to search back in time for excuses after it discovers that it will not meet standards, nor is it appropriate to require CLECs to research facts surrounding events that have become stale.

(d) Nexus Between Force Majeure Events and Qwest Performance: Whether it be QPAP Section 13.3 or SGAT Section 5.7, there is already a clear requirement that a force majeure event be the cause of a failure of Qwest performance. Moreover, it is not proper to adopt the extremely high standard of impossibility of performance. It is likely in many instances that Qwest could still perform up to standard, or at least closer to it, if it were to undertake extraordinary efforts that do not consider economy of resources. The burden on Qwest should be to undertake reasonable and efforts to mitigate, not to accomplish the extraordinary, whatever the cost. We construe the existing language as providing so already. In addition, establishing a fixed duration on any force majeure event is: (a) not consistent with the nature of such events, (b) as likely to be over-protective as under-protective, and (c) is otherwise unnecessary, because the burden on Qwest is not only to show the existence of an event, but to show its nexus to performance failure and to demonstrate the time period during which the event and this nexus existed.

There is merit in the AT&T language specifying the method for calculating the impact of a force majeure event on interval measures. It should be added to clarify the method for calculating QPAP payments when force majeure event should have less than a completely excusing impact.

(e) Applicability of Force Majeure to Parity Measures: Qwest is undoubtedly correct in observing that a force majeure event could have differential effects on the services it provides for its own end users and the services that it provides for CLECs. We must nevertheless ask ourselves why it should be presumed that the differential effect must always work in one direction. We would answer that the differential effect would, on a basis relative to CLEC performance, sometimes lessen the quality of Qwest's service for itself and sometimes increase it.

With that answer in hand, we would then be correct to observe that Qwest's provision only allows itself the benefit of choosing when to apply the QPAP's force majeure provisions. While the reasonableness of declaring the necessary conditions to exist will be reviewable, nothing would allow a decision not to declare to be reviewed. That difference is sufferable as a general rule. However, it simply would deny basic fairness to permit Qwest both to: (a) avoid parity-measure payments when it decided that the impairment to service for its own end users was lesser, while (b) meeting parity standards that it might otherwise have failed when the impact on its own end users was greater.

The Colorado Special Master, as he did in so many other cases as part of his fine efforts for the commission there, got the solution to this issue just right. Parity, although in a somewhat different sense, requires that parity measures not be subject to force majeure payment exclusions.

(f) CLEC Forecast Exclusion: Qwest's concession puts most of the problem behind us, but the QPAP continues to reach a scope that appears inappropriately wide, given the need for the document to operate reasonably free of litigation risk. Particularly troublesome is the provision about forecasts under state rules. Those rules could change over time and they could involve forecasts that address interests much broader than those

considered to warrant forecasts under the SGAT. There could also be arguments about whether information to be required by states in the future even constitutes a "forecast" as the term is contemplated by the SGAT and the QPAP. It would be much better to limit the exclusion to the failure to provide properly those forecasts that are "explicitly required by the SGAT" of which the QPAP will form a part.

This change will deal as well with the other material concern about Qwest's offer. By definition, the SGAT cannot be read as requiring any forecast whose provision would be "unreasonable." Therefore, Qwest's use can only be logically read as implying that the SGAT can be read as reasonably requiring yet additional forecasts in this particular context. It would create far too much ambiguity to include a provision that may be interpreted as authorizing the compulsion of additional, yet unspecified forecasts under the terms of the SGAT. Identifying the specific forecasts that were to be required formed much of the debate in prior workshops. It simply will not do to introduce a troublingly undefined and shadowy provision that might do indirectly what we seek to prohibit directly.

7. SGAT Limitation of Liability to Total Amounts Charged to CLECs

ELI/Time Warner/XO Utah noted that SGAT Section 5.8.1 limits Qwest and CLEC total liability (except for willful misconduct) to the total amount charged under the SGAT for the applicable year. As ELI/Time Warner/XO Utah note, this SGAT provision expressly does not limit QPAP payments; however, nothing provides that QPAP payments do not limit the other damages, to which this section applies.[98]

Discussion: Now that the QPAP is before these workshops, we can conclude that the payments addressed by SGAT Section 5.8.1 and by the QPAP are mutually exclusive. Qwest's liability for property damage and personal injury should not be limited by QPAP payments, just as QPAP payments should not be limited by payments for property damage and personal injury. Therefore, SGAT Section 5.8.1 should include a provision stating that:

> *payments pursuant to the QPAP should not be counted against the limit provided for in this SGAT section.*

D. Incentive to Perform

1. Tier 2 Payment Use

AT&T urged the elimination of the QPAP Section 7.5 requirement that Tier 2 payments be limited to use for purposes that relate to the Qwest service territory.[99]

Discussion: The proper construction of the Qwest language is that the restriction applies only to payment amounts to be administered by the commission. Should the commission administer those funds the restriction is generally appropriate, given the statutory role that commissions typically have. However, even in that case, it should not be presumed that commission powers are so limited. There should also be no restriction on payments

[98] ELI/Time Warner/XO Utah Initial PAP Brief at page 25.
[99] AT&T Initial PAP Brief at page 10.

made to the general fund. Therefore, QPAP Section 7.5 should be replaced with the following.

> *Payment of Tier 2 Funds: Payments to a state fund shall be used for any purpose determined by the commission that is allowed to it by state law. If the Commission is not permitted by state law to receive or administer Tier 2 payments to the state, the payments shall be made to the general fund or to such other source as may be provided for under state law.*

While not addressed by the participants, the Colorado Special Master's Report (at Part VII) recommended a novel method for funding what may be significant administrative and dispute resolution responsibilities for the states that will receive such funds. As these multi-state workshops have demonstrated, many, if not all of the Qwest states can find it efficient to address wholesale telecommunications services issues on a combined basis. More critically, some states simply may not have the resources necessary to carry out the many burdens that the SGAT, interconnection agreements, the QPAP, federal law, and FCC regulations impose upon them. The creation of a funding mechanism to support state commission activities represents a proper use of a portion of Tier 2 payments and, if necessary, of a fraction of the escalated portion of Tier 1 payments.

The QPAP should provide that one-fifth of the escalation portion of payments otherwise due to CLECs for non-compliant service in each participating state and one-third of the state's Tier 2 payments be made to a special fund that would be available for states participating in a common administration effort to use for: (a) administrative activities, (b) dispute resolution, and (c) other wholesale telecommunications service activities determined by the participating commissions to be best carried out on a common basis. The Tier 2 payments should be first used to carry out these purposes, with any excess remaining Tier 1 payments returned to the CLECs who made them, on a pro-rata basis, not less than every two years. Qwest should also be required to make an advance payment against future Tier 2 obligations in an amount reasonably determined by the participating commissions to fund the preceding listed activities on an interim basis.

The Colorado Special Master's Report recommended a particular form of administrative structure for carrying out the activities listed above. Given the multi-state nature of the effort envisioned here, as opposed to the single-state process addressed there, it is preferable to allow the states interested in participating to give consideration to the best means for designing and implementing a common administrative structure.

2. Three Month Trigger for Tier 2 Payments

The QPAP requirement that non-compliance extend to three consecutive months before Tier 2 payments would be triggered concerned a number of participants. Qwest argued that there were sound reasons why Tier 2 payments should, unlike Tier 1 payments, not begin at the first month. Qwest said that the Tier 2 payments were not compensatory to CLECs, but were designed to add to Qwest's incentives to perform. Given the lag involved in identifying continuing problems and in taking steps to meet them, Qwest

considered is appropriate to allow a three-month correction period, which it said is identical to how Tier 2 payments work in the Texas, Oklahoma, and Kansas plans.[100]

AT&T argued that payments should begin after a single month of non-compliant performance, in order to assure that there are effective sanctions for poor performance on Tier 2 measures.[101] The New Mexico Advocacy Staff argued that the payment lag proposed by Qwest would serve to postpone the need for Qwest to begin to address performance problems associated with Tier 2 measures.[102] AT&T said that Qwest has more than its regulatory reporting systems to advise it of any problems that it may be having in meeting obligations to CLECs. Qwest's own internal information sources, according to AT&T, should highlight areas requiring management attention earlier than three months after the fact.[103]

Discussion: One compliant month out of every three should not be considered adequate for measures that have no Tier 1 payment. In any 12-month rolling period in which there have been two non-compliant months out of any consecutive three months, payments for those Tier 2 payments without a Tier 1 payment obligation should be triggered by a single additional month of non-compliance. Escalation should then take place as provided in the QPAP, while assuring that payments do not drop back to zero until there is reached a point where there has been no occasion in the preceding 12 months during which non-compliant Tier 2 performance has occurred in two of three consecutive months.

There remains the question of whether the performance inducement for Tier 2 payments that have Tier 1 counterparts is sufficient, given the three-consecutive-month requirement for Tier 2. Qwest's principal defense of the QPAP provision at issue was two-fold: (a) the need for time to identify and resolve long-term problems, and (b) consistency with other plans that the FCC has reviewed. The time-lag issue would be resolved by the adoption of the recommended approach for triggering Tier 2 payments for measures without a Tier 1 payment counterpart. However, it does appear that the Texas plan adopts the same three-consecutive-month trigger for Tier 2 payments. Nevertheless, given the emphasis placed on Tier 2 payments as an inducement, it remains difficult to place much faith in their contribution to a performance incentive plan when they can be avoided (even under measures where there are Tier 1 payments) by concerted efforts to bring performance to minimum acceptable levels only four months each year. Such a program appears more likely to lead to frequent underperformance than it does to encouraging routine compliance. In the case of Tier 2 payments that have Tier 1 counterparts, therefore, the QPAP should trigger Tier 2 payments in the second consecutive month of non-performance, provided that the same two-out-of-three month condition recommended immediately above for Tier 2 measures that have no Tier 1 counterpart is met.

[100] Qwest Initial PAP Brief at page 25.
[101] AT&T Initial PAP Brief at page 11.
[102] New Mexico Advocacy Staff Initial PAP Brief at page 16.
[103] AT&T Reply PAP Brief at page 14.

3. Limiting Escalation to 6 Months

Qwest supported the QPAP's limitation of payment escalation to six months on a number of grounds:[104]

- There was no evidence that such a limit would fail to provide Qwest sufficient incentive to meet performance standards
- Continuing escalation would substantially overcompensate CLECs (the Tier 1 and Tier 2 payments combined were already equivalent to giving CLECs free wholesale service for between 7 and 15 years, Qwest said)
- Such overcompensation would remove CLEC incentives to invest in their own facilities.

AT&T, ELI/Time Warner/XO Utah, WorldCom, Z-Tel, Covad, and the New Mexico Advocacy staff were among those who argued that escalation should continue after six months, rising as necessary to succeed ultimately in inducing Qwest to perform up to standards.[105] WorldCom said that the fact that Qwest even now has been missing some standards for more than 6 months shows that the threat of 6-month escalation is not a sufficient inducement to perform adequately.[106] Z-Tel said that there is no doubt in concluding that, where performance remains below standard for six consecutive months, the payment levels were insufficient to induce compliance by Qwest. Therefore, according to Z-Tel, it follows that there should be continued escalation until performance comes up to standards. Z-Tel also suggests that there is systematic discrimination being shown if such performance continues past six months.[107]

Discussion: First, it is not so clear that continuation of poor performance past six months means that there was a methodical calculation by Qwest that the continuing costs of compliance exceeded the continuing costs of violation. It must be recalled that many of the measures at issue are not even parity measures; they are benchmark measures. There is no evidence in this record that would demonstrate with certainty that those levels of performance can be met and sustained at any cost that is within the realm of economic reason. There is certainly a common belief and expectation that they can; otherwise it is difficult to see why Qwest would have agreed to them. However, they generally relate to the provision of services about which there was relatively little experience when the measures were adopted. Thus, the correlation between long-term non-compliance and insufficiency of inducements is not so self-evidently strong as some have argued. If non-compliance continues for half a year in the face of stiff financial consequences, one of the issues that would bear consideration is the achievability of the established benchmark itself.

Moreover, even the parity measures, while based on a substantiated and common belief that there are no material differences between serving retail and wholesale customers, cannot be said to rest upon an absolute certainty that growing experience with the CLEC community will not show otherwise. Finally, calculating comparisons of the marginal

[104] Qwest Initial PAP Brief at page 21.
[105] AT&T Initial PAP Brief at page 26; ELI/Time Warner/XO Utah Initial PAP Brief at page 13; Z-Tel Initial PAP Brief at page 18; Covad Initial PAP Brief at page 32; WorldCom Initial PAP Brief at page 7.
[106] WorldCom Initial PAP Brief at page 7.
[107] Z-Tel Initial PAP Brief at page 10.

costs of compliance versus non-compliance are not by a long shot the only reason why problems can persist for extended periods of time.

Yet, the logic of those who would extend escalation beyond six months depends profoundly upon the certainty of propositions like these, which are open to some question. At this point, it would be speculative to conclude that insufficiently increasing payments, as opposed to other factors, such as: (a) a less than optimally crafted standard, (b) a series of extenuating external circumstances, (c) buyer efforts to induce failure, (d) management's performance decisions and actions (that may have been soundly believed sufficient to improve performance, but proven inadequate only as time passed), or even other reasons, caused or contributed to a failure to provide compliant performance. The correlation that underlies CLEC requests to continue escalation is not sufficiently reliable to ground continuous payment escalation upon it.

If it can be shown that six-month's of escalation would create payment levels that we can generally judge to be far enough in excess of both the value of CLECs and the costs of calculating decisions to continue to under perform, then we should consider reasonable a six-month cutoff of escalation. This conclusion is all the more appropriate in light of three other factors:

- There are provisions for root cause analyses of continuing, substantial problems; such analyses more directly get at the issue of cause and effect than does the presumption about Qwest motive and intent that underlie the CLEC proposal
- There exists the option of ending 271 authorization where that measure is shown to be appropriate to the circumstances
- There exists the ability under non-271 sources of regulatory authority to examine the causes and consequences of structural failures or weaknesses in the facilities, management, systems, processes, activities, or resources by which regulated providers of utility services, such as Qwest, satisfy their service obligations.

4. Splitting Tier 2 Payments between CLECs and the States

Qwest said that Covad's proposal for such a split was based on a misreading of the Colorado Special Master's Report; the report's splitting provisions related to Tier 1.Y payments, not to Tier 2 payments. Colorado's Tier 1.Y corresponds to the portion of QPAP Tier 1 payments that escalate for consecutive months of non-compliant performance. As Qwest noted, the escalation portions of Tier 1 payments already go to CLEC's under the QPAP here.[108]

Discussion: The Colorado Special Master's Report does not support a division of Tier 2 payments between the states and CLECs. Neither does any other plan that exists under a 271 application previously addressed by the FCC. Tier 1 payments under the QPAP are adequately compensatory for CLECs. Those CLECs that conclude otherwise may retain their rights to damage recovery through other actions. The goals of the Tier 2 payments are best served by continuing to provide that they be paid to the states.

[108] Qwest Initial PAP Brief at page 28.

V. Clearly Articulated and Pre-Determined Measures

A. Measure Selection Process

The Performance Indicator Definitions (PID) document setting forth wholesale performance measures was developed through an extended collaborative process involving Qwest, CLECs, and state commission personnel under the ROC Operational Support Systems (OSS) Process. The PID's performance measures encompass the following interactions between Qwest and CLECs in the context of resale, transport, interconnection, unbundled loops, and other wholesale services:[109]

- Gateway
- Pre-Ordering
- Ordering
- Service
- Provisioning
- Repair
- Network Performance
- Billing

Qwest observed that the PEPP collaborative included extensive negotiations to determine which PID performance measures should be included in the QPAP. Qwest said that, after the completion of that PEPP collaborative negotiation process, it agreed to add two additional diagnostic measures: GA-7(Timely [Gateway] Outage Resolution) and PO-16 (Release Notifications). Qwest also agreed to include a number of other measures not addressed at the PEPP collaborative: OP-17 (LNP Disconnect Timeliness), MR-11 (LNP Trouble Reports Cleared within 24 Hours), and MR-12 (LNP Trouble Reports – Mean Time to Restore).[110]

Discussion: No participant disputed that the PEPP collaborative sought to achieve a broad set of measures to include in the QPAP's payment structure. There was also not, per se, any challenge to the breadth or comprehensiveness of the measures that were agreed to during that collaborative. The issue in dispute essentially was about whether substantial grounds existed for including additional measures. The next sections of this report discuss the merits of adding to what we conclude is generally a well articulated set of pre-determined measures and standards that span the range of carrier-to-carrier performance.

[109] Qwest Initial PAP Brief at page 3.
[110] Qwest Initial PAP Brief at page 4.

B. Adding Measures to the Payment Structure

1. Requiring Payments for Canceled Orders

[illegible] recommended that the QPAP provide payments for canceled orders in certain circumstances, arguing that a CLEC's loss of a customer was both significant economically and not otherwise compensated under the QPAP payment structure. In order to implement their recommendation, they would count as a late provision any order canceled after Qwest misses a due date.[111]

Qwest argued that there be created a performance measure that would identify the number of orders that CLECs cancel in response to expected service cancellations by Qwest customers due to long waits for orders that Qwest places in "held" status due to its lack of facilities.[112]

Qwest responded that it cannot be fairly held responsible for all the reasons why CLECs cancel orders. Qwest argued that the QPAP already sufficiently measures order-filling performance, for so long as orders remain active. Qwest cited, for example, OP-6, which the QPAP includes, and which captures Delayed Days.[113]

Discussion: The QPAP should hold Qwest responsible for the consequences of its failure to perform. There is without question some correlation between the length of delays in provisioning services to end users and decisions by those users to cancel requests for service from CLECs. However, several conditions should have to be met before deciding that added compensation is necessary to make CLECs whole in such cases:

- The degree of correlation should be shown to be high enough to demonstrate cause and effect to a reasonable degree of certainty
- It should be reasonably clear we would not be adopting a program that would provide CLECs compensation for their own business decisions to cancel orders
- The compensation for any interim sources of delay should be shown to be sufficient, given the degree of the correlation (the weaker the correlation, the more confident we can be that payments made by Qwest already under the QPAP are sufficient).

These conditions have not been shown to exist here. CLECs presented no evidence to demonstrate the strength of the relationship between Qwest performance and canceled orders. In fact, they have not even presented enough evidence to demonstrate that canceled orders, whatever the reasons, are material in number. In any event, there is no apparent way to craft a provision that would exclude compensation for CLEC decisions to cancel or for end user decisions to cancel for reasons unrelated to performance. The CLECs proposing this measure certainly offered no specific proposal for doing so.

In the absence of substantial evidence, we consider it reasonable to assume that it generally would take more than nominal delay to cause customers frequently to cancel requests for CLECs to serve them. The QPAP already provides for compensation for

[111] [illegible] Initial PAP Brief at page 5.
[112] Covad Initial PAP Brief at page 53.
[113] Qwest Initial PAP Brief at page 51

delays during the period in which orders remain open, whether or not they are finally completed. The record available to us allows a conclusion that the QPAP will already serve to compensate CLEC's adequately for delays in processing orders, whether or not those orders are ultimately filled.

Covad makes a sound argument about the special circumstances regarding orders "held" for lack of facilities. However, it is not clear that such an identification should produce a separate payment responsibility, given that Covad will continue to receive interval-based payments, despite its internal policy to cancel orders 30 days after their initial due date. It just will not get them for periods of more than 30 days. The usefulness of a held order measure, which we would see as having principally and perhaps solely diagnostic use, Covad should address by presenting its proposal in the forum established for considering new and revised performance measures.

3. Requiring Payments for "Diagnostic" UNEs

Several CLECs noted the importance of EELs to CLECs. They observed that, while the QPAP provides for payments in the case of poor performance for loops and for transport, none exist for EELs, which are a combination of the two. The PID applies no benchmark or parity standards to EELs at present; the performance measures related to them are diagnostic in nature.[114] Qwest's brief acknowledged that, as the ROC OSS collaborative changes measures from diagnostic to a firm benchmark or parity standard, they would be included in the QPAP.[115]

Line sharing and sub-loops are also currently excluded from the QPAP payment structure, because the performance measures for them are diagnostic in nature.[116] Qwest noted that there had been general agreement among the CLECs to exclude line-sharing measurements for the present, but to include them under the nascent service provisions of QPAP Section 10 when a benchmark or parity standard might be adopted.[117]

Discussion: Our prior workshops have made clear the importance of EELs to CLECs. Those workshops also demonstrated that there was not, prior to those workshops, an adequate experience base with EELs until recently. The ROC OSS collaborative properly determined that EELs should be measured on a diagnostic basis for some period of time. As EEL ordering activity increases, this measure should be subjected as soon as practicable to a measurement base that will allow for its prompt addition to the payment structure of the QPAP.

As is the case for EELs, the use of a diagnostic standard reflects the fact that experience with line sharing and sub-loop elements was too limited to support a benchmark or parity standard. Clearly, they should be included in the QPAP payment structure as soon as is practicable.

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[114] E.g., Qwest Section XII Joint Initial PAP Brief at page 10; Covad Initial PAP Brief at page 18.
[115] Qwest Reply PAP Brief at page 34.
[116] Covad Initial PAP Brief at page 18.
[117] Qwest Reply PAP Brief at page 33.

3. Cooperative Testing

Covad noted the existence of an agreement under which Qwest will perform acceptance testing in cooperation with Covad for all xDSL loops that Covad leases. Covad testified that Qwest is failing to perform this testing in a significant number of cases. Covad argued that its need for trouble reporting after installation could be diminished if defective loops were discovered, as contemplated, beforehand, during the agreed upon testing. Covad recommended a cooperative testing performance measure as the most effective means of minimizing trouble reports for the xDSL UNE loops that it takes from Qwest. Covad cited a decision of the Texas commission requiring that orders not be marked as complete when an xDSL loop is not provisioned correctly at the outset.[118]

Qwest said that Covad failed to raise the cooperative testing issue at the PEPP collaborative; neither was it raised when the ROC OSS collaborative designed the performance measures set forth in the PID. Given the failure of Covad to offer any substantial reason for adding it now, Qwest argued that it should be rejected.[119]

Discussion: It should not be possible to meet a service order's requirements by supplying a defective or non-conforming UNE. While such events will happen occasionally in a large-volume operation, we should not encourage it as a means of meeting installation-interval measures. Moreover, it is reasonable to require measures appropriate to validate the delivery of a UNE within specifications in those cases where it cannot be taken for granted that the specifications have been met. What Covad has not demonstrated is the difference in QPAP payments that would result from calculating them under maintenance and repair performance measures as opposed to calculating them under installation interval performance measures. Nor does the record indicate how direct and efficient it would be to create a cooperative testing measure that would provide for effective performance measurements and not duplicate the payments to be obtained under existing installation or repair measures.

While it stands to reason that it is better to prevent and detect problems at the earliest possible point, the failure of Covad to raise this issue earlier means that we do not have a sound basis for concluding that Covad's approach, after all other parties have been heard from, would be preferable. Covad should raise the issue in the forum where new or changed performance measures are identified, discussed, and resolved. Should that forum determine that a cooperative testing measure is appropriate, there can then be consideration of how its introduction into the PID should affect Qwest payment responsibilities, if at all after considering the other compensable installation and repair intervals.

4. Adding PO-15 D to Address Due Date Changes

Covad argued that performance measure PO-15 D, which measures the number of due date changes per order, should be included in the Tier 1 payment structure. Covad said that due date changes injure CLECs, because they must subsequently undertake efforts to re-establish reasonable expectations with customers about when service can be

[118] Covad Initial PAP Brief at page 51.
[119] Qwest Initial PAP Brief at page 52.

initiated.[120] Qwest noted that this performance measure is diagnostic in nature, and that neither Covad nor any other party has heretofore offered a parity or benchmark standard that would change it to a benchmark or parity standard, which is required to allow development of a payment calculation basis.

Discussion: Covad offered no recommendation for what the standard should be; this lack is critical, because a diagnostic measure cannot provide a payment calculation basis. We can offer no solution to the Covad concern on this record.

5. Including PO-1C Preorder Inquiry Timeouts in Tier 2

AT&T commented that performance measure PO-1C should be separately included as a Tier 1 payment item. This measure calculates the number of inquiries that "time out." Such an event ceases the query function underway, thus requiring CLEC representatives to initiate it again. AT&T testified that some time-outs occurred after about 2.5 to 3 minutes of waiting.[121]

Qwest observed that AT&T considered the failure to raise this issue as an oversight. Qwest found that position hard to understand, because the PO-1A and B payment structure is based on intervals, while PO-1C is a percent measurement, which is structurally very different and therefore not compatible for payment purposes.

Discussion: The QPAP already provides for compensation for measures PO-1A and PO-1B, which measure response times.[122] There was a logical basis for excluding this percent measurement from the duration measurements that were included in Tier 1. We believe that the QPAP's treatment of the overall measurement (which includes 1A, 1B, and 1C) reflects a proper treatment of the issue of response times for the present. We also believe that incorporating sub-measure 1C would take more information and analysis than the current record supports. It would also raise the question of how total payments, which now consist of the combination of existing 1A and 1B combined payments, should be changed, if at all, to reflect the addition of 1C.

Given all the circumstances, we think it is reasonable to construe the PAP Collaborative agreement as intending not to include 1C separately; moreover, we find no reason to disturb that agreement as we have interpreted it. However, should the OSS testing now underway demonstrate a high enough number of timeouts to give concern about the impact on PO-1A and 1B response times, it would be appropriate to revisit the issue. This caution is offered in recognition that a high number of timeout cases (which have relatively much longer durations) could make response times under 1A and 1B look artificially good.

6. Adding Change Management Measures

Covad wanted to add change management performance measures to the QPAP.[123] Qwest had already agreed that it would add two change management measures, GA-7 (Timely

[120] Covad Initial PAP Brief at page 54.
[121] AT&T Initial PAP Brief at page 11.
[122] Exhibit S9-QWE-MGW-3.
[123] Covad Initial PAP Brief at page 49.

Outage Resolution) and PO-16 (Release Notifications). Those measures are now diagnostic, but would be included as "High" Tier 2 measurements after the ROC OSS collaborative establishes benchmark measures for them.[124]

Discussion: It is appropriate to include the measures as Qwest has proposed after benchmarks are established, given their importance and the region-wide nature of their operation and impact.

7. Adding a Software Release Quality Measure

WorldCom argued that the propriety of adding a proposed software Release Quality Measure should be reviewed at the QPAP's first 6-month review.[125] Qwest objected to the addition of a software-release quality measurement (GA-7), which the ROC OSS Steering Committee has recently rejected adding to the PID. Qwest also said that its testimony showed that the measure duplicated others, that it would tend to discourage ILECs from introducing software updates, and that such a measure is not included in any other ROC PAPs.[126]

Discussion: No participant sought the inclusion of the measure at this point. The request was only to address it under established QPAP review procedures. All of WorldCom's arguments in support of such a measure and all of Qwest's arguments against it can be raised in the context of the established procedures for addressing PID and QPAP changes. Should the ROC Steering Committee's recent decision remain binding and apt at that time, its reconfirmation will end the matter without material inconvenience or harm.

8. Adding a Test Bed Measurement

WorldCom asked that a Test Environment Responsiveness measure (included in its brief as proposed performance measure PO-19) be included in the QPAP payment structure after its adoption.[127] Qwest said that it is premature to discuss WorldCom's suggested test bed measurement because:[128]

- The test bed has only been in existence since August 1, 2001
- There have only been preliminary discussions about defining a performance measurement for it
- The FCC did not consider the Texas application defective for failing to include such a measure.

Qwest presented evidence that the proposed measure is being "vigorously disputed," and that Qwest's current proposal under discussion at the ROC OSS collaborative specifically provided that the measure would remain diagnostic until the 6-month review. Therefore, Qwest took exception to any suggestion that this measure could be considered to be close to resolution.

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[124] Qwest Reply PAP Brief at page 31.
[125] WorldCom Initial PAP Brief at page 10.
[126] Qwest Reply PAP Brief at page 31.
[127] WorldCom Initial PAP Brief at page 11.
[128] Qwest Initial PAP Brief at page 50.

Discussion: We have no basis for predicting whether a measure will be approved, what its final content might be, whether it would lay a proper foundation for a QPAP payment, or what payment level might be appropriate. It is premature to express opinions about the future inclusion of a measure that is in this state of development. There should be no presumption for or against its eventual inclusion in the QPAP under the applicable procedures for modifying the plan.

9. Adding a Missing-Status-Notice Measure

WorldCom proposed adding to the QPAP payment structure a performance measure based on the missing status notice measure adopted in New York.[129] Qwest noted that neither WorldCom nor any other CLEC proposed this measure for inclusion during the PEPP collaborative. Moreover, the measure exists in the PID only in diagnostic form.[130] Qwest also noted that this measure (PO-10) has only been adopted in New York for a temporary period, and is scheduled for deletion by the end of this year.[131]

Discussion: No proper basis has been laid for establishing here a measure designed to respond and to respond only temporarily to circumstances existing in New York. Its inclusion may be requested later and in accordance with the applicable procedures for modifying the plan.

C. Aggregating the PO-1 A and PO-1B Performance Measures

Qwest said that the PEPP collaborative reached agreement on collapsing the seven individual measurements under PO-1A (response times for transactions under IMA-GUI) and PO-1B (response times for the same transaction types under EDI) into two that would be subject to QPAP compensation, by averaging the response times for all seven PO-1A measures and all seven (and identical) PO-1B measures. EDI and IMA-GUI are two different means by which CLECs can gain access to the OSS that manages the processing of CLEC orders and requests. AT&T argued at the QPAP hearings that the collapse intended was to aggregate each of the PO-1A measurements with their PO-1B counterparts, thus producing seven compensable QPAP measures.

Qwest said that its view is supported by agreement on the Qwest approach in Arizona, which it said came without objection by any participating CLEC there, and the inclusion of that same approach in the Colorado Special Master's Final Report, to which AT&T also did not object. Qwest also said that the agreement, which provides for escalation in payments as response times increase, is reasonable for these kinds of measurements.[132]

AT&T said that Qwest's interpretation of the agreement would allow Qwest to mask poor performance in certain transaction types.[133]

Discussion: Qwest will still be required to report performance under each of the seven transaction types and for each of PO-1A and PO-1B. The source of any deficient

[129] WorldCom Initial PAP Brief at page 11.
[130] Qwest Initial PAP Brief at page 51.
[131] Qwest Reply PAP Brief at page 31.
[132] Qwest Initial PAP Brief at page 45.
[133] AT&T Reply PAP Brief at page 21.

performance will be known with particularity. The real issue therefore is not about masking performance, but the reasonableness of combining the types of transactions into a single payment "opportunity." The seven transaction types involved are:

- Appointment scheduling
- Service availability information
- Facility availability
- Street address validation
- Customer service records
- Telephone number
- Loop qualification

The longest standard for any of them is 25 seconds; the shortest is 10 seconds.[134] The QPAP calls for maximum payments of $210,000 per month per measure; under Qwest's two collapsed measures the total monthly exposure would therefore be $420,000. AT&T's approach would produce a maximum monthly exposure of $1,470,000. The recommended AT&T exposure appears to be out of balance with the Tier 2 payment amounts for other failings (e.g., how long the electronic gateways are out of service, which can mean no transactions at all, not just responses delayed by seconds). The AT&T approach would also have the greater tendency to mix unrelated performance types. It would average response times produced through two different systems. For each system, what is at issue are small response-time variances; the maximum penalty is reached after a delay of 10 seconds. These two systems are likely to produce delays for largely independent reasons.

The evidence shows that the agreement reached was on the terms represented by Qwest; moreover, those terms establish significant and more balanced payment responsibilities for failure to meet standards.

D. Measure Weighting

1. Changing Measure Weights

Some CLECs requested that the weighting (and therefore the QPAP payment amounts) be increased for certain high capacity loop (DS1 and DS3) measures. Qwest agreed to do so, but it then dropped the weighting and corresponding payment amounts for other services, such as residence resale, to compensate. AT&T argued that it was appropriate to increase the high capacity measures, but not to decrease any others in response.[135]

Qwest said that it could accept the AT&T approach of applying different payment structures to what AT&T called high value services (in which AT&T included collocation, LIS trunks, unbundled dedicated interoffice transport, unbundled loops, and resold DS-1 and DS-3 services), but only if PAP payments would remain in reasonable

[134] Exhibit S9-QWE-MGW-3.
[135] AT&T Initial PAP Brief at page 25; ELI/Time Warner/XO Utah Initial PAP Brief at page15.

proportion to the monthly rates that Qwest charges for those services. Qwest also specifically objected to including 4-wire unbundled loops in the high value category.[136] Qwest's reply brief stated that no CLEC had taken issue with the proportionality analysis set forth by its witness in Exhibit S9-QWE-CTE-5, Slides 11 and 13.[137]

AT&T said that Qwest's response to AT&T's request to increase the weighting on certain services was inappropriate. AT&T said that the reduced weighting on residence resale, unbundled 2-wire loops, unbundled analog loops, and business resale represented high volume CLEC services, while the services whose weight was increased were low volume. Therefore, according to AT&T, Qwest's proposal would significantly drop its overall payments under the PAP.

Discussion: Conceptually, there was no error in Qwest's efforts to rebalance payments among measures as a way of responding to AT&T's request for a higher weighting on certain services of value to AT&T. Qwest's proportionality analysis was also an appropriate overall gauge for comparing the financial consequences associated with different measures. The issue of financial exposure here is not merely one of what a total cap might be, but also one of how fast one progresses to that cap and how likely it is that the cap will be reached. Obviously, moving measures to a higher weighting will cause a faster progression to the cap and it will increase the chances that it will be met.

One source of disagreement is the AT&T belief that Qwest overcompensated. However, a number of CLECs go further. They at least implicitly argue that there is no reason not to increase the net rate of progression toward the cap, but we will defer resolution of that issue until later, in the *6-Month Plan Review Limitations* section of this report. As to the overcompensation issue, AT&T, which requested the change in the first place, failed to propose any better alternative. Therefore, given its opposition to what Qwest did to meet AT&T's stated needs and given a concern that Qwest may have overcompensated (and perhaps even to the detriment of CLECs other than AT&T, for whose benefit Qwest made this change), the best course is not to make either the weighting increases or the weighting decreases that Qwest offered to address AT&T's concern.

The QPAP before Qwest agreed to change certain weights was reasonable. It was also reasonable for Qwest to ask, in return for changing some payment amounts upward, for compensating reductions in others. It would be fair to give CLECs a choice between the two, but it would be imbalanced to allow them to take the benefit of Qwest's offer, while denying the compensating benefit sought by Qwest to keep payments in balance. Qwest's proportionality analysis buttresses this conclusion. As a principal supporter of changed weights, AT&T found Qwest's change in to be imbalanced. No other reasonable proposal being made or accepted, the weights should return to those proposed in the QPAP that Qwest initially filed in these proceedings.

2. Eliminating the Low Weighting

ELI/Time Warner/XO Utah argued that no measure should have a low weight, all should be at least a medium, and some should move from medium to high. Covad also said that

[136] Qwest Initial PAP Brief at page 35.
[137] Qwest Reply PAP Brief at page 24.

no measures should be considered low. Z-Tel suggested averaging the low and medium payment amounts to reduce the weights from three classes to two classes. [138]

Qwest argued that CLECs presented no evidence to support a change in measurement weighting for PAP purposes. Qwest said that these changes would not improve the PAP, but would merely provide increased payments to CLECs.[139]

Discussion: Little support was provided for these requested changes. Certainly, no case was made that the QPAP may be found inadequate for failing to incorporate them. Finally, some of them suffer from the same balance problem that we addressed in the immediately preceding section of this report. All CLECs might agree on increasing the payments associated with all measures. But upon imposing what we feel is a proper balancing requirement, that consensus would likely disappear as parties began to focus on making their particular needs "winners" in the process, while seeking not to suffer any "losers" of importance to their operations. We believe that the three categories of weights that came out of the PEPP collaborative process should remain.

3. LIS Trunks Weighting

AT&T said that LIS trunks should be considered as particularly high value services, which therefore should carry higher non-performance payments. AT&T said that it could not sign up new customers where Qwest failed to deliver LIS Trunks. [140] ELI/Time Warner/XO also considered LIS Trunks to be of high value.[141]

Qwest said that the argument that CLECs are "out of business" without LIS trunks is applicable only to the first LIS trunk order, which is not the common order. The much more typical order is for added trunks, where, Qwest argued, the trunk blocking measure, N-1, would already provide payments in cases where Qwest cannot provision incremental trunks on time.[142]

Discussion: From a broad perspective, it is a significant overstatement to say that LIS trunks are of particularly high value because CLECs are "out of business" if Qwest fails to deliver them. Qwest correctly notes that trunk blocking, as opposed to an inability to take on new customers is the more common issue. In that regard, orders for incremental LIS trunks are not categorically different from other services that Qwest may be slow to deliver. In fact, a review of the CLEC testimony makes it appear as if what LIS Trunks mean to AT&T and ELI/Time Warner/XO Utah, high capacity loops or line sharing mean to others. The QPAP needs to address value in a more balanced way, because taking each CLEC's claim of particular importance at face value would inevitably make all measures of high weight. We continue to believe that the QPAP payment structure already reflects an adequate treatment of measure weights. No change is recommended here.

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[138] ELI/Time Warner/XO Utah Initial PAP Brief at page 18, Covad Initial PAP Brief at page 34, Z-Tel Initial PAP Brief at page 34.
[139] Qwest Initial PAP Brief at page 27.
[140] AT&T Initial PAP Brief at page 25.
[141] ELI/Time Warner/XO Utah Initial PAP Brief at page 17.
[142] Qwest Reply PAP Brief at page 25.

E. Collocation

The New Mexico Advocacy Staff proposed either the Michigan or the Georgia approach to determining collocation payment amounts.[143] Qwest commented that the CLECs represented during a May PEPP collaborative workshop that their proposal did reflect the Michigan approach. Qwest later accepted that proposal. No CLEC has argued in its briefs that Qwest's acceptance of the cited proposal is in any way inadequate.

Discussion: The evidence presented by Qwest demonstrated that the collocation proposal whose acceptance it acknowledged at the hearings was both based on the Michigan proposal and acceptable to the CLECs who responded to it. No objection was made to the proposal by any CLEC brief. The incorporation of the proposal already agreed to by Qwest appears to respond to the request of the staff and is in any case reasonable. There is no reason to question the QPAP's treatment of collocation payments.

F. Including Special Access Circuits

WorldCom requested that special access circuits be included in the PID performance measures as one of the product disaggregations, and that the QPAP be changed to provide for payments associated with such circuits.[144] ELI/Time Warner/XO Utah also considered it important to include payments for special access circuits, in order to provide proper incentives for Qwest to support this important means by which some CLECs provide local exchange service.[145] ELI/Time Warner/XO Utah said that Qwest did not dispute the evidence that comprises the key factual support for its position – evidence that:[146]

- Special access circuits are a widespread means of providing local exchange service
- It is impracticable to procure UNEs, such as EELs, as an alternative means of providing local exchange service
- There will be post-271 approval problems with the service that Qwest provides through special access circuits.

Qwest said that there had been agreement to drop special access circuits from discussions by the ROC OSS collaborative that designed the PID, because section 251 did not include them. Qwest also said that special access circuits cannot be considered a checklist item at all, according to the FCC and a number of state commissions. Qwest also cited the FCC's current consideration of the complex issues involved in extending unbundling obligations to special access circuits. Qwest cited the Colorado Special Master's Report as supporting the exclusion of special access from PAP or other section 271 consideration. Qwest also objected to the notion that other states had acted substantively on the question of special access circuits. Qwest said, for example, that there is no authority for concluding that the Minnesota Commission has in fact adopted special

[143] New Mexico Advocacy Staff Initial PAP Brief at page 25.
[144] WorldCom Initial PAP Brief at pages 18 and 19.
[145] ELI/Time Warner/XO Utah Initial PAP Brief at page 6.
[146] ELI/Time Warner/XO Utah Reply PAP Brief at page 2.

access service standards.[147] Qwest also cited a recent Indiana Utility Regulatory Commission as denying a CLEC request to include performance metrics and penalties for special access circuits in proceedings addressing Indiana Bell (SBC-Ameritech) compliance with section 271(c). Qwest cited that decision's review of other state decisions, none of which, according to the Indiana commission, supports inclusion of special access circuits in an examination under section 271.[148]

Qwest also responded to the claim of ELI/Time Warner/XO Utah that Qwest failed to contest the factual issues surrounding special access.[149] Qwest cited testimony from its witnesses stating that virtually all special access circuits had been purchased out of interstate tariffs.[150]

ELI/Time Warner/XO Utah argued that nothing that the FCC has said in prior contexts, focusing on the Verizon (Bell Atlantic – New York) 271 order, should be read as contrary to its request here. These participants said the ruling in the New York 271 order provided that special access circuits should not be considered in the context of a 271 review. The issue here is different to them: it is adopting a QPAP payment structure. These participants said that the structure needs to include special access circuits, in order to assure that the PAP gives meaning to Qwest parity obligations, by encouraging adequate provisioning and repair of high-capacity Qwest facilities that serve CLECs. ELI/Time Warner/XO Utah said that the FCC has not precluded PAP treatment of special access circuits in any prior decision, and that a number of states are now expressing concern about the issue of poor special-access-circuit service, and are considering remedies.[151]

Discussion: We have spent considerable time examining CLEC use of special access circuits to provide local exchange service. The August 20, 2001 *Unbundled Network Elements Report* in these workshops described the contest over the relevant facts and the standards under which those facts should be considered. We conclude that special access circuits do not merit the treatment recommended by a number of CLECs. The evidence of record supports the conclusion that the overwhelming majority of special access circuits at issue here were purchased under federal tariffs. Remedies for failure to meet the requirements of that tariff should be addressed by the agency with jurisdiction under such tariffs: i.e., the FCC, not state public service commissions. Similarly, the QPAP need not address failures to meet existing state tariffs; CLECs can appeal directly to state commissions for any necessary relief.

The only apparent reason for overriding the sound principle of having the FCC and the state commissions police their own tariffs would be if there existed some inappropriate barrier that had the practical effect of requiring tariff purchases where interconnection agreement purchases should have been available. That issue was addressed in the prior workshops, where some of the same CLECs arguing this issue here disputed the propriety of Qwest's historical limitations on allowing access to EELs as UNEs. The August 20, 2001 report substantially eased restrictions on the conversion of special access circuits to

[147] Qwest Initial PAP Brief at page 54.
[148] Qwest Reply PAP Brief at page 33.
[149] ELI/Time Warner/XO Utah Initial PAP Brief at page 9.
[150] Qwest Reply PAP Brief at page 34.
[151] ELI/Time Warner/XO Utah Reply PAP Brief at page 4.

EELs,[152] which makes it possible for CLECs to bring services under the terms and conditions of an interconnection agreement or an SGAT, should they elect to do so. In that case, CLECs would have all the rights and expectations applicable under such agreements, rather than, as they would effectively do here, mixing tariff and agreement and federal and state jurisdictional purchase rights and remedies.

G. Proper Measure of UNE Intervals

Covad argued that QPAP payments should be based on the intervals of SGAT Exhibit C, rather than on the intervals set forth in the PID.[153] Qwest responded that there is a logical relationship between SGAT Exhibit C and the PID performance measures.[154]

Discussion: This issue is similar to the one addressed as the first unresolved *Loops* issue (*Standard Loop Provisioning Intervals*) in the August 20, 2001 *Unbundled Network Elements Report* in these workshops. There is, as was discussed there, consistency between PID performance measure OP-3 (percent of installations completed on or before the due date) and PID performance measure OP-4 (number of days to complete installations), and SGAT Exhibit C (Qwest's Standard Interval Guide). For the reasons expressed in the August 20, 2001 report, it is appropriate for the QPAP to apply the PID performance measures, not SGAT Exhibit C, as the payment standard.

H. Low Volume CLECs

Covad argued that Qwest designed the QPAP primarily to compensate high-volume CLECs, with the result that lower volume CLECs, such as itself, will be under-compensated.[155] Qwest argued that the evidence refutes any claim that the QPAP's reliance upon a per-occurrence compensation structure would disadvantage CLECs with small wholesale-service volumes. Qwest presented evidence showing that a number of smaller CLECs, including Covad, would for the period from February through March of 2001 have received payments much larger than CLECs of greater size. At the same time, some of the largest CLECs would have received disproportionately small payments.[156]

Covad also objected, more particularly, to the QPAP provision that it said would provide Qwest with one free miss each month in the case of CLECs with small order volumes, in order to compensate for that phenomenon. Covad recommended setting minimum payments at five times the baseline amount for CLECs subjected to the free miss standard.[157]

Qwest objected to Covad's characterization of this aspect of the QPAP. Qwest defended this provision as a necessary adjustment to provisions that would make its performance standard one of perfection in the case of very small order volumes, because even one miss would put Qwest below the required level of performance. For example, for order

[152] See for example the proposed resolution of the third-degree *EELs* issue (*Waiver of Termination Liability Assessments for EELs*) from the August 20, 2001 *Unbundled Network Elements Report*.
[153] Covad Initial PAP Brief at page 23.
[154] Qwest Reply PAP Brief at page 40.
[155] Covad Initial PAP Brief at page 27.
[156] Qwest Initial PAP Brief at page 30.
[157] Covad Initial PAP Brief at page 33.

volumes of five, the best Qwest could do, unless it were perfect, would be to reach 80 percent, i.e., four out of five. Qwest said its analysis of the February to May 2001 period showed that the so-called "one-miss" standard would only have come into play 8 percent of the time, which falls far short of justifying minimum payments 100 percent of the time.[158]

Discussion: As a general matter, Qwest provided substantial evidence that the QPAP would not serve to under-compensate smaller volume CLECs. Qwest's evidence, which was credible and which was not rebutted by CLEC evidence to the contrary, demonstrated that, for the sample period of February through May of 2001, it could not be demonstrated that there was any disturbing correlation between QPAP payment levels and CLEC order volumes, thus disproving the claim that would be relative under compensation to those with lower order volumes.

Turning to the "free miss" issue, as parties termed it, the goal of excluding one miss from compensation was to prevent (in the case measurements with CLEC volumes of 5 or fewer) turning a 90 percent benchmark into a 100 percent one.[159] Qwest's illustration calls to mind the way that the Sun illuminates the Moon; it can get only half the job done at a time. The occult side of Qwest's point about the problem of rounding "up" is that rounding "down" turns a 90 percent standard to an 80 percent one. A rolling average applied yearly would serve much better to correct the problem of rounding. It would not, however, alone solve the issue of escalating payments for consecutive-month misses. That problem can be solved by providing that the escalation provision will be applicable in any month where any miss occurred for CLECs with order volumes at the level in question, and where the annual calculation shows violation of the applicable requirement. The SGAT should incorporate these changes.

VI. Structure to Detect and Sanction Poor Performance as It Occurs

A. 6-Month Plan Review Limitations

Section 16 of the QPAP provides the means for amending the plan. This section allows for the following changes:

- Addition, deletion, or change of measurements (based on whether there was an omission or failure to capture intended performance)
- Change of benchmark standards to parity standards (based on whether there was an omission or failure to capture intended performance)
- Changes in weighting of measurements (based on whether the volume of "data points" was different from what was expected)
- Movement of a measure from Tier 1 to Tier 2 (based on whether the volume of "data points" was different from what was expected).

The section requires any change to the QPAP to be approved by Qwest.

[158] Qwest Initial PAP Brief at page 33.
[159] Qwest Reply PAP Brief at page 21.

AT&T noted that the New York and the Texas plans allow any aspect thereof to be examined at the six-month reviews. AT&T urged this approach, in order to allow for a consideration of the public interest. Specifically, AT&T would make all plan aspects open to review, and would rest authority for deciding to accept any changes with the state public service commissions. AT&T would also eliminate the number of data points as the sole basis for determining performance measure reclassifications.[160] AT&T would also take away Qwest veto power over QPAP changes, and allow more extensive PID review.[161]

ELI/Time Warner/XO Utah proposed that the QPAP be treated like any other SGAT or interconnection agreement provision in terms of its amendment.[162] WorldCom objected to the failure of the QPAP to permit state commissions to amend the substance of the plan and to the veto power that Qwest has under the QPAP.[163] Covad said that the plan-review provisions of the QPAP were neither appropriate nor what has been included by other BOCs.[164]

Qwest objected to an obligation to open the QPAP generally to amendment, because of its need to have certainty about the extent of the obligations it was agreeing to undertake. Qwest also said that effective administration of the plan required a substantial degree of stability in its provisions. Qwest said that the QPAP limits on the scope of the 6-month reviews reflect the same provisions included in the Texas, Kansas, and Oklahoma PAPs existing as of FCC 271 application decisions there.

Discussion: The Texas PAP is in almost all respects consistent with what Qwest has proposed. The four types of permissible changes are the same. The requirement that the BOC agree to changes in existing performance measures is also the same. One material difference is that questions related to the addition of new measures may be resolved by arbitration. The Colorado Special Master's Report sets forth similar constraints on revising the PAP under the six-month review process. Specifically, it would:

- Prohibit revisiting the statistical methods applicable to parity determinations
- Prohibit revisiting the payment structure and the categorization of payments by tiers
- Prohibit revisiting the methods for capping payments
- Allow measures to be added or deleted
- Allow shifts in the weighting given to existing measures.

The Colorado Special Master's Report would grant state public service commissions authority to decide on the propriety of any identified changes, which the commissions would then ask Qwest to include in an amended SGAT filing. That report also recommends a separate review process (assisted by an outside expert under funding provided through Tier II payments), which would take place after three years of PAP

[160] AT&T Initial PAP Brief at page 14.
[161] AT&T Initial PAP Brief at page 14.
[162] ELI/Time Warner/XO Utah Initial PAP Brief at page 27.
[163] WorldCom Initial PAP Brief at page 9.
[164] Covad Initial PAP Brief at page 37.

operation, and which could examine broader changes to the PAP. That process would address:

- An assessment of the effectiveness of the PAP
- Revisions to PAP payment amounts (based solely upon evidence of harm produced by particular wholesale performance deficiencies)
- Removal of measures from the payment structure (based on the degree to which commercial alternatives to the use of Qwest services have become available or on a demonstration that Qwest can deliver reliable wholesale performance)
- Deletion of measures no longer needed to be measured or subjected to payments
- Whether the six-month interval for routine consideration of changes remains appropriate.

There are two basic economic issues that appear to concern Qwest when it comes to QPAP changes; i.e., the matters of payment ceiling and payment trajectory. We have already addressed the question of the ceiling in the discussion of the *Total Payment Liability* section of this report. We see no reason here to change the recommendation that total financial liability remain predictable and thus fixed. The question of trajectory; i.e., how fast payments move toward the ceiling, we began to address earlier in the *Measure Weighting* section of this report. The kinds of changes to the performance measures that are in dispute would clearly affect that trajectory; providing a too liberal mechanism for changing them would be problematic. Qwest would solve that problem by requiring its agreement to all changes. In contrast, the Texas plan would use arbitration in a limited number of cases. The Texas plan's approach is more appropriate to addressing the need for and financial consequences of new performance measures that meet the QPAP's standard, which here is whether there was an omission or failure to capture intended performance.

The market of concern is young and in many cases yet to be tested by substantial experience under new ways of doing business. We should also recall that the performance measures at issue came from a process conducted under the auspices of the ROC. It is reasonable to anticipate the possibility of substantial need for new measures if we are to assure that the QPAP will continue to detect and sanction poor performance as it occurs. Because we are uncertain of the continued role of the ROC in performance measure development and administration, the Texas arbitration provision is therefore appropriate to assure that the QPAP meets the applicable standards without unduly exposing Qwest to indeterminate increases in its financial exposure.

The Colorado Special Master's Report made several creative suggestions that may provide for an effective alternative. In particular, the establishment of a mechanism for dispute resolution and PAP administration, funded through Tier 2 payments may prove quite effective and efficient when applied in a multi-state context that includes a large number of states with significant resource limitations. We have discussed that concept in the *Tier 2 Payment Use* section of this report.

The three-year PAP review process recommended in the Colorado Special Master's Report would also serve a useful purpose in examining the continuing effectiveness of

the QPAP as a means of inducing compliant performance without applying payment requirements that experience may prove excessive or unnecessary. That process should also be adopted, with the understanding that its results would not be intended to open the QPAP generally to amendment, but would serve to assist the commissions in generally determining then existing conditions and reporting to the FCC on the continuing adequacy of the QPAP to serve its intended functions.

In summary, we believe that the QPAP is not fundamentally different from either the Texas plan or the Colorado Special Master's Report in the matter of changing the plan. With the following changes, we believe that the present QPAP provisions can function effectively to respond to external changes, without creating insufficiently defined financial exposure to Qwest. Those changes are:

- Provide for normal SGAT dispute resolution procedures in the event that there is disagreement with a six-month review process recommendation regarding proposed addition of new measures to the QPAP payment structure
- Recognize and support multi-state efforts (should they occur) to create a Tier 2 funded method and a regular administrative structure for resolving QPAP disputes
- Provide for biennial reviews of the QPAP's continuing effectiveness for the purpose of allowing state commissions to regularly report to the FCC on the degree to there are adequate assurances that Qwest's local exchange markets remain and can be expected to continue to remain open.

B. Monthly Payment Caps

Several CLECs expressed concern over the QPAP Section 13.9 provision that allows Qwest to place Tier 1 payments that exceed a monthly cap into escrow, and to ask for relief from the obligation to pay such amounts.[165]

Discussion: Except for the problem of a CLEC that first experiences deficient performance late in the year, which was addressed under the subject of *Procedural Caps* earlier in this report, there is no reason under the QPAP for calculating or using monthly caps. There is not a basis for relieving Qwest of the obligation to pay amounts up to the total annual cap, regardless of how quickly those amounts accumulate. There should be no other reference to the calculation or use of monthly caps in the QPAP.

C. Sticky Duration

Z-Tel stated that the best evidence of the sufficiency of payments to provide an incentive to Qwest would be actual performance under the QPAP.[166] It therefore proposed that base payment levels escalate if Qwest, after suffering an initial episode of non-compliance, should suffer a second or third episode of similar magnitude. For example, if the first episode was of two months duration (i.e., produced an obligation to make base payments escalated once for the second month) and the second was of two months

[165] AT&T Initial PAP Brief at page 20; ELI/Time Warner/XO Utah Initial PAP Brief at page 24.
[166] Z-Tel Initial PAP Brief at page 20.

duration (or greater presumably) at the end of the second episode, payments would not drop back to the base level after a following month of compliant performance. Instead they would remain at the higher two-month level as a new base for the next six months, presumably escalating from that higher level for consecutive month misses during that period. If there were to be a third two-consecutive-month miss period, then the two-month payment level would be the minimum on a permanent basis.[167]

Qwest first argued that the QPAP already contained measures that would, unlike the Texas plan, keep payments for long-term problems from dropping to initial levels based on merely one month of acceptable performance. As payments step up gradually over time, so would they step down only gradually after performance improved.[168]

Qwest argued that permanently freezing base payments at an escalated level would be inappropriate. Such a provision would create an improper presumption about the speed with which Qwest should be able to identify and correct performance problems. Qwest specifically cited the lag in producing performance results reports, which would mean that a problem could well exist for nearly two months before those reports even disclosed its existence.[169] Qwest noted that, once the payment levels stick permanently at a higher amount, Qwest could do nothing to cause the levels ever to drop, no matter how long it might provide compliant performance after correcting whatever problem caused the non-compliance.[170]

Discussion: The Z-Tel proposal is wholly inappropriate. It purports to spring from the premise that the best test of the sufficiency of a payment structure is Qwest's performance while operating under it. Then it proceeds to add penalties for multiple failures by Qwest no matter how far apart in time they occur. It is disingenuous because it would ignore entirely successful performance by Qwest however long Qwest provided it. The proposal is draconian because its new baseline payment levels, when multiplied by the still applicable escalation levels, could produce payments by Qwest that are an order of magnitude higher than those contemplated by the QPAP before Z-Tel's amendment. We have already addressed the fallacy in Z-Tel's argument that there should be no reasonable limit to Qwest's financial exposure under the QPAP. This proposal suffers from that same flaw.

D. Low Volume Critical Values

The QPAP reflects a statistical approach that came from partial agreement at the PEPP collaborative. That agreement was to alter the default critical value from 1.65 to 1.04 for a number of small-volume measures, and to increase it to varying levels above 1.65 for progressively larger volume measures. Z-Tel and WorldCom argued at the QPAP workshop that the lower value of 1.04 should apply to all low volume measures, not just to the subset of them to which the QPAP would subject to the 1.04 value.[171]

[167] Exhibit 870-ZTL-GSF-1 at page 14.
[168] Qwest Initial PAP Brief at page 22.
[169] Qwest Initial PAP Brief at page 23.
[170] Qwest Reply PAP Brief at page 17.
[171] Z-Tel Initial PAP Brief at page 23.

Qwest objected to this proposal for being:[172]

- Out of step with what was agreed to by it, commission staffs, and the other CLECs at the PEPP collaborative
- Out of balance in terms of the numbers of measures to which it would apply.

Qwest said that the PEPP collaborative reached a statistical-methods agreement (which did not include Z-Tel) that was designed to balance the impact of the changes that benefited each side. According to Qwest, a key aspect of that agreement was that the parity measures subject to statistical testing would involve CLEC volumes of less than ten over 60 percent of the time. The agreement to use the 1.04 critical value (in lieu of the 1.65 value) only for certain measures would apply the lower value to the benefit of CLECs in the case of 1,519 measures.[173] In return, values higher than 1.65 would be applied to the benefit of Qwest in 1,917, or roughly the same number of parity measures.

Qwest said that the Z-Tel proposal would destroy this balance by applying the lower 1.04 value to over 10,000 tests, not the 1,519 contemplated by the agreement reached at the PEPP collaborative, leaving the number to which the higher value would be applied at 1,917. Qwest also noted that the FCC has already considered and rejected a similar CLEC argument in the Verizon New York application.[174] Qwest also said that the New Mexico Advocacy Staff has not provided any reason to support the reversal of its position on applying the 1.04 value, citing the staff's agreement to its limited application in the PEPP collaborative.[175]

Discussion: The need to reach some compromise in this case appears not to arise from a dispute about statistical theory per se, but rather about what to do in cases where statistical theory may fail those who must deal with practical realities. As Z-Tel noted in its comments, certain statistical errors occur when statistical techniques are applied to small sample sizes. These are not errors in the data, but errors in what the application of statistical techniques indicates that we should conclude from the data. The use of the alternate 1.04 (versus 1.65) value does not even eliminate those errors; as Z-Tel said in its comments, it merely provides a "rough approximation" of some (at least to us) elusive mathematical truth.[176]

No participant disputed the fact that those participants who did agree to the modified statistical approach at the PEPP collaborative did so in major part to balance out, in terms of numbers of measures, cases where the value to be used increased from 1.65 with cases where the value to be used was reduced from 1.65. In other words, what Z-Tel and a number of others (including some who apparently were in accord with the agreement reached at the PEPP collaborative) appear to want to do now is to apply theory to adjust a decision reached through compromise. That is not fair. We would have to begin without the compromise solution if we are to resolve this through debates about the relative superiority of competing theories. Nobody argued in reply briefs that Qwest misread the

[172] Qwest Initial PAP Brief at page 41.
[173] LIS Trunks and undbundled dedicated interoffice transport, resale, and unbundled loops for DS-1 and DS-3.
[174] Qwest Initial PAP Brief at pages 41 and 42, citing paragraph 17 of the Bell Atlantic New York Order.
[175] Qwest Reply PAP Brief at page 29.
[176] Exhibit S10-ZTL-GSF-1 at page 12.

FCC decision with respect to the application of statistical methods in prior cases. We see no reason to upset the balanced, compromise approach that met with substantial agreement at the PEPP collaborative.

E. Applying the 1.04 Critical Value to 4-Wire Loops

The Q-PAP excludes 4-wire loops from the 1.04 critical value compromise, but it includes DS-1 loops. AT&T said that it is disingenuous to concede, as Qwest has, that DS-1 and 4-wire loops are analogous for setting provisioning intervals, but not for establishing QPAP payment amounts. AT&T said that it always understood the agreement reached at the PEPP collaborative to include 4-wire loops. AT&T also said that its proposal would not be difficult to administer, because AT&T would simply have it applied to all 4-wire loops, thus obviating any need to determine whether those loops were being used at the DS-1 level.

Qwest objected to AT&T's request to include 4-wire loops under those measures subject to the 1.04 critical value agreement.[177] Qwest said that 4-wire loops:

- Were clearly excluded from that agreement
- Were considered analogous to DS-1 loops (which are included in the agreement) only for the purpose of measuring intervals, not the value of the underlying service
- Are not always used at the DS-1 level, and are only so used when CLECs add electronics, a fact which Qwest neither controls nor about which Qwest even has knowledge

Discussion: The evidence shows that the agreement made was to apply the 1.04 critical value to various types of high-value services. Four-wire loops could be used at DS-1 levels or they could not. Whether or not DS-1 loops are or are not the correct analog for 4-wire loops with respect to provisioning intervals does not have a self-evident connection with the reason why special groupings were established for purposes of applying the 1.04 critical value. What is relevant are the answers to the two following questions: (a) is there a feasible way to include 4-wire loops that are used at the DS-1 level into the identified group, which would make it logical to conclude that such loops were intended to be included under the agreement to be reached, and (b) if not, whether there is a sound reason for including them anyway.

The answer to the first question is that, unlike loops provisioned by Qwest with the capability to provide DS-1 services, 4-wire loops take after-the-fact action by CLECs to make them DS-1 capable. Qwest has neither knowledge nor control over those actions; therefore, the only way feasibly to include them would be to assume that all (or the overwhelming majority at least) of the 4-wire loops are made DS-1 capable by CLEC additions of electronics to them. This assumption has not been supported by evidence; therefore, we should not make it. The agreement made should be read as excluding 4-wire loops, particularly since the participants were knowledgeable enough of the capabilities issue to have addressed it had they wished to do so.

[177] Qwest Initial PAP Brief at page 44.

As to the second question, no sound reason for adding 4-wire loops has yet been shown to exist. Increasing payment levels to CLECs is not per se a sound reason. Their addition would either impose undue PAP administration requirements or require an unsound assumption that all 4-wire loops are DS-1 loops.

We should underscore that this conclusion is based upon the lack of evidence from AT&T to show that there is a very high rate of use of 4-wire loops for delivering high value services. Should there later be clear and convincing evidence during application of the QPAP's amendment procedures that such use is made of 4-wire loops in excess of 75 percent of such loops leased as UNEs, the issue should be reconsidered during the application of the QPAP's amendment procedures.

F. Measures Related to Low Volume, Developing Markets

Section 10.0 of The QPAP has been designed to provide a minimum level of compensation in developing markets. The section provides for minimum payments of at least $5,000 per month for non-compliant service in cases where aggregate CLEC volumes are between 11 and 99.[178]

Z-Tel proposed to replace the $5,000 aggregate payment to all CLECs with a minimum payment of $1,000 to individual CLECs for individual measures.[179] Covad also recommended individual, rather than aggregated, payments, and questioned why only a limited number of xDSL services had been included in QPAP Section 10.[180] Covad argued that all xDSL products can be considered to be low volume by comparison with POTS/voice-grade lines, thus making the inclusion of all xDSL sub-measures self evidently appropriate. Qwest objected to the Covad and Z-Tel proposal to apply the higher payments to individual CLEC volumes that fall within these limits, regardless of what aggregate CLEC volumes under the measures may be.

Qwest said that, for the February through March 2001 time frame, individual CLEC volumes for the OP and MR performance measurements were less than the 100-occurrence limit. Applying the Covad/Z-Tel proposal on such a widespread basis would change it from a market-development inducement to a preference for CLECs with small volumes operating even in mature markets.[181] Qwest also responded to the Covad recommendation to add other xDSL products. Qwest said that they are included in other parts of the QPAP, and that there are many services that CLECs could purchase for use in providing their end users with xDSL services without Qwest's knowing about it. Therefore, according to Qwest, it would take extraordinarily broad categories of unbundled loops to encompass all that could be used in providing nascent services.[182]

Discussion: The Z-Tel and Covad proposals would serve to change the nature of QPAP Section 10. Aggregating CLEC volumes keeps the provision focused on developing markets. Making minimum payments to individual CLECs based on their individual order volumes would extend its applicability to small CLECs operating in very well

[178] Qwest Initial PAP Brief at page 29.
[179] Z-Tel Initial PAP Brief at pages 25 through 27.
[180] Covad Initial PAP Brief at pages 34 through 37.
[181] Qwest Initial PAP Brief at page 29.
[182] Qwest Reply PAP Brief at page 23.

developed markets. We address this latter issue in the following *Minimum Payments* section of this report. We conclude here that Qwest's design for Section 10 is an appropriate method for providing Qwest with an added incentive to perform in developing markets. We also conclude that Qwest's designation of DSL products covered is adequate for the purposes of the section.

G. Minimum Payments

WorldCom commented that small order counts would not produce significant payments by Qwest. WorldCom therefore recommended a $2,500 per occurrence minimum payment, with escalation based on these minimums.[183] Qwest objected to WorldCom's minimum payment proposal as not relating to small CLECs, on grounds that it would apply regardless of CLEC size or order volumes. Qwest also objected to the resulting application of the QPAP's escalation provisions to the minimum payment amounts. Qwest cited as an example the fact that WorldCom's proposal could produce a $2,500 payment for late installation of a service selling for $20 per month.[184]

WorldCom agreed that it would be appropriate to limit its proposed minimum payments to CLECs with monthly volumes of less than 100 occurrences. WorldCom continued, however, to support a minimum payment amount of $2,500 per occurrence, arguing that Qwest's apportionment of $5,000 among all qualifying CLECs and its limitations on the sub-measures qualifying for minimum payments would provide insufficient incentive to Qwest to respond to underlying problems.[185]

Discussion: The issues of minimum payments and payments for developing markets are distinct. The latter should apply on the basis of combined CLEC orders; the former, if appropriate at all, should be a function of the quantity of an individual CLEC's orders. Should the latter be appropriate, it would be because CLECs with very small order numbers suffer harm out of proportion to the number of their orders. There is logic in that theory; it takes a relatively small number of instances of noncompliance to affect a very large portion of a small CLEC's business operations. Thus, their ability even to stay in business in Qwest's region can be more severely threatened by smaller numbers of noncompliant performance instances. However, compensating for that risk on a monthly basis and applying escalated payments to a higher base level of compensation are not rationally related to this risk factor. Thus, it would be appropriate to set an annual minimum payment that is a function of the number of months in which Qwest fails to meet performance standards.

Applying WorldCom's revised 100 orders per month would produce a ceiling of 1,200 orders per year, above which minimum payment provisions should not apply. A minimum payment of $2,000 is more appropriate, and should be applied per month for each month in which Qwest missed any measure applicable to such CLECs. The minimum payment should not be applied on a per measure basis. The minimum payment should also account for months in which volumes were more substantial, in order to assure that order placement is not influenced by month-end considerations. All QPAP

[183] Exhibit S9-WCM-CEW-1, at pages 34 and 35.
[184] Qwest Initial PAP Brief at page 34.
[185] WorldCom Reply PAP Brief at page 3.

payments to such CLECS for that month should count against that minimum. The QPAP should therefore provide as follows:

> *For each CLEC with annual order volumes of no more than 1,200, Qwest shall perform at the end of each year a minimum payment calculation. Qwest shall multiply the number of months in which at least one payment would be required to such CLEC by $2,000. To the extent that actual CLEC payments for the year are less then the product of the preceding calculation, Qwest shall make annual payments equal to the difference.*

Thus, for example, if the total amount due to a qualifying CLEC before the application of this provision, counting escalation, were $5,000, and if there were 9 months in which Qwest failed to meet a Tier 1 compensable standard for that CLEC, the additional amount that Qwest would pay to such CLEC at the end of the year (with other payments due for service during the month of December) would be 9 x $2,000 -$5,000 = $13,000. This approach also responds to the Qwest concern about the multiplying effect of escalation on minimum payments.

H. 100% Caps for Interval Measures

The QPAP contains a number of provisions that are intended to provide payments on the basis of the number of occurrences that fail to meet standards. A measure that provides an overall average quantification of the degree to which Qwest misses a standard can cause misleading results when it is applied to a per-occurrence payment structure. For example, a 3-day actual average interval for 100 events that are subject to a 2-day interval would produce a miss of 150 percent.[186] If the per-occurrence penalty were applied to this result, Qwest argues that it would produce payments for more occurrences than actually took place.[187]

Qwest also said that similar limiters exist in other PAPs:[188]

- 100 percent limiter added to the Texas PAP after 271 approval and at the first six-month review of that plan
- 100 percent limiter in the Oklahoma PAP in the Oklahoma 271 application as approved by the FCC
- 50 percent limiter in the Kansas 271 application as approved by the FCC.

Several CLECs objected to the 100 percent limiter.[189] Z-Tel said that the Qwest argument on this issue improperly seeks to introduce the number of misses into a measure that does not and cannot use the number of misses to measure performance. As Z-Tel notes, the thing being measured is the average length of an interval. Moreover, according to Z-Tel, Qwest's truncation of payments at 100 percent ignores the sound principle that what Qwest pays should increase as the divergence between its performance for itself and

[186] The formula looks like this: 100 events times 3/2 = 1.5 or 150 percent.
[187] Qwest Initial PAP Brief at page 17.
[188] Qwest Initial PAP Brief at page 18.
[189] AT&T Initial PAP Brief at page 26; ELI/Time Warner/XO Utah Initial PAP Brief at page 14; Z-Tel Initial PAP Brief at page 9.

its performance for CLECs increases. Z-Tel said that eliminating Qwest's truncation is necessary to make sure that, as the severity of Qwest's non-compliant performance increases, so will the financial consequences associated with it. AT&T commented that the FCC did not approve the Texas plan limiter at the time of 271 approval; the Texas state commission approved the cap thereafter.[190]

Discussion: Several CLECs did correctly criticize Qwest's description of the alternate CLEC proposal as providing compensation for "phantom orders" or for more orders than CLECs had actually placed. That was not a fair criticism of the alternate proposal supported by a number of CLECs, and the use of a term that can be described as pejorative did not shed helpful light on a difficult issue.

Turning to what is more directly pertinent, Z-Tel noted in its brief that there is a difference between providing all CLEC orders on an average of 2 days versus providing them on an average of 3 days. Z-Tel is correct, but it is also correct that the QPAP somewhat recognizes this issue already. The problem, if there is one, is that the QPAP stops recognizing the difference at a certain point. The conceptual reason that the QPAP does so is sound. In order to reflect the volume of CLEC business, the QPAP must make the payment somehow volume sensitive. Otherwise, if: (a) CLEC A has 50 monthly orders, (b) CLEC B has 2,000 monthly orders, (c) the required interval to be met is 1 day on average, and (d) the average interval Qwest meets for both is 2 days, then Qwest would make the same payment to each, even though CLEC B has experienced vastly more occasions of delay, lengths of delay, or both.

Volume issues make it necessary to reflect somehow in the payment calculations the number of occurrences involved. The CLECs who oppose the QPAP's truncation implicitly accept this need, but they do not explicitly acknowledge it. In this regard, there is some irony in their allegations that Qwest's approach improperly seeks to introduce the concept of occurrences where it does not fit mathematically. The better argument against Qwest's approach is that it fails to measure both the number of individual misses and then to assign a severity level to each of those individual misses. That is what it might do in a perfect world.

No CLEC who objected to the QPAP's 100 percent truncation took this tack. Rather, having accepted the mathematical anomaly with which the QPAP begins, they chose instead a truncation approach as well; i.e., to cut off Qwest's continued use of per-occurrence based thinking on a measure that does not tell us anything about occurrences. To demonstrate, if a CLEC has 10 orders and if the average Qwest interval for serving them is 2 days, we have no way of knowing (to list but two examples out of a vast number of possible ones) whether each of the 10 was served in 2 days, or if 9 were served in 1 day, while the other was served in 11 days. Yet this is precisely the kind of distribution information we would need to know if we were to accomplish what is the logically correct thing to do if the CLECs are right, which is to pay only for the misses and to create and pay for each miss according to an intelligently arrived at scale that escalates payments for the degree of the miss.

[190] AT&T Initial PAP Brief at page 27.

What we have here is a need for arithmetical compromise to fit the quality of the data we have to work with under this measure. It is clear that the CLECs, despite what look like arguments for mathematical purity, in fact propose merely a different sort of impurity. There is not a factual or logical basis for believing that it comes closer to ultimate reality than does the one Qwest proposed. Notably, methods like those proposed in the QPAP here exist in other plans examined by the FCC.

It may well prove to be the case that the actual distribution of numbers of misses and their extent makes the QPAP a less effective motivator of compliant performance than some other formula might. Evidence addressing number and length distribution would, in that presumed case, have gone a long way to supporting CLEC claims that different QPAP treatment would be appropriate to detect and to sanction poor performance. As we have none here, no change is yet appropriate. However, such distribution information and any recommended QPAP changes resulting from it should be open to consideration during plan amendment processes.

I. Assigning Severity Levels to Percent Measures

Z-Tel argued that the severity of the consequences of missing a standard expressed as a percentage (e.g., percent of loops installed within the required interval) differs according to what that standard is. As Z-Tel put it, there is a difference in severity between missing a 60 percent standard by 5 percent and missing a 90 percent standard by that same 5 percent amount. Z-Tel proposed a payment formula that it said would make compensation more proportional to the relative size of the "miss" involved.[191] Covad made a similar point.[192]

Qwest presented an analysis to support its claim that the Z-Tel proposal could provide exorbitant payments to CLECs. This analysis showed that Qwest would have been required to pay in excess of the 36 percent annual total cap in just the four-month period from February through May 2001, had the QPAP been fully effective at that time.[193] Qwest considered this result to be particularly extreme, given that Qwest's evidence showed that it met 92 percent of all performance standards during that period.[194] Qwest also noted that Z-Tel's witness disclaimed support for the particular formula values included in Z-Tel's comments (and based on which Qwest performed its analysis); the Z-Tel witness stated at hearings that the weighting proposal should rather be considered as conceptual in nature. Qwest's reply brief argued that the PAP already provides for increased payments as performance diverges more from the required standard. Qwest asserted that the principal difference between the QPAP and the Z-Tel proposal was not one of whether there was an increase in payments, but how fast that increase would occur.[195]

Z-Tel's reply brief argued that its witness had not retreated from Z-Tel's recommended approach, but had only recognized that the values to be used in its proposed formula

[191] Z-Tel Initial PAP Brief at page 12.
[192] Covad Initial PAP Brief at page 30.
[193] Qwest Initial PAP Brief at page20.
[194] Qwest Initial PAP Brief at page21.
[195] Qwest Reply PAP Brief at page 18.

could be changed to manage the degree of difference in payments that it would produce, in comparison with those of the current QPAP.[196]

Discussion: The dispute between Qwest and Z-Tel over this measure did not focus on the correctness of Z-Tel's formula in capturing the severity of misses of performance measures expressed as percentages. Rather, the problem appears to be that the PEPP collaborative negotiated payment amounts that did not use this formula, and applying it now would have the effect of significantly increasing payment amounts. It would be inappropriate to graft the Z-Tel formula as proposed onto base payment amounts negotiated at the collaborative. Had it been clear then that the base penalty amounts would be subjected to such a formula, it is reasonably certain to conclude that Qwest would not have agreed to those amounts.

It is true, as Z-Tel suggests, that inserting different "A" and "B" values into the formula could substantially moderate its impact on the total payments that would be produced under Qwest's approach. Nevertheless, Z-Tel made a specific proposal that has been shown to produce results that are: (a) out of keeping with the negotiations at the PEPP collaborative, and (b) beyond reason in their financial impact. Had that proposal not so far overreached in its financial consequence, it might merit closer consideration for adoption at the present time. As it did, however, the forum for addressing QPAP changes on an ongoing basis should consider whether there are means for introducing the correlation Z-Tel seeks between payments and severity of misses, without unduly altering the total payment expectations that came out of the PEPP collaborative process.

It is not reasonable to expect the recommendation to be made here to fine-tune the QPAP's payment engine without the aid of input and comment from the whole range of interests who would be affected. In other words, open-ended, conceptual proposals were not looked on with favor. In this case, the better approach is to allow that consideration to be made in a forum better suited to a full and detailed examination of how differing formulas would affect all of the participants. The Qwest proposal for the present provides an adequate means to detect and sanction poor performance in meeting measures expressed as percentages. For the future, QPAP review and amendment procedures will provide a suitable place for full debate about and consideration of a more adequately defined Z-Tel formula.

VII. Self-Executing Mechanism

The QPAP provides for self-executing Tier 1 payments to CLECs and Tier 2 payments to states in amounts that are based on monthly performance results.[197] Qwest designed the Tier 1 payments to provide compensation to CLECS and to provide performance incentives to Qwest; the Tier 2 payments address the Qwest incentives goal.[198] The payments under the QPAP will be provided monthly and they will not require any showing of harm.[199] In each month, payments would first go to Tier 1, with any excess over those, up to 1/12th of the yearly amount, going to Tier 2. Any excess Tier 1 and

[196] Z-Tel Reply PAP Brief at page 7.
[197] Qwest Initial PAP Brief at page 5.
[198] Qwest Initial PAP Brief at page 9.
[199] Qwest Initial PAP Brief at page 12.

Tier 2 monthly amounts would roll forward for payment by the end of the year, subject to the annual cap.[200]

A. Dispute Resolution (Section 18)

Qwest's brief added a dispute resolution provision specifically applicable to the QPAP. It would allow the general SGAT dispute resolutions to apply, but only in the event of disputes arising under QPAP Sections 13.3, 13.3.1, 13.7, 13.9, 15.1, 15.2, and 15.9.[201] ELI/Time Warner/XO Utah said that the limitations on the QPAP sections to which dispute resolution provisions would apply begs the question of how other disputes under the QPAP get resolved. ELI/Time Warner/XO Utah would require all QPAP disputes to be resolved under the provisions of the SGAT or the applicable interconnection agreement.[202]

AT&T requested that the Texas plan language replace what Qwest proposed, and that the dispute resolution provision should apply to all the QPAP, not just the sections proposed by Qwest.[203]

Qwest argued that the limitation of the QPAP dispute resolution provisions to certain sections was appropriate, citing the existence of more than 170 CLECs operating in Qwest's region as reason to protect against the use of the procedures for "de minimis controversies."[204]

Discussion: Qwest has not proposed a dispute resolution mechanism for QPAP disputes that involve QPAP sections other than those it listed. All SGAT provisions, the QPAP included, require some method for independent resolution. Those resolution methods are not necessary (or appropriate) for changing the meaning of the SGAT or QPAP, but for interpreting what those provisions mean and how they should be applied when the parties differ. Qwest has accepted the use of the general SGAT dispute resolution provisions for the specified sections. Those provisions have no explicit exclusion for "de minimis" disputes, although there is no reason for concluding that disputes are likely to be less numerous or more substantial when applied to the SGAT. Neither should we here preclude dispute resolution in advance on a theory of presumed immateriality.

No reason has been shown why the general SGAT dispute resolution sections are any less suitable for addressing QPAP provisions beyond those listed by Qwest. Therefore, it should be clear that the dispute resolution provisions of the SGAT apply to QPAP disputes involving CLECs who use the SGAT in its entirety or act to make the QPAP part of their interconnection agreements (i.e., the unique dispute resolution provisions of interconnection agreements should not apply).

AT&T's recommendation should not be accepted, because the Texas agreement refers to dispute resolution procedures that are a function of Texas Commission procedural rules,

[200] Qwest Initial PAP Brief at pages 13 and 14 .
[201] Qwest Initial PAP Brief at page 78.
[202] ELI/Time Warner/XO Utah Reply PAP Brief at page 14.
[203] AT&T Initial PAP Brief at page 9.
[204] Qwest Reply PAP Brief at page 54.

and therefore may contemplate steps not applicable before the commissions participating here.

B. Payment of Interest

The QPAP did not provide for interest on late PAP payments. Qwest agreed that interest at the one-year Treasury rate would be appropriate on late payments, provided that the same rate would apply to overpayments and to underpayments.[205] AT&T noted this agreement, but observed that Qwest had offered no provision incorporating it into the QPAP.[206] AT&T also recommended that each state's statutory interest rate be inserted in lieu of the one-year Treasury rate, which AT&T said was likely to be low.[207]

Discussion: Payment delayed is certainly payment partially denied after the time value of money is considered. Qwest's proposal goes only part of the way to address this problem. It falls short insofar as it applies the United States Government's cost of money, when the value that must be replaced is that of commercial telecommunications entities. Their cost of money includes a mix of equity, long-term debt, and short-term debt. Short-term debt rates probably represent the best indicator of payments temporarily delayed through errors in billing or the pendency of disputes. The need for a reliable public benchmark leads to the conclusion that the QPAP interest rate should be the prime rate published daily by one of the numerous services or publications respected in the industry. The QPAP should provide for such interest as so posted for any payments made after the date due for any reason.

C. Escrowed Payments

Covad objected to allowing Qwest to avoid current payment obligations by claiming exclusion. Covad argued that Qwest should either have to pay pending dispute resolution or to make payments to an interest-bearing escrow account.[208] Having agreed to pay interest, Qwest objected to being required to place funds in escrow pending dispute resolution.[209]

Discussion: The provision for interest, absent concerns about credit-worthiness, resolves the issue of the time value of money for the present, because there is not at present a need for concern about credit-worthiness in the case of Qwest. However, there would be no harm and some potential benefit in including a provision that would allow a party to require the other to make payments into escrow where the requesting party can show cause, perhaps on grounds similar to those provided by the Uniform Commercial Code for cases of commercial uncertainty.

[205] Qwest Initial PAP Brief at page 39.
[206] AT&T Initial PAP Brief at page 13.
[207] AT&T Reply PAP Brief at page 16.
[208] Covad Initial PAP Brief at page 43.
[209] Qwest Initial PAP Brief at page 77.

D. Effective Dates

1. Initial Effective Date

AT&T and WorldCom asked that the QPAP become effective when a state public service commission enters its consultative report. The goal of this recommendation is to prevent backsliding while the FCC considers a Qwest 271 application.[210] ELI/Time Warner/XO Utah and Covad also argued for making the QPAP effective essentially immediately.[211]

Qwest proposed that the QPAP be effective state-by-state as of the date when Qwest may receive FCC 271 approval in each. Qwest proposed this date because it offered the QPAP as a means for assuring compliance after it gets such approval, and because there are significant issues concerning the statutory authority of the state commissions to order an application under state law, independent of section 271 considerations. Qwest said that the QPAP is self-executing; it does not even require a complaint. Qwest said that no CLEC has demonstrated that the laws of any of the nine states provide the authority necessary for a commission to compel the adoption of the QPAP as a requirement under state law.[212]

Qwest also said that there are sufficient methods for addressing Qwest performance pending FCC consideration of a 271 application. Qwest said that there already exists an opportunity for state and CLECs to supplement the record made in these workshops with evidence that is current through the date that they can present comments to the FCC.[213] Qwest also argued that it will have more than sufficient incentive not to backslide while its 271 application is pending before the FCC. Qwest also said that Covad erred in arguing that the Telecommunications Act of 1996 gives states authority to impose self-executing payment programs.[214] Qwest also objected to the Covad claim that Qwest's consent to impose the QPAP generally could be inferred; Qwest cited the explicit condition it has placed on its agreement to be bound; i.e., its prior receipt of in-region, InterLATA authority under section 271.[215]

ELI/Time Warner/XO Utah said that the issue of commission authority to order enforcement of the QPAP was not material, because the commission role in approving QMAPs and checklist consulting to the FCC would allow it merely to withhold approval or endorsement during Qwest's agreement to make the QPAP effective immediately. At the least, ELI/Time Warner/XO Utah said, the commissions should require monthly reports of payments that would have resulted under the QPAP, had it been in effect earlier than 271 approval.[216]

Discussion: Qwest's consent to the immediate effectiveness of the QPAP cannot be implied from any action it has taken. However, such consent is not necessary, because the issue at hand is not whether commissions can implement something like the QPAP

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[210] AT&T Initial PAP Brief at page 28; WorldCom Initial PAP Brief at page 16.
[211] ELI/Time Warner/XO Utah Initial PAP Brief at page19; Covad Initial PAP Brief at page 6.
[212] Qwest Initial PAP Brief at page 80
[213] Qwest Initial PAP Brief at page 84
[214] Qwest Reply PAP Brief at page 42
[215] Qwest Initial PAP Brief at page 5
[216] ELI/Time Warner/XO Utah Reply PAP Brief at page 10.

under their own authority. The issue more accurately stated is whether the commissions should tell the FCC that they consider the QPAP sufficient to meet the public interest standard even if it is not made effective prior to FCC approval of a 271 application.

In that context, we note that PAPs were not part of the landscape when BOC obligations were being addressed in the context of mediations, arbitrations, and SGAT approvals. No participant has cited FCC support for such a thing outside the context of 271 approval. The very reason cited by the FCC in support of the adoption of a PAP is the need for assurance that local exchange markets will remain open after Qwest may receive the power to provide in-region interLATA service. Given the reasonably long history of operating without PAPs in the pre-271 context and given the purpose ascribed to them, it is logical to conclude that it should become effective when the QPAP proposes, absent special circumstances.

The only circumstances cited were by the New Mexico Advocacy Staff, which argued that there is a risk of deteriorating performance, because Qwest can present a dated record of more adequate performance to the FCC, while allowing more current performance to deteriorate. No other special circumstances were cited; for example, there were no claims that Qwest's wholesale performance history to date was of a nature that would require unique or special inducements. The risk of short-term backsliding is mitigated by the fact that current information can and presumably will be provided to the FCT, should it be relevant. The virtual certainty that such information will become a part of the FCC's deliberations means that there is no change in Qwest's current incentives.

These remarks the issue of whether Qwest should report performance and presumed payment levels between now and any grant of 271 approval. That recommendation is sound. It will provide focus to the interim performance information that was of concern to the New Mexico Advocacy Staff. It will also be helpful in accommodating CLECs to the QPAP reports, to their independent confirmation efforts, and to the general relationship that exists between the performance they are receiving and the payments they are getting. The QPAP should therefore require Qwest to provide monthly QPAP reports as if the QPAP had become effective on October 1, 2001.

2. "Memory" at Initial Effective Date

AT&T said that when the QPAP becomes effective it should effectively calculate performance for as many prior months as are necessary to provide that escalated, rather than baseline, payments apply from the first month. Otherwise, said WorldCom, there would be insufficient incentive to Qwest and a failure to meet the FCC requirement that poor performance be sanctioned when it occurs. [217] Qwest said that this proposal is no different conceptually from one recommending the imposition of the QPAP's payment requirements before 271 approval. [218]

Recognizing having decided that the QPAP should be limited to performance post-dating section 271 approval and that other remedies apply before that time, and thereafter for CLECs not opting into the QPAP for compensation purposes, it would be inappropriate to start the QPAP payment structure in "mid-stream." Otherwise, the effect would be to

[217] AT&T Initial PAP Brief at page 24
[218] Qwest Initial PAP Brief at page 84

remedies appropriately, given that CLEC's retain for the historical period in question whatever remedies are applicable under their existing interconnection agreements.

3. PAP Effectiveness if Qwest Exits InterLATA Market

AT&T and ELI/Time Warner/XO Utah would continue the QPAP payment obligations should Qwest exit the in-region, interLATA market.[219]

Discussion: For the same reasons that the QPAP should only be effective upon entry by Qwest into that market, it should terminate upon the end of Qwest's authority to serve that market.

E. QPAP Inclusion in the SGAT and Interconnection Agreements

WorldCom said that Qwest failed to address the question of how the QPAP should be made a part of the SGAT, which requires commission consideration of the issue.[220]

Discussion: There does need to be some SGAT context for the QPAP and there should also be clarity about the scope of what a CLEC with an interconnection agreement would be required to elect. Qwest's 10-day comments on this report should address these issues.

F. Form of Payment to CLECs

The QPAP provides for QPAP payments to be made by bill credit, rather than by cash or check. Qwest argued that it would not be administratively more efficient to provide for payment by check. Qwest agreed to commit to a sample bill credit format, which it said would obviate any concern about the ability to identify the source and calculation of the credits.[221] Qwest also said that the QPAP already provides for the use of wire transfers in cases where a CLEC's PAP credit exceeds the amount it owes Qwest.[222]

WorldCom recommended that QPAP payments be made by monthly checks.[223] Covad requested that payment forms be limited to cash or check. Covad also asked that there be no offset of any payments due for unrelated debts of CLECs.[224]

Discussion: The CLEC arguments about the administrative convenience of requiring payment by the equivalent of cash were not persuasive. They missed the point that it would be inappropriate to require Qwest to make payments to CLECs in cases where CLECs were not current in paying Qwest for the same kinds of services. The QPAP provision is appropriate; it provides for a cash-equivalent transfer when there is not a sufficient CLEC amount due to offset the credit. Covad's concern about other CLEC debts is not pertinent here. The crediting approach applies to the bills issued under the

[219] AT&T Initial PAP Brief at page 14; ELI/Time Warner/XO Utah Initial PAP Brief at page 21.
[220] WorldCom Initial PAP Brief at page 3.
[221] Qwest Initial PAP Brief at page 39.
[222] Qwest Reply PAP Brief at page 28.
[223] WorldCom Initial PAP Brief at page 14.
[224] Covad Initial PAP Brief at page 40.

SGAT or interconnection agreement. Any other arrangements between Qwest and a CLEC must be addressed by the terms of those agreements, not the QPAP. However, if agreement (covering different services) allows offset rights that would extend to the QPAP, the provisions of that agreement would apply. The reason is that the QPAP should not be read as overriding any other agreement except where explicitly required or otherwise reasonably necessary.

The QPAP should require Qwest to provide credit information in substantially the form of the sample it provided as Exhibit S-9-QWE-CTI-4, absent commission consent to change it.

VIII. Assurances of the Reported Data's Accuracy

Qwest noted a number of means for providing assurances that the performance data underlying QPAP payments will be reliable. Qwest cited the following:

- The underlying performance measures will have been audited twice by the time that the QPAP becomes effective
- The QPAP includes a root cause analysis provision
- The QPAP includes a risk-based audit program
- CLECs may request their raw calculation data from which to verify Qwest's results, and to request audits of individual performance measures.
- The QPAP provides for audits of the Qwest financial system used to calculate CLEC credits.[225]

The following paragraphs address these related means of assuring the accuracy of the data.

A. Audit Program

Qwest said that it modeled the QPAP audit provisions after the Texas plan, and that it included the concept of risk-based auditing, as proposed in the report by The Liberty Consulting Group (Liberty) recommending the adoption of an ongoing monitoring program. Qwest's conception of a risk-based auditing program would include audits triggered by measurements that change from manual to mechanized techniques and audits of measurements that have a high degree of risk, as substantiated by Liberty's report. Such measurements will be identified by the auditor and will be scheduled for audit over a two-year cycle. Qwest sought the right to select the auditor in order to assure consistency of results and efficiency in the conduct of the audit program across its 14 state region. Qwest argued that comprehensive annual audits would waste resources, particularly in light of the fact that CLECs could initiate audits to address any concerns that may arise in the future.[226]

Qwest argued that CLEC-initiated audits should be subject to limitation and that their costs should not be chargeable to Qwest in the absence of audit findings that would raise material concerns. Qwest proposed to limit CLEC-initiated audits to two per year, with

[225] Qwest Initial PAP Brief at page 6.
[226] Qwest Initial PAP Brief at page 57.

each audit covering no more than two performance measures. Qwest noted that the number of CLEC's involved could produce audits of "dozens" of measures each year. Qwest also proposed that the CLEC-initiated audits be performed by the same auditor selected to perform the risk-based auditing to which Qwest agreed.[227]

Qwest also said that the QPAP's root-cause analysis provision, taken from the Texas PAP, provides a reasonable means for assuring that problems reaching an established threshold level will be examined.[228]

Qwest opposed the recommendation by WorldCom that Qwest should bear at least half of all CLEC audit costs, regardless of whether the audit finds a material deficiency. Qwest also noted that the Colorado Special Master's Final Report[229] included limitations on measurements subject to routine audits.[230] Qwest also opposed the Covad recommendation[231] for audits of all "high" weighted QPAP measures that Qwest has failed regularly to meet, arguing that accuracy of the data, not degree of success in meeting the measure, is the key to deciding whether an audit is appropriate.[232] Covad argued that there is no reason to limit CLEC-requested audits; they are self-limited by the requirement that CLECs pay for them if they do not uncover material problems. Covad also argued that the standard of materiality for use in determining audit cost responsibility should be 5 percent of the amount of QPAP payments to the CLEC.[233]

Qwest argued that it should retain the internal control to manage the processes that it uses to make performance measurements. Qwest said that its change management governance process includes strict controls and that it will post to an external website material changes affecting the processes, methods, and activities related to producing performance measurements and reports. Qwest considered it inappropriate to require prior commission approval of its ability to change data gathering processes or to work around temporary problems or errors it finds in making measurements.[234]

AT&T and WorldCom proposed elimination of the restrictions on the number of special audits that CLECs could request. AT&T would also eliminate the authority of Qwest to request audits of CLEC data.[235] AT&T also considered it inappropriate to disallow overlap in CLEC-requested audits.[236] The QPAP allows Qwest the right to select the independent auditor; AT&T and WorldCom argued that this right was inconsistent with the need for independence.[237]

WorldCom's reply brief recommended two specific changes, which it said would provide for greater state public service commission control over the QPAP's operation:

- Allowing CLECs to request additional audits to be conducted by the commissions

[227] Qwest Initial PAP Brief at page 58.
[228] Qwest Initial PAP Brief at page 62.
[229] At pages 5 and 6.
[230] Qwest Reply PAP Brief at page 37.
[231] Covad Initial PAP Brief at page 46.
[232] Qwest Reply PAP Brief at page 38.
[233] Covad Reply PAP Brief at page 12.
[234] Qwest Initial PAP Brief at page61
[235] AT&T Initial PAP Brief at page 15; WorldCom Initial PAP Brief at page 13.
[236] AT&T Initial PAP Brief at page 16.
[237] AT&T Initial PAP Brief at page 16; WorldCom Initial PAP Brief at page 12.

- Allowing CLECs to conduct additional audits when they can show cause for them.[238]

WorldCom also recommended a collaborative, i.e., multi-state, audit program, and objected to any provision that would limit public service commission powers to request performance-measure audits.[239] Covad generally recommended the adoption of the auditing language of the Colorado Special Master's Report.[240]

Discussion: The issue here is one of providing sufficient assurance that a high level of confidence can be placed in the performance results that Qwest measures – results that will drive QPAP payments and that will serve as a primary basis for state public service commission oversight of wholesale performance. It is perhaps not helpful to approach this issue by providing a simple "thumbs up" or "thumbs down" to each specific auditing or data-testing element proposed by Qwest or CLECs. A sound data auditing and testing program should consist of an integrated and complementary set of tools; it would be difficult to craft an effective yet non-duplicative approach by cobbling together individual elements from the multiple proposals we have here.

We begin by concluding that the QPAP does provide for some of the key elements of a sound program, but fails to create an effective and efficient overall program that will provide adequate assurances of the continuing accuracy of underlying performance data. It suffers from certain gaps that would make it unreasonably difficult to identify potential changes of consequence, it does not assure continuing attention to data accuracy indefinitely out into the future, and it provides Qwest a degree of control over the program that is not fully consistent with the need for complete independence of the data auditing and testing program.

Therefore, we propose the adoption of an integrated program in response to the concerns raised by many participants. It takes much from the Liberty monitoring recommendations and from the Colorado Special Master's Report, changing each to respond to constructive arguments and suggestions raised both by Qwest and the CLECs who commented on this issue. The QPAP should be amended to explicitly provide for a program incorporating the elements described in the following paragraphs.

Given the nature of Qwest services and performance measurement systems and processes, it is reasonable to conclude that there will be substantial commonality among the states. It would be appropriate for the QPAP to support common efforts to provide the assurances that Qwest's measurements remain reliable. All stakeholders will suffer, should there be a need to participate in and respond to as many as 14 different ongoing testing programs, because:

- Qwest will face significant added cost and resource burdens as a result of the duplication that will be inevitable
- CLECs will face the need to address the same or closely related measurement problems in many different forums

[238] WorldCom Reply PAP Brief at page 5.
[239] WorldCom Initial PAP Brief at pages 12 and 14.
[240] Covad Initial PAP Brief at page 46

- State commissions will face the need for a significantly greater use of their own individual resources to oversee monitoring and auditing efforts and to resolve disputes about them.

Each state needs to retain the ability to assure attention to its particular needs and circumstances. This objective can be met without unnecessary duplication of testing efforts by designing and implementing them on a common basis. A proper program should consist of the following activities:

- Providing for a transparent Qwest process for changing the systems, processes, methods, and activities by which Qwest takes measurements under established performance measures ("Qwest's measurement regimen"); i.e., allowing an opportunity for others to challenge such changes
- Adopting a programmatic approach that will provide for both pre-planned and as-needed testing of material aspects of Qwest's measurement regimen.

This two-part program recognizes the following principles:

- Qwest's measurement regimen has undergone a thorough audit and will also have to pass FCC muster before 271 approval would be granted
- All other things being equal, continuing to apply the Qwest measurement regimen will provide sufficient assurances that measured wholesale results remain sufficiently accurate
- Insofar as the Qwest measurement regimen remains static, it will be necessary to examine periodically how and how well Qwest continues to apply it
- In addition to the periodic reviews, which should be of indefinite duration (but sensitive to the findings of preceding test work) to be effective, in the short term it is appropriate to examine the areas that the performance measures audit, the ROC collaborative OSS test, and the FCC's review find to be areas of particular risk or instability
- Qwest should retain the power to make measurement processes more accurate or more efficient to perform without sacrificing accuracy
- These changes should be at Qwest's initial discretion, but subject to sufficient visibility to allow challenges to the propriety of any changes to be made.

With respect to the transparency of changes, we should first recognize that what Qwest considers to be a material change might differ from what others believe. There should be a process for brief, regular meetings (once per quarter will suffice) between Qwest and the independent auditor (whose selection and responsibilities are more fully discussed below). These meetings should not include other parties. Their purpose should be to allow Qwest to report on and the auditor to ask questions about changes made in the Qwest measurement regimen. The meetings would then produce reports by the auditor to the commissions and, where the commissions deem it appropriate, other participants.

The results of the meetings would permit the auditor to make an independent assessment of the materiality and propriety of any Qwest proposed change, including, where necessary, testing of the change details by the auditor. These meetings would

supplement, but not replace the other change management and notification methods by which Qwest would make other parties aware of what it considered to be significant changes to its measurement regimen. Other parties would be free to communicate with the selected auditor any concerns about such changes.

With respect to auditing and testing, Qwest has accepted the two-year planning cycle proposed by Liberty as part of its performance measures audit. Liberty's recommended approach contemplated the adoption of a formal plan identifying the specific aspects of performance measurement to be tested, the specific tests to be conducted, and the entity to conduct them. Central to the planned and cyclical approach is that higher risk areas should be audited more frequently, but that even lesser causes of risk should periodically be tested. Each two-year cycle would examine risks likely to exist across that period and the past history of testing, in order to determine what combination of high and more moderate areas of risk should be examined.

The first year of each successive cycle would concentrate on areas most likely to require follow-up in the second year. Near the end of each two-year cycle, planning for the next cycle would commence. The short-term needs of the period immediately following any 271 approval can be handled, if they are not addressed as part of the completion of the ROC collaborative OSS auditing and testing process, and can be incorporated into the plans for the first cycle. Absent an unusual level of adverse findings and conclusions, it would be expected that audit work would reduce in total magnitude across the first several cycles, falling in that case to the level appropriate for a mature and well-functioning measurement regimen. The other major factor expected to influence test work magnitudes is the degree to which Qwest makes changes to its measurement regimen.

Cycle planning should be conducted under the auspices of the participating commissions, with detailed planning recommendations to be made by an outside auditor retained for two-year periods. The auditor should be selected by the participating commissions, if for no other reason, because one of the auditor's tasks will be to recommend the assignment of cost responsibility for CLEC-requested audits. Neither Qwest nor CLECs should choose auditors whose responsibilities include determining whether they should bear potentially significant audit costs. Moreover, the selected auditor must be one with whom all participants are comfortable discussing issues and concerns, which will sometimes prove material to the design of test activities. Commission selection is most likely to produce the communications climate that is most appropriate to the circumstances at issue here. Finally, we believe that assuring both the reality and the appearance of independence in the auditor's test work calls for retention by the commissions, who should be considered the clients for whom the test work is performed.

The audit planning and auditor retention work should provide for Qwest and CLEC input to the commissions, in order to promote their confidence in the work to be performed and the resources performing it. In some cases, however, the audit plan might require confidentiality for certain test activities where advance notice could compromise their efficacy.

Another role of the auditor should be to assess the need for individual audits proposed by CLECs. Those audits should be available for CLEC-specific concerns or issues not

otherwise addressed by the plan for the current cycle. Qwest's testimony recognized the need to avoid unnecessary duplication, but its method of minimizing it was arbitrary. The independent auditor should review CLEC requests for audits, with dispute resolution available to any party questioning the auditor's recommendation. Absent dispute, the auditor would carry out any CLEC-requested audits whose need the auditor accepted; the parties could ultimately accept or challenge results or the determination of need for the audit through available dispute resolution methods. The auditor's tasks should include determining:

- General applicability of findings and conclusions (i.e., relevance to CLECs or jurisdictions other than the ones causing test initiation)
- Magnitude of any payment adjustments required
- Cost responsibility for the tests performed, with the test being the materiality and clarity of any Qwest non-conformance with measurement requirements (no pre-determined variance is appropriate, but should be based on the auditor's professional judgment).

The states can address their individual needs during the planning process, and they can, should they choose, commission additional testing in the event that a commonly derived plan fails to meet their needs. It is not anticipated that such a unilateral approach will be often requested or required.

Payment of audit program costs constitutes a sound use of Tier 2 payments. Qwest should fund in advance the costs of the first two-year cycle, with amounts to be refunded from Tier 2 payments as they accumulate. In the event that this Tier 2 funding should prove insufficient to meet the requirements of the program, half of any uncompensated amount advanced by Qwest should be returned from the ensuing two-year cycle's Tier 1 escalated payments, to be shared by CLECs according to their pro rata share of Tier 1 escalated payments from that prior cycle. Qwest will absorb any leftover amounts not capable of recompense out of Tier 2 and escalated Tier 1 payments as described above.

B. PUC Access to CLEC Raw Data

QPAP Section 14.2 authorizes Qwest, upon Commission request, to provide CLEC raw data to that commission. Qwest said it would be inefficient for commissions to follow the CLEC approach, which would be to ask the CLECs directly for the information. Qwest would agree to provide it to the commissions as confidential, subject to whatever decisions the commission later made with respect to continuing confidential treatment.[241] AT&T asked that Section 14.2 be stricken from the QPAP, because there is not provision for maintaining confidentiality.[242]

Discussion: Public service commissions have legitimate needs for the data at issue. There is no sound reason for requiring them to undertake the potentially significant burdens of seeking it from individual CLECs. Each state has existing procedures for the treatment of confidential information. Moreover, each state should retain existing

[241] Qwest Initial PAP Brief at page 78.
[242] AT&T Initial PAP Brief at page 28.

authority to determine what kinds of information ultimately will remain confidential. We have already addressed a similar issue regarding the provision of confidential CLEC data to public service commissions in connection with the thirteenth unresolved *General Terms and Conditions* issue (*Access of Qwest Personnel to Forecast Data*) in the *General Terms and Conditions, Section 272 & Track A Report* issued on September 21, 2001 in these workshops. There, we recommended language for SGAT Section 5.16.9.1.1. Similar language should be inserted into the QPAP, specifically:

> *Pursuant to the terms of an order of the Commission, Qwest may provide CLEC-specific data that relates to the QPAP, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures and further provided that Qwest provides such notice as the Commission directs to the CLEC involved, in order to allow it to prosecute such procedures to their completion.*

C. Providing CLECs Their Raw Data

AT&T recommended a deadline of two weeks from a CLEC's request for Qwest to provide a CLEC with its specific data relevant for QPAP measurement and payment purposes.[243] AT&T said that the lack of an explicit deadline could leave Qwest free to provide the data well after CLECs need it.[244] Qwest objected to AT&T's request that it be obliged to provide the data to CLECs on a firm (as opposed to a mutually agreed to) schedule. Qwest said that such a request would fail to respond adequately to the factors (e.g., timing or volume of data requested) that could materially affect the time in which it could reasonably be provided.[245]

Covad said that it requires the computer code and process information underlying CLEC data in order to reconcile its performance measurements with those of Qwest.[246]

Qwest opposed AT&T and Covad proposals involving Qwest's website for posting CLEC-specific results and data, arguing that its proposal should be considered purely voluntary because no other BOC has been obliged to offer such a capability.[247]

WorldCom asked that Qwest be required to maintain electronic access to underlying records for three years, and to keep records in an archived state for an additional three years.[248]

Discussion: Qwest should be obligated to provide the data as soon as it feasibly can. More specific deadline language would not respond to the need for flexibility given the size or nature of the requests that Qwest may face. Nothing in the QPAP limits those requests sufficiently to justify firm response deadlines.

[243] AT&T Initial PAP Brief at page 29.
[244] AT&T Reply PAP Brief at page 21.
[245] Qwest Initial PAP Brief at page 63.
[246] Covad Reply PAP Brief at page 14.
[247] Qwest Initial PAP Brief at page 60.
[248] WorldCom Initial PAP Brief at page 14.

The QPAP should provide retention periods for underlying records. The three years recommended by WorldCom appears at first blush to be a very long period, considering the kinds of information and the potentially vast amounts of it. However, we must recognize that the auditing and testing work to be made a part of the QPAP may uncover not only needs for future changes, but may lay a basis for CLEC requests for recalculation of prior payments. The QPAP should allow payments to be recalculated retroactively for three years (from the later of the provision of a monthly credit statement or payment due date) and it should require Qwest to retain sufficient records to demonstrate fully the basis for its calculations for long enough to meet this potential recalculation obligation. CLEC verification or recalculation efforts should be made reasonably contemporaneously with Qwest measurements. Thus, it is sufficient to require Qwest to maintain the records in a readily useable form for one year; it is sufficient if the remainder of the required records is retained in archived format.

While the use of a web site may prove useful, there is no evidence to support a conclusion that it is the only acceptable way, or that it would even provide significant advantages over other methods. Covad's request for computer code and process information is overly broad. The QPAP, however, should include a provision providing that Qwest's distribution of CLEC-specific data must be in a form that will allow CLECs to be able to identify its nature and content, and will be in a form that will allow CLECs to undertake the same kinds of calculations performed by Qwest.

D. Late Reports

WorldCom proposed the following payment schedule for late, incomplete, and incorrect reports:

- $5,000 per day for late reports
- $1,000 per day for incomplete reports
- $1,000 per day for reports later revised by Qwest
- $1,000 per day for reports for which a CLEC cannot gain access to its data underlying the reports due to reasons within Qwest's control.

WorldCom said that its proposal would not unduly penalize Qwest, which already has under the QPAP a five-day grace period and an opportunity to escape penalties when it can show that the cause of the delay was outside its control. WorldCom also noted that the Texas commission set a $5,000 per day payment for Texas alone, even though SBC also served in other states that could apply additional penalties.[249]

Z-Tel proposed a $100/day payment for each report that is late, rather than the QPAP's flat $500/day no matter how many are late.[250] Covad argued that not only late reports, but also inaccurate ones should require payments.[251] AT&T ultimately proposed the adoption of the Texas approach, which would include the higher payments noted above, and would also eliminate the grace period provided for in the QPAP. AT&T also said

[249] WorldCom Reply PAP Brief at page 3.
[250] Z-Tel Initial PAP Brief at page 34.
[251] Covad Initial PAP Brief at page 45.

that CLECs are damaged by late reports, which include data that CLECs need to make timely assessments of service that they are being provided.[252]

Qwest defended the QPAP Section 14.3 per-day late report payment of $500 as providing sufficient incentive to report on time, after considering the number of states for which payments would be required and the relationship between payment amounts and the number of days that reports are late. Qwest cited as an example the $70,000 total payment that would apply across the 14 states for a report filed 10 days after the end of the QPAP's grace period.[253] Qwest noted that the CLEC proposal to apply the penalty to each report (counting unique CLEC and state reports) could produce a $4.2 million payment for the same 10-day example that would cost Qwest $70,000 under Section 14.3 as now written.[254]

Qwest said that WorldCom was in error in asserting that the Texas plan included the provision of data access payments. Qwest also said that the $5,000 per day payment would yield a $700,000 (10 times the QPAP amount) for a single monthly set of reports that were filed 10 days after the end of the grace period.[255] Qwest also said that the CLEC proposals provided compensation well out of proportion with the harm to them, because QPAP payments were due independently of a report's filing, and CLECs could still get access to their underlying data and request audits, regardless of whether reports arrived on time.

Discussion: There is no support in the Texas plan for the imposition of liquidated payments for reports that are inaccurate or for failures to provide underlying CLEC data. The Texas plan requires payments for reports that are late or incomplete. For each missing measure, the Texas plan would impose a penalty of one-fifth the amount for failure to file any report at all. Reports with omissions have diminished value. The one-fifth factor of the Texas report, subject to a cap equal to the daily amount for failure to file any report should be incorporated into the QPAP in order to give adequate strength to the late-report provision.

Requiring payments for inaccurate reports is troublesome. The QPAP consists of a vast number of measures; it is not realistic to expect that no report would ever contain a measure that will later require restatement. CLEC proposals provide no guidance in determining what is an adequate level of accuracy; i.e., the level at which no payment would be required and the payment scale that would properly correlate to the severity of any inaccuracy.

Moreover, the QPAP should encourage correction where warranted, not discourage it by imposing potentially severe penalties. The better way to deal with the accuracy of reports is to include the issue of report accuracy into the risk analysis that will be used to formulate audit plans.

Similarly, liquidated payments for an inability to meet deadlines for providing a CLEC with its specific data are not warranted. The auditing program should consider CLEC-specific and CLEC-aggregate data in its planning. If there is a persistent failure to

[252] AT&T Reply PAP Brief at page 16.
[253] Qwest Initial PAP Brief at page 37.
[254] Qwest Initial PAP Brief at page 38.
[255] Qwest Initial PAP Brief at page 38.

provide CLEC-specific data, there will be reason to address its causes in audits, given that such a failure is all but certain to raise questions about the accuracy of the measurements that Qwest makes.

We come now to the question of payment levels. Z-Tel proposes a remedy that would produce penalties that are unreasonable on their face. The Texas payment approach bears a much closer relationship to what is reasonable. However, we do need to be mindful of the fact that Qwest, unlike SBC (which included both the old Southwestern Bell and Ameritech states) is approaching its 271-authorization process on a region-wide basis. The Texas Commission and the FCC may not yet have considered the effect of accumulating payments from the same reporting process (assuming, of course, that there will be one or a few PAP reporting processes used by SBC). However, that does not mean that they will not be considered when the number of SBC states where 271 approvals have been granted grows.

Therefore, we consider it reasonable to examine payments in the context of the way that Qwest will make reports, which is on a 14-state consolidated basis. Assuming all 14 states, the payment levels that Qwest proposes are substantial, but there is a question about whether an inducement of that magnitude will be sufficient. The $70,000 payment that Qwest showed as an example is not much money when compared with the amount of time and effort that will be necessary to produce QPAP monthly reports. Payments at that level are sufficient to deal with small delays, but should escalate over time. Recognizing that the QPAP already includes a grace period of one week, the payments should escalate as follows:

- Second-week reports: $500/day
- Third-week reports: $1,000/day
- Subsequent-week reports: $2,000/day.

Qwest remains protected against undue growth in payments by virtue of its ability to seek a waiver of late-report payments.

IX. Other Issues

A. Prohibiting QPAP Payment Recovery in Rates

AT&T argued that there should be specific language precluding QPAP recovery in rates. AT&T recommended its language, because Qwest has proposed none.[256] Qwest said that language is not necessary, because the FCC has already made it clear in prior 271 orders that PAP payments may not be recovered in interstate rates, noting that the New York Commission made a similar determination at the state level.[257] Qwest also noted that the requirement that wholesale rates be set according to prescribed FCC pricing methods also precludes the inclusion of QPAP payments in SGAT or interconnection agreement prices.[258]

[256] AT&T Initial PAP Brief at page29; WorldCom Initial PAP Brief at page 4.
[257] Qwest Initial PAP Brief at page 72.
[258] Qwest Reply PAP Brief at page 47.

Discussion: We believe that neither the FCC nor the state commissions require guidance as how or when to determine what to do about QPAP payment recovery in rates.

B. No-Admissions Clause

ELI/Time Warner/XO Utah and Covad argued that measurements under the PID and payments based on them should be admissible as evidence in other proceedings; they would delete QPAP Section 13.4.1.[250]

Discussion: The objective information set forth in the performance reports is indeed strong evidence of the characteristics of Qwest's performance. The use of that information to show what Qwest's performance actually was should not be constrained. The QPAP does not do so. The Section 13.4.1 restrictions apply only to the existence of the QPAP and to the making of payments thereunder. Given the multiple purposes of the QPAP and given the availability of the underlying performance data for use as evidence, the narrowly drawn provision constitutes a reasonable approach.

C. Qwest's Responses to FCC-Initiated Changes

Qwest cited three proposed QPAP changes that Qwest said came from informal FCC input, and that Qwest noted were not objected to or commented upon at the hearings on the QPAP.[251]

- Eliminating two families of OP-3 sub-measurements, so that no missed order would go uncompensated (accomplishable by striking footnote "c" to QPAP Attachment 1)
- Removing the adjustment for Commission rate orders, which adjustments had the effect of reducing the total amount at risk under the QPAP
- Making two changes in the statistical values used to test Tier 2 parity measurements.

Discussion: There were no objections to these changes by any participant. They should be incorporated into the QPAP.

D. Specification of State Commission Powers

Section 12.3 provides that a state commission may recommend to the FCC that Qwest be prohibited from offering in-region interLATA services to new customers in the event that the annual cap is reached.

Discussion: Apart from the QPAP, commissions may recommend such relief for reasonable reasons other than the fact that Qwest reaches the cap. They may also recommend other relief when Qwest reaches the cap. It is self evident that this section is utterly valueless in providing commissions with any power that they do not already possess. Therefore, it could only be read as an indication that commissions approving the plan have agreed in advance that they would self limit their authority to respond to future

[250] ELI/Time Warner/XO Utah Initial PAP Brief at page23; Covad Initial PAP Brief at page 44.
[251] Qwest Initial PAP Brief at page 40

circumstances. That not being the case, the provision should be stricken, in order not to cloud the legitimacy of or weight to be given to any future commission action other than the ones recited in the QPAP.