

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of the Investigation Into)	
)	
U S WEST COMMUNICATIONS, INC.'s)	DOCKET NO. UT-003022
)	
Compliance With Section 271 of the)	
Telecommunications Act of 1996)	
.....)	DOCKET NO. UT-003040
)	
In the Matter of)	THIRTEENTH
)	SUPPLEMENTAL ORDER
U S WEST COMMUNICATIONS, INC.'s)	INITIAL ORDER
)	(WORKSHOP THREE):
Statement of Generally Available Terms)	
Pursuant to Section 252(f) of the)	CHECKLIST ITEM NO. 2, 5,
Telecommunications Act of 1996)	and 6
.....)	

SYNOPSIS

1 This Order proposes resolution of issues raised in Workshop III relating to Qwest's expected application for approval under Section 271 of the Telecommunications Act of 1996 for authority to provide regional telecommunications services. This Initial Order proposes to find Qwest not in compliance with Checklist Item Nos. 2, 5, and 6.

BACKGROUND AND PROCEDURAL HISTORY

2 This is a consolidated proceeding to consider the compliance of Qwest Communications, Inc. (Qwest), formerly known as U S WEST Communications, Inc. (U S WEST),¹ with the requirements of Section 271 of the Telecommunications Act of 1996 (the Act),² and review and approval of Qwest's Statement of Generally Available Terms (SGAT) under Section 252(f)(2) of the Act. The general procedural history is included in the Eleventh Supplemental Order, entered March 30, 2001, and will not be repeated here.

3 The Commission held its third workshop in this proceeding in Olympia, Washington on March 12-15, 2001, addressing the issues of Checklist Items Nos. 2, 5, and 6, and provisions of Qwest's proposed SGAT addressing these issues. The Commission

¹ After this proceeding began, U S WEST merged and has become known as Qwest Communications, Inc. For consistency and ease of reference we will use the new name Qwest in this Order.

² Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

held a follow-up workshop on April 24 and 25, 2001, in Seattle, Washington to address unresolved issues from the March workshop session.

4 The parties filed briefs with the Commission on May 16, 2001, addressing their disputes. This Initial Order proposes resolution of the issues raised by the parties at the Workshop and in the briefs.

PARTIES AND REPRESENTATIVES

5 The following parties and their representatives participated in the Third Workshop: Qwest, by Lisa Anderl, attorney, Seattle, Washington, and John Munn and Andrew Crain, attorneys, Denver, Colorado; AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle (collectively AT&T), by Richard Wolters and Dominick Sekich, attorneys, Denver; WorldCom, Inc. (WorldCom) by Ann Hopfenbeck attorney, Denver; Electric Lightwave Inc. (ELI), Advanced TelCom Group, Inc. (ATG), and XO Washington, Inc. (XO) by Gregory J. Kopta, attorney, Seattle; Covad Communications Company (COVAD) by Brooks E. Harlow, attorney, Seattle; McLeod USA Telecommunications Services, Inc. (McLeod), by Marianne Holifield, attorney, Seattle; Sprint Corporation, by Barbara Young, Hood River, Oregon; and Public Counsel by Robert Cromwell, Assistant Attorney General, Seattle.

PROCESS

6 This docket has been conducted through the mechanism of workshops, in which affected participants engage on the record in the presentation of information and issues. Cross examination is conducted, and there ensues a relatively informal recorded discussion – often consisting of negotiations – during which the parties attempt to resolve the issues.

7 Many times the parties are successful at those negotiations. As to those, this Order merely acknowledges the agreements, which are generally memorialized in a newly-filed SGAT or Statement of Generally Available Terms. Any instances in which the parties' agreements are insufficient for Commission acceptance will be identified and the parties allowed to respond.

8 Items on which disagreement, or “impasse,” remains following the workshops are described and resolved in this Order. Areas in which Qwest's performance or its provisions are insufficient to merit Commission approval are identified. This Order is an initial order and is subject to review and adoption, modification, or rejection by the Commission in a process adopted prior to the outset of this proceeding. While it is drafted in language that reflects a Commission decision, it is a proposal for Commission decision only, consistent with RCW 34.05.461(1)(c), RCW 80.01.060,

and WAC 480-09-780. Further information to parties is set out at the conclusion of this Order.

DISCUSSION:

CHECKLIST ITEM NO. 2 – UNBUNDLED NETWORK ELEMENTS

FCC and Washington State Requirements

- 9 In order to comply with the requirements of Checklist Item 2, a Bell Operating Company (BOC) such as Qwest must show that it is offering “nondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3).”³ Section 251(c)(3) requires an incumbent LEC to “provide, to any requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.”⁴ Section 251(c)(3) of the Act also requires incumbent LECs to offer unbundled network elements to requesting carriers in a manner that allows them to combine them to provide a telecommunications service.⁵
- 10 In its *Local Competition First Report and Order*,⁶ the FCC applied its interpretation of the “necessary” and “impair” standards of section 251(d)(2) to the unbundling requirements of section 251(c)(3). Specifically, the FCC defined “necessary” to mean “an element [that] is a prerequisite for competition,”⁷ and it defined “impair” to mean, “to make or cause to become worse; diminish in value.”⁸ The FCC also determined that a requesting carrier’s ability to offer service is “impaired” or “diminished in value” if “the quality of the service the entrant can offer, absent access to the requested element, declines” or if “the cost of providing the service rises.”⁹ The FCC adopted rule 51.319, which sets forth the network elements that incumbent LECs were required to make available to requesting carriers on an unbundled basis.¹⁰ Section 51.319 of the FCC’s rules required incumbent LECs to offer unbundled access to the following network elements: (1) local loops; (2) network interface devices; (3) local switching; (4) interoffice transmission facilities; (5) signaling

³ 47 U.S.C. § 271(c)(1)(B)(ii).

⁴ 47 U.S.C. § 251(c)(3).

⁵ *Id.*

⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) (*Local Competition First Report and Order*), aff’d in part and vacated in part sub nom, *Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997)

⁷ *Local Competition First Report and Order*, 11 FCC Rcd at 15641-42, para. 282.

⁸ *Id.* at para. 285 (quoting Random House College Dictionary 665 (rev. ed. 1984)).

⁹ *Local Competition First Report and Order*, 11 FCC Rcd at 15643, para. 285.

¹⁰ *Id.* at 15683, para. 366.

networks and call-related databases; (6) operations support systems; and (7) operator services and directory assistance.¹¹ Section 51.317 of the FCC's rules allowed states to impose additional unbundling requirements pursuant to the Commission's interpretation of section 251(d)(2).¹²

- 11 Following adoption of the *Local Competition First Report and Order*, incumbent LECs and state commissions filed various challenges to the FCC's rules; these appeals were consolidated in the Eighth Circuit. Among the rules initially vacated by the Eighth Circuit Court of Appeals was the UNE combination rule, 47 C.F.R. Section 51.315(c)-(f). Later, the court also vacated 47 C.F.R. Section 51.315(b).¹³ Rule 315(b) prohibits an ILEC from separating requested network elements that the incumbent currently combines. Rule 315(c)-(f) requires an ILEC to perform the functions necessary to combine other elements upon request. The Eighth Circuit invalidated Rule 315(b) using the same rationale it employed to invalidate Rule 315(c)-(f). The United State Supreme Court granted *writs of certiorari* for review of the Eighth Circuit Court decision. The Eighth Circuit's decision with regard to Rule 315(c)-(f) was not before the Supreme Court, however.
- 12 The Supreme Court rejected arguments by ILECs that the Act requires CLECs to combine network elements for themselves and reversed the Eighth Circuit's decision that Rule 315(b) violates the Act.¹⁴ Although the Eighth Circuit Court presently is considering the validity of Rule 315(c)-(f), the U. S. Court of Appeals for the Ninth Circuit recently considered the Supreme Court's decision regarding UNE combinations in two separate decisions (the MFS and MCI cases).¹⁵
- 13 In the MFS case, Qwest appealed the decision of this Commission approving Qwest's Agreement with MFS and the decision of the federal district court granting summary judgment on all issues to the Commission and MFS, including the Commission's determination that Qwest has obligation to combine UNEs for interconnecting carriers. The Ninth Circuit Court relied on the Act and the Supreme Court's interpretation of the Act, and affirmed the provision in the MFS Agreement that broadly requires Qwest to combine elements at the request of MFS.¹⁶ Most recently,

¹¹ 47 C.F.R. § 51.319. *Local Competition First Report and Order*, 11 FCC Rcd at 15641-42, paras. 281-83.

¹² 47 C.F.R. § 51.317.

¹³ *Iowa Util. Bd. v. Federal Communications Comm'n*, 120 F.3d 753, 813 (8th Cir. 1997)

¹⁴ *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S. Ct. 721, 736-738, 142 L. Ed. 834 (1999) (*AT&T Corp.*).

¹⁵ *U S WEST Communications v. MFS Intelenet, Inc., et al.*, 193 F.3d 1112 (9th Cir. 1999) (MFS case) and *MCI Telecommunications Corporation, et al., v. U S WEST Communications, et al.*, 2000 U S App. LEXIS 3139 (March 2, 2000) (MCImetro case), respectively.

¹⁶ *Id.* at 1121.

Qwest's petition for *writ of certiorari* in the MFS case was denied by the United States Supreme Court.¹⁷

14 In the MCI case, the Ninth Circuit Court again held that the Supreme Court's interpretation of the Act makes "absolutely clear" that a state requirement that Qwest combine network elements consistent with Rule 315(c)-(f) does not violate the Act.

15 In a recent arbitration proceeding between Qwest and American Telephone Technology, Inc. (ATTI), the Commission discussed the Ninth Circuit Court's MFS decision and ordered Qwest to perform the functions necessary to combine requested UNEs in any technically feasible manner either with other UNEs from Qwest's network, or in combination with network elements possessed by ATTI.¹⁸

16 The Ninth Circuit Court held in the MFS decision that under the Supreme Court's rationale in *AT&T Corp.*, it must affirm a requirement that Qwest combine unbundled network elements at MFS's request. In *AT&T Corp.*, the Supreme Court held that the statutory language requiring ILECs to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service" indicates that network elements may be leased in discrete parts, but "does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form."¹⁹ The Ninth Circuit Court held in the MFS decision that it necessarily follows from *AT&T Corp.* that requiring Qwest to combine unbundled network elements is not inconsistent with the Act.²⁰

17 The Ninth Circuit Court also stated,

Although the Supreme Court did not directly review the Eighth Circuit's invalidation of 47 C.F.R. Section 51.315(c)-(f), the court's interpretation of 47 U.S.C. Section 251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. We must follow the Supreme Court's reading of the Act despite the Eighth Circuit's prior invalidation of the nearly identical FCC regulation.²¹

¹⁷ *U S WEST Communications v. MFS Intelenet, Inc., et al.*, 530 U.S. 1284, 120 S. Ct. 2741, 147 L. Ed. 2d 1005 (2000)

¹⁸ *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between American Telephone Technology, Inc., and U S WEST Communications, Inc.*, Commission Order Adopting Arbitrator's Report, In Part; Modifying Report, In Part; and Approving Negotiated and Arbitrated Interconnection Agreement, Docket No. UT-990385 (February 2, 2000) (ATTI case).

¹⁹ *AT&T Corp.*, 119 S. Ct. at 737.

²⁰ *U S WEST v. MFS* at 1121.

²¹ *Id.*

18 Likewise, the Commission's Order in the ATTI case acknowledges that we must follow the Ninth Circuit Court's decision. Qwest's petition for writ of certiorari to review the decision in the MFS case has been denied, and the Ninth Circuit Court's MFS decision is final and binding.

19 After the Commission entered its Order in the ATTI case, the Ninth Circuit decided *MCI v. U S WEST*.²² In that case, the Commission approved an interconnection agreement that also required Qwest to combine separate network elements at MCIMetro's request. The Ninth Circuit Court noted that the Eighth Circuit's decision to vacate FCC Rule 315(c)-(f) still stands but, in light of the Supreme Court's *AT&T Corp.* decision, the Eighth Circuit's decision merely signifies that the Act does not currently mandate a provision requiring combination. The Ninth Circuit Court held that the Supreme Court's interpretation of the Act makes "absolutely clear" that a provision requiring UNE combinations is not inconsistent with the Act.

Washington State Evidentiary Requirements

20 The Commission has identified several general requirements and specific evidentiary requirements Qwest must meet to demonstrate its compliance with Checklist Item No. 2. *Supplemental Interpretive and Policy Statement, Appendix A*. The specific evidentiary requirements that Qwest must meet to establish compliance with Checklist Item No. 2 are:

- 21 (1) How is Qwest providing nondiscriminatory access to unbundled network elements at just and reasonable rates and in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of the Act?
- 22 (2) List each CLEC to which Qwest is selling network elements, the network elements provided, the volume of each network element provided, and the date the element was first provided.
- 23 (3) At current network capacity, what additional volume of each network element can Qwest provide to CLECs?
- 24 (4) Are there any network elements required by this Commission or the FCC that Qwest does not plan to offer? Please list them and explain why US West does not plan to offer them.
- 25 (5) For each element Qwest does not plan to unbundle, has Qwest demonstrated technical infeasibility and offered any alternative? For each such element,

²² *MCI Telecommunications Corporation v. U S WEST Communications, et al.*, 204 F.3d 1262 (9th Cir. 2000), cert. denied, *Qwest Corporation v. MCI WORLDCOM Network Servs.*, 531 U.S. 1001, 121 S. Ct. 504, 148 L. Ed. 2d 473 (2000).

please describe why they are technically infeasible and what alternatives have been offered.

- 26 (6) What methods can entrants use for physical access to UNEs?
- 27 (7) Is Qwest providing access to UNEs in a manner that allows requesting carriers to combine them? Describe the methods for these UNE combinations. Additionally, list all restrictions Qwest imposes on CLEC requests for combinations of UNEs. List the length of time needed for new entrants to obtain and combine network elements, e.g. time required to build collocation cages; loop cutover times, etc.
- 28 (8) Are there any UNE elements that Qwest will offer only in combination (unseparated)? If so, what are they, and why?
- 29 (9) Does Qwest intend to take the position that CLECs must obtain separate licenses from vendors when obtaining and using unbundled network elements from Qwest?

30 In compliance with the Supplemental Interpretive and Policy Statement, Qwest filed Exhibit 571 purporting to document Qwest's compliance with the general and specific evidentiary requirements for Checklist Item No. 2. AT&T filed responses to Appendix B questions for these checklist items in Exhibit 617.

Impasse Issues

31 During the workshops, Commission Staff prepared an issues log to document areas in which the parties agreed and those in which they were at impasse. The reference numbers following each issue below correspond to the number assigned to the issue in the issues log. For example, WA-TR-2 refers to Washington transport issue number 2.

32 At the end of the workshop and briefing process, the majority of issues were agreed. As to those issues, the Commission should find that, subject to the Commission's review of Qwest's performance and the OSS testing conducted by the ROC²³ Qwest is in compliance with the requirements of Section 271.

33 At the conclusion of the process, however, the parties remained at impasse with regard to the issues discussed below. This order proposes a resolution for each of the

²³ ROC stands for the Regional Oversight Committee, composed of representatives of the regulatory commissions in states in which Qwest provides local exchange service. The OSS tests are tests sponsored by the ROC on behalf of the states to verify operation of Qwest's OSS systems and the ability of interconnecting carriers to receive the service they need.

impasse issues, and finds as to each item whether the Qwest SGAT proposal complies with the Section 271 requirement, so as to earn a positive Commission recommendation to the FCC,²⁴ or fails to comply.

Checklist Item 2, Unbundled Network Elements

Premarket Testing – Issue WA-CL2-1

34 During the April workshops, Qwest and AT&T proposed separate SGAT sections on testing procedures at Exhibits 709 and 656, respectively. AT&T subsequently amended Exhibit 656 to include an additional section from Qwest’s proposed SGAT language. Both proposals include Connectivity Testing, Stand-Alone Testing, Interoperability Testing, and Controlled Production Testing. *Ex. 656, 709.* AT&T proposed an additional type of testing called Comprehensive Production Testing, which would allow the CLECs to conduct pre-market testing using test accounts rather than actual customer accounts and would allow testing on a larger scale. *Tr. 3567.*

AT&T’s Position

35 In responsive testimony, AT&T witness Michael Hydock discusses Qwest’s lack of documented testing procedures and AT&T’s difficulty in establishing testing processes in Minnesota. *Ex. 651T, at 3-5 and 6-10.* AT&T argues that testing of CLEC to ILEC interfaces is essential to ensure that CLECs can compete effectively. *Id. at 4.* AT&T asserts that it needs to perform testing at commercial volumes to determine that the interfaces will work in a real world environment. *Id.*

Qwest’s Position

36 In rebuttal testimony, Qwest witness Karen Stewart argues that the testing procedures it proposes provide adequate testing opportunities for CLECs. *Ex. 572T at 10.* Qwest states that the issue of the size of the test bed (number of lines tested) is being addressed through Qwest’s Co-Provider Industry Change Management Process (CICMP) process, which includes input from CLECs. *Id.* Qwest asserts that, because Qwest’s testing procedures are being reviewed through the ROC OSS testing of Qwest’s CICMP, this issue should not be discussed further. *Id. at 10-11.*

37 Qwest objects to the scope of AT&T’s Controlled Production Testing proposal, and asserts that it is duplicative of the OSS testing being performed by the ROC. Qwest states that it is willing to negotiate a comprehensive production test procedure under certain conditions. *Qwest Brief at 5; Tr. 3568.* Both WorldCom and AT&T dispute

²⁴ To earn a positive recommendation, Qwest must not only **offer** services in compliance with Section 271, it must **provide** those services in compliance.

Qwest's commitment to negotiate, citing difficulties in negotiating terms and conditions outside of the SGAT, and delays in negotiating testing procedures in another state. *Tr.* 3568-3570.

Discussion and Decision

38 The questions here are: (a) whether the testing provision proposed by Qwest is adequate, (b) whether AT&T's alternative language should be added to the SGAT; and (c) whether consideration of this issue should be deferred to the forum addressing the ROC OSS tests.

39 First, adequate testing is essential to providing CLECs a meaningful opportunity to compete. CLECs must be able to establish that their systems will interface properly with Qwest's in providing services to customers, before they enter the market. Second, the SGAT should include testing provisions. Qwest is including its proposed testing language as a topic for discussion in its testimony on CICMP, scheduled for Workshop 4.²⁵ The parties also acknowledge that some of Qwest's testing procedures will be examined during the ROC OSS testing. We believe it would be appropriate to consider the results of that testing, and evidence regarding the CICMP in Workshop 4, before deciding this issue. Parties at that workshop should be prepared to discuss in detail the scope of testing, including how the scope(s) proposed in this proceeding compare with those provided by RBOCs in other states that have received Section 271 approval.

Qwest Adherence to Wholesale and Retail Quality Standards – Issue WA-CL2-5b

40 Section 9.1.2 of Qwest's SGAT addresses nondiscriminatory access to unbundled network elements. Qwest states that it will provide access to elements in "substantially the same time and manner" as that which Qwest provides such access to itself or its affiliates. At the end of the section Qwest says "Qwest shall comply with all state wholesale service quality requirements." Issue CL 2-5(b) deals with whether the term should also include compliance with state retail service quality standards.

AT&T's Position

41 AT&T argues that Qwest should be required to comply with both wholesale and retail service quality standards. *AT&T Brief at 5*. AT&T states that in the *Local Competition Order* at 312, the FCC "note[d] that providing access or elements of lesser quality than that enjoyed by the incumbent LEC would also constitute an 'unjust' or 'unreasonable' condition." *AT&T Brief at 5 and 6*. According to AT&T, the FCC argued that section 251(c)(3) of the Act requires incumbent LECs to

²⁵ See, Direct Testimony of James H. Allen, filed May 16, 2001.

“provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete.” *Id. at 6*. Therefore, AT&T claims that its request to add retail service quality standards is supported by FCC rules²⁶ and orders. *Id.*

Covad’s Position

42 Covad concurs with AT&T. *Covad Brief at 11*.

Qwest’s Position

43 Qwest argues that it has revised section 9.1.2 of the SGAT to address AT&T’s concerns. However, Qwest maintains that retail service quality needs to be treated separately from the 271 process. *Qwest Brief at 7*. Qwest claims that there is no way to compare the performance of UNEs purchased by CLECs’ with the performance of retail services Qwest provides to its customers. *Id. at 8*.

44 Qwest argues that both Qwest and the CLECs recognized there were no “retail analog[s] for most UNEs” and that “many UNEs were given benchmarks” for the ROC OSS Test performance requirements. Qwest believes that because of this distinction for UNEs, the performance measures set in the ROC process are more appropriate than retail service quality rules for assessing CLECs access to UNEs. *Id.*

Discussion and Decision

45 The ROC OSS Test collaborative process did provide a number of measurements as benchmarks, as Qwest pointed out in its brief. However, other measurements were kept at the retail analog. In essence, there are both wholesale and retail service quality standards that must be followed. By saying that “Qwest shall comply with all state wholesale service quality standards,” Qwest completely omits any requirement to follow retail service quality standards. In the absence of such requirements, Qwest could with impunity provide elements that would prevent an interconnecting carrier from meeting applicable standards in its retail service. That is unacceptable. Qwest must make every effort to comply with both wholesale and retail service quality standards.

46 Qwest must modify the last sentence in section 9.1.2 of the SGAT so that it reads, “In addition, Qwest shall comply with all state wholesale *and retail* service quality standards.”

²⁶ 47 C. F. R. § 51.311 (a) and (b).

Restrictions on UNE Use; Connecting UNEs to “finished services” – Issues WA-CL2-6, WA-UNEC-4)

47 The proposed SGAT at section 9.23.1.2.2 states that UNE combinations will not be directly connected to a Qwest finished service, whether provided from a tariff or otherwise, without going through a collocation, unless otherwise agreed to by the parties. Notwithstanding the foregoing, a CLEC can connect its UNE combination to Qwest’s directory assistance and operator services platforms. “Finished Services” as defined by agreement amongst the parties include voice messaging, Qwest-provided DSL, Access Services, private lines, retail services and resold services.²⁷ CLECs challenge this as inappropriate.

AT&T’s Position

48 AT&T argues that no such general limitation exists in FCC orders or rules, and that the words “finished service” are not contained in the FCC orders or rules. *AT&T Brief at 12*. Section 251(c)(3) of the Telecom Act also allows interconnecting carriers access to UNEs at any technically feasible point²⁸ using any technically feasible method.²⁹ The FCC has held that “the use of the term ‘feasible’ implies that interconnecting or providing access to an ILEC network element may be feasible at a particular point even if such interconnection or access requires a novel use of, or some modification to, incumbent LEC equipment.”³⁰ *Id. at 13*.

49 AT&T asserts that Qwest has not provided any evidence that accessing UNEs by connecting the UNE to a finished service is not technically feasible. In fact, the SGAT acknowledges that connecting finished services to UNEs is technically feasible by requiring such connection to be done in a CLEC’s collocation,³¹ which adds unnecessary expense and denies CLECs a meaningful opportunity to compete. *Id.*

50 AT&T argues that Qwest’s restriction on connecting UNEs to finished services precludes a CLEC from aggregating traffic on the same trunk groups.³² It contends that this is inefficient and expensive, and that it allows Qwest to control market entry by the CLECs by delaying the provisioning of facilities or improperly restricting the availability of UNE capacity. Qwest’s restrictions simply make it more difficult for the CLECs to meaningfully compete with Qwest. *Id.*

²⁷ SGAT 4.23 (a) includes more than “tariffed special access services.”

²⁸ See also 47 C.F.R. § 51.307(a).

²⁹ *Id.*, § 51.321(a).

³⁰ *Local Competition Order*, para. 202.

³¹ SGAT § 9.23.1.2.2. See also SGAT § 9.6.2.1.

³² AT&T Ex. 630, TR 3589-3593 (April 25, 2001).

51 AT&T also points to Qwest's SGAT section 9.1.5 as allowing use of UNEs or combinations without restriction, except as required under existing rules. AT&T refers to Exhibit 715, which Qwest offered and later withdrew, as characterizing Qwest's interpretation of "existing rules," and asserts that Qwest's interpretation of SGAT section 9.1.5 must not allow restrictions unless specifically prohibited by the FCC. *AT&T Brief at 14.*

WorldCom's Position

52 WorldCom opposes the restriction against connecting UNE combinations to finished services, citing an FCC rule.³³ WorldCom also concurs in AT&T's arguments on brief. *WorldCom Brief at 5.*

Joint CLECs' Position

53 The Joint CLECs argue that the Commission should reject Qwest's proposal. Qwest's argument is wrong, they say, because it is based on the FCC's prohibition on "commingling" in the "significant local usage" certification requirements established for converting tariff services to EELs,³⁴ which remains in place pending further proceedings.³⁵ The FCC, however, uses the term "commingling" to refer to "combining loops or loop-transport combinations with tariffed special access services."³⁶ The FCC's stated concern in this context, like its "significant local usage" certification requirement in general, is to prevent "use of unbundled network elements by IXCs solely or primarily to bypass special access services." *Joint CLEC Brief at 10.*

Qwest's Position

54 Qwest relies for support of its position on the FCC's *Supplemental Clarification Order*, which contains the language at Paragraph 28, "whether unbundled network elements may be combined with tariffed services." Qwest contends that this implies that the commingling prohibition applies to all tariffed services. *Qwest Brief at 26.*

Discussion and Decision

55 The FCC prohibits commingling (*i.e.* combining loops or loop-transport combinations with tariffed special access services).³⁷ Qwest's proposed prohibition on connecting

³³ See, 47 C.F. R. § 51.309(a).

³⁴ An EEL is an Enhanced Extended Loop.

³⁵ In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 00-183, Supplemental Order Clarification at para 28 (June 2, 2000) (*"Supplemental Clarification Order"*).

³⁶ *Id.*

³⁷ *Id.*

UNEs to “finished services” does not comport with the FCC decision because the term “finished services” as defined at SGAT 4.23 (a) includes more than “tariffed special access services.”

56 Therefore, SGAT Section 9.23.1.2.2 must be amended to delete the prohibition against combining UNEs with “finished services.” In accordance with current FCC policy,³⁸ the only UNE combinations that are prohibited from combination with other services are loops or loop-transport combinations with tariffed special access services. Qwest may not prohibit connection of UNEs to “finished services” as currently defined at SGAT section 4.23.

Regeneration costs - Issues WA-CL2-11, WA-TR-6

57 In the terms and conditions for unbundled dedicated interoffice transport, SGAT section 9.6.2.1 states that to the extent that cross-connections are not ordered as part of a UNE combination, the CLEC is responsible for cross-connections, including any regeneration charges. Further, SGAT section 9.6.2.3 goes on to specify that when regeneration is required between either an Unbundled Dedicated Interoffice Transport (UDIT) or an Extended Unbundled Dedicated Interoffice Transport (EUDIT) termination point and the CLEC’s collocation, the CLEC must order regeneration according to the general terms for unbundled network elements, SGAT section 9.1.4. In addition, SGAT section 9.1.10 defines the channel regeneration charge, required when the distance from the Qwest network to the leased physical space, the collocated equipment, or the interconnection distribution frame is of sufficient length to require regeneration.

AT&T’s Position

58 AT&T claims that the SGAT should not require CLEC to order or provide regeneration. *Exhibit 616-T at 28*. This issue is similar to the regeneration issue in the collocation workshop (*See, Eleventh Supplemental Order; Initial Order Finding Noncompliance on Collocation Issues, pp. 21-23*). AT&T argues that the CLECs should not have to pay for regeneration costs within the Qwest wire center that result from the location of the CLEC collocation cage, which is generally determined by Qwest. *Tr. 3007*. Based on these decisions, regeneration may or may not be necessary, for all or some of the CLECs collocated in a central office. *AT&T Brief at 39*.

Covad’s Position

59 Covad cites the FCC’s *Second Report and Order* in CC Docket 93-162 as stating that regeneration should not be necessary, and that therefore Qwest should provide

³⁸ *Supplemental Clarification Order at para. 28*.

regeneration required in cross-connects between itself and CLECs, unless such an arrangement is specifically requested by the CLEC. Covad goes on to argue that, as this Commission has done before, it should require that the SGAT be amended to eliminate direct or indirect imposition of channel regeneration charges. *Covad Brief at 4.*

Qwest's Position

60 Qwest does not accept the proposition that it must provide regeneration at no extra charge. UDIT cost studies do not include regeneration. *Exhibit 572-T at 8.*

61 Qwest urges that costs can be recovered in two ways, both of which are acceptable to Qwest. The cost of regeneration can be averaged across UDITs, or the cost of regeneration can be applied in a situation-specific fashion. *Qwest Brief at 9.*

Discussion and Decision

62 Qwest is entitled to recover its costs indirectly.

63 The Commission agrees with Qwest that it is entitled to recover its costs. The Commission also agrees with the Joint Intervenors that this issue is similar to the regeneration issue in collocation. CLECs should not pay for regeneration costs within the Qwest wire center that are caused by location decisions made by Qwest.

64 The Commission will allow Qwest to include non-CLEC-requested regeneration costs in indirect costs that are spread equitably to all users of its facilities, including itself. The Commission particularly observes the FCC's findings that regeneration should seldom, if ever, be necessary. Recovery as an indirect cost should result in Qwest's being indifferent to which facilities (CLEC or Qwest) are subject to regeneration.

Qwest's Obligation to Build – Issues WA-CL 2-15, WA-UNE-C-11, and WA-EEL-5

65 Issues CL 2-15, UNE C-11, and EEL-5 address whether Qwest is obligated to construct for CLECs unbundled network elements other than unbundled loops and line ports that would normally be used for basic primary service. The SGAT language in question appears in sections 9.1.2.1 and 9.1.2.2. Qwest recognizes that it is "legally obligated" to build certain facilities but believes certain unbundling, i.e. dedicated transport, is restricted to only its "existing" network. Also at issue is how to define an "existing" network.

AT&T's Position

66 AT&T argues that Qwest is obligated to build network elements on a nondiscriminatory basis for CLECs. AT&T, quoting from the FCC's *Local Competition Order* at paragraph 315 states

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

67 AT&T asserts that the FCC's rules also require incumbent LECs to provision elements on terms and conditions that are no less favorable to the terms and conditions the ILEC provides those elements to itself. *AT&T Brief at 8*

68 AT&T points out that Qwest's claim that it is not obligated to build is based on the FCC's exemption at paragraph 324 of the FCC's *Local Competition Order*³⁹ that was directed at protecting rural carriers. *AT&T Brief at 8*. AT&T contends that the FCC extended its exemption by holding that ILECs in general need not build transport for CLECs, but that section 251(f) of the Act provides relief only to rural carriers from having to provide other network elements. AT&T's argument continues that although ILECs are given relief from interoffice facilities, the FCC did not grant them relief from building other network elements. *Id.*

69 AT&T notes that, at paragraph 268 of the FCC's *Local Competition Order*, the FCC requires ILECs to replace defective UNEs that are being provided to CLECs, and that this replacement criterion is essentially the same as an obligation to build UNEs. *AT&T Brief at 8; 47 C.F.R. Section 51.309(c)*. AT&T notes that Qwest has agreed to build network elements, if it has a legal obligation to do so, but will only provide DS0 loops (*Tr. 3217 [March 14, 2001]*). AT&T states that this offer does not go far enough and does not comply with the Act and FCC rules. AT&T recommends that Qwest strike the language "provided that facilities are available" from SGAT sections 9.23.1.4, 9.23.1.5, 9.23.1.6, and 9.23.3.7.2.12.8. *AT&T Brief at 12*.

³⁹ Rural Telephone Coalition contends that incumbent LECs should not be required to construct new facilities to accommodate new entrants. We have considered the economic impact of our rules in this section on small incumbent LECs. In this section, for example, we expressly limit the provision of unbundled interoffice facilities to existing incumbent LEC facilities. We also note that section 251(f) of the 1996 Act provides relief for certain small LECs from our regulations under Section 251. *Local Competition Order* at para. 324.

70 AT&T argues that the Commission should also require that Qwest make clear in its SGAT under section 9.1.2 that Qwest is “obligated to build UNEs, except dedicated transport, on a nondiscriminatory basis at cost-based rates under section 252(d). AT&T also contends that the first sentence in section 9.19 should be amended to read, “Qwest will conduct an assessment of any request which requires construction of network capacity, facilities, or space for access to or use of unbundled loops. *AT&T Brief at 12.*

WorldCom’s Position

71 WorldCom objects to the use of an “individual financial assessment” in paragraph 9.19 of the SGAT as does AT&T. WorldCom insists that Qwest should not be allowed to make a unilateral determination on the feasibility of a project for constructing access to UNEs without giving CLECs the opportunity to challenge Qwest’s decision. *WorldCom Brief at 6.*

Joint CLECs’ Position

72 The Joint CLECs maintain that the Telecommunications Act of 1996 requires Qwest to provide access to UNEs “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.” *47 U.S.C. 251(c)(3)*. The Joint CLECs point out that Qwest currently provides facilities for customers requesting service under the terms and conditions established in its tariffs, but that Qwest’s SGAT allows it to refuse to provide service to a CLEC if no facilities are available except under very narrow conditions. “Qwest concedes that it evaluates a CLEC’s request differently than Qwest evaluates an end-user customer’s request for construction of comparable facilities.” *Joint CLECs’ Brief at 2.*

73 The Joint CLECs also point to Qwest’s reliance on paragraph 451 of the FCC’s *Local Competition Order* which “expressly limit[s] the provision of unbundled interoffice facilities to *existing* incumbent LEC facilities.” *Joint CLECs’ Brief at 3.* The Joint CLECs note that Qwest’s remarks are taken out of context and that the Eighth Circuit opinion only applies when CLECs request *superior* service. *Id.* The Joint CLECs point out that the FCC Order addressed small and rural LECs and is restricted to interoffice facilities, and that the FCC has implicitly required incumbent LECs such as Qwest to construct new facilities unless specifically relieved of that obligation under the Act or FCC rules. *Id.*

74 The Joint CLECs also cite Washington law, which they contend is more demanding. Qwest is prohibited from “subject[ing] any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.” *RCW 80.36.170.* Qwest also “shall, upon reasonable notice, furnish to all persons and corporations who may apply therefore and be reasonably entitled thereto suitable and

proper facilities and connections for telephonic communication and furnish telephone service as demanded.” *RCW 80.36.090. Joint CLECs’ Brief at 3 and 4.*

75 The Joint CLECs recommend the Commission refuse to approve Qwest’s SGAT until the SGAT is revised “to require Qwest to construct facilities for CLECs in the same circumstances and under the same terms and conditions that Qwest constructs the same or comparable facilities for other customers.” *Joint CLECs’ Brief at 4.*

Qwest’s Position

76 Qwest argues that its SGAT language in sections 9.1.2.1 and 9.1.2.2 actually exceeds Qwest’s legal obligation to provide UNEs to CLECs. Qwest insists that it “does not have an obligation to build networks for CLECs.” *Qwest Brief at 11.* The Qwest SGAT language indicates that Qwest has a legal obligation to build facilities when facilities are not available to meet either Provider of Last Resort (POLR) or Eligible Telecommunications Carrier (ETC) obligations to provide basic local exchange service.⁴⁰

77 Qwest asserts that it is not “obligated to do everything for CLECs as it does for retail.” As an example, Qwest says it is not required to provide unbundled packet switching in all circumstances, and that “[t]he bottom line is that there is no statute, rule or case that imposes on Qwest the obligation to construct all UNEs.” *Qwest Brief at 13.*

78 Qwest claims that its SGAT limitations on the obligation to provide facilities is supported by the Eighth Circuit Court Opinion that “subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC’s *existing* network – not to a yet unbuilt superior one.” *Iowa Utils. Bd. V. FCC, 120 F.3d753, 813 (8th Cir. 1997).* *Rev’d in part and remanded on other grounds, AT&T v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).*

⁴⁰ SGAT section 9.1.2.1 states: If facilities are not available, Qwest will build facilities dedicated to an end-user customer if Qwest is legally obligated to build such facilities to meet its Provider of Last Resort (POLR) obligation to provide basic local exchange service or its Eligible Telecommunications Carrier (ETC) obligation to provide primary basic local exchange service. CLEC will be responsible for any construction charges for which an end-user customer would be responsible. In other situations, Qwest does not agree it is obligated to build UNEs, but it will consider requests to build UNEs pursuant to section 9.19 of this Agreement.

Discussion and Decision

79 Qwest's discussion of "existing" network refers to paragraph 324 of the *UNE Remand Order*.⁴¹ While Qwest points to the FCC's reference to limiting unbundling to the incumbent LEC's "existing" network, the FCC says it "did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use."⁴² The FCC goes on to state that the "incumbent LEC's unbundling obligation extends throughout its ubiquitous transport network." Later, the FCC explains the incumbent is not required to provision for "point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use." In other words, the incumbent LEC's "existing" network includes all points that it currently serves via interoffice facilities, and it is not required to extend its network to new points, based on competitors' requests. However, the incumbent LEC is still required to provide access to UNEs within its existing network even if it must construct additional capacity within its network to make the UNEs available to competitors. Qwest implies that the term "existing network" only applies to the actual facilities that are in place, when in fact existing network applies to the "area" (end offices, serving wire centers, tandem switches, interexchange carrier points of presence, etc.) that Qwest's interoffice facilities serve. This same concept applies on the loop side of Qwest's network where Qwest is obligated to construct additional loops to reach customers' premises whenever local facilities have reached exhaust.

80 Qwest must modify section 9.1.2 of the SGAT and the appropriate subsections of 9.1.2 to state that Qwest will provide access to UNEs to any location currently served by Qwest's network. Qwest must construct new facilities to any location currently served by Qwest when similar facilities to those locations have exhausted. In situations where locations are outside of currently served areas, Qwest may construct facilities under the same terms and conditions it would construct similar facilities for its own customers in those locations.

⁴¹ Notwithstanding the fact that we require incumbents to unbundle high-capacity transmission facilities, we reject Sprint's proposal to require incumbent LECs to provide unbundled access to SONET rings. In the *Local Competition First Report and Order*, the Commission limited an incumbent LEC's transport unbundling obligation to existing facilities, and did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use. Although we conclude that an incumbent LEC's unbundling obligation extends throughout its ubiquitous transport network, including ring transport architectures, we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use. *UNE Remand Order*, para. 324.

⁴² *Local Competition Order*, para. 451.

Requirement To Provide Additional Capacity For Unbundled Dedicated Transport Through The Addition Of Electronics Or Activation Of “Dark Fiber” (CL 2-18)

81 Issue CL 2-18 addresses Qwest’s obligation to provide additional capacity on facilities that are at or near exhaust. This issue can be viewed as a subset of issues EEL-5, UNE C-11, and CL 2-15, discussed earlier. In those issues we discussed Qwest’s obligation to build unbundled dedicated transport for CLECs within its current existing service area. Issue CL2-18 assumes that facilities are already in place and that additional capacity can be provided by activating unused fiber,⁴³ or by adding electronics to make additional capacity available.

AT&T’s Position

82 AT&T asserts that the FCC determined that dark fiber is dedicated transport at paragraph 325 of the *UNE Remand Order*. Quoting from paragraphs 327 and 328 of the *UNE Remand Order*, AT&T notes that the FCC views dark fiber no differently than unused copper that is “dormant until carriers put it into service,” and that the fiber “is physically connected to the incumbent’s network and is easily called into service.” *AT&T Brief at 10*.

83 AT&T believes Qwest should be required to “light” unused dark fiber and to replace electronics to expand capacity to make dedicated transport available. Additionally, AT&T says that Qwest should be required to add the necessary electronics to provide dedicated transport for CLECs. AT&T also indicates that Qwest should be required to provision unused dark fiber as provided in paragraphs 325, 327, and 328 of the *UNE Remand Order*. AT&T argues that Qwest would add the necessary electronics or light up unused dark fiber, if it needed more capacity for its own use. Failure to add electronics for CLECs would be a clear violation of Section 251(c)(3) of the Act and FCC rules. *AT&T Brief at 11*.

Qwest’s Position

84 Qwest acknowledges that it is required to provide access to unbundled dark fiber. However, it claims that it is not required to provide the electronics needed to put the dark fiber in service. *Qwest Brief at 13*.

85 Qwest asserts that it has no obligation to upgrade multiplexers, or other electronics, to allow additional capacity so that CLECs have access to transmission facilities. Qwest looks for support to paragraph 324 of the *UNE Remand Order* which states, “we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements that the incumbent LEC has not

⁴³ Optical fiber that is in place but has no electronic equipment on either end to send or receive impulses is called “dark fiber.”

deployed for its own use.” Qwest believes that upgrading of electronics is comparable to new transport facilities. *Qwest Brief at 13.*

86 Qwest objects to being required to incur what it refers to as expensive “material and placing costs” to furnish what Qwest believes will provide small incremental capacity needs of the CLECs. *Qwest Brief at 15.* Qwest also points to the possibility of network downtime and additional costs for potential migration of circuits between electronic units. *Id. at 16.*

Discussion and Decision

87 At paragraphs 325-328 of the *UNE Remand Order*, the FCC explains the need to provide electronics in order to “light” the dark fiber.⁴⁴ In these paragraphs FCC discusses the use of electronics to expand capacity on fibers that have been previously “lit.” In particular, paragraph 327 provides insight into FCC’s determination that dark fiber represents facilities dedicated for use, which like other elements have surplus capacity that can be upgrade to provide additional capacity.⁴⁵ A discussion of the use of specific optical capacities by the CLECs is given in paragraphs 323-324 of the *UNE Remand Order*.⁴⁶ The additional capital outlays Qwest would make for

⁴⁴ “To provide additional capacity, new electronics are attached to previously “lit” fiber or to previously “dark” fiber. Because dark fiber is already installed and easily called into service, we find that it is similar to the unused capacity of other network elements, such as switches or “dead count” or “vacant” copper wire that is dormant until carriers put it in service.” *UNE Remand Order, at para. 325.*

⁴⁵ “Although particular dark fiber facilities may not be “lit” they constitute network facilities dedicated for use in the provision of telecommunications service, as contemplated by the Act. Indeed, most other network elements have surplus capacity or can be upgraded to provide additional capacity and therefore are not always “currently used” as the term is interpreted by incumbent LECs. For example, switches, loops, and other network elements each may have spare, unused capacity, yet each meets the definition of a network element.” *Id. at para. 327.*

⁴⁶ **High-Capacity Transmission.** We reaffirm that the definition of dedicated transport set forth in the *Local Competition First Report and Order* includes all technically feasible capacity-related services such as DS1-DS3 and OC3-OC96 dedicated transport services. We clarify that this definition includes all technically feasible capacity-related services, including those provided by electronics that are necessary components of the functionality of capacity-related services and are used to originate and terminate telecommunications services. . . . Accordingly, we modify section 319(d)(ii) of our rules to clarify that incumbent LEC must unbundle DS1 through OC192 dedicated transport offerings and such higher capacities as evolve over time. Our intention is to ensure that the definition of interoffice transmission will apply to new, as well as current technologies, and to ensure that competitors will continue to be able to access these facilities as unbundled network elements as long as that access is required pursuant to section 251(d)(2). *UNE Remand Order, para. 323. See para. 324 at footnote 41.*

CLECs are no different from outlays it is currently required to make when its own end use customers or interexchange carriers request additional capacity.

88 The Commission directs Qwest to provide access to unbundled dedicated transport capacity between Qwest's wire centers, between Qwest's wire centers and other carriers' (including interexchange carriers) wire centers, and between Qwest's wire centers and the wire center of the requesting CLEC. In instances where CLECs want specific optical capacities (as specified by paragraph 323 of the *UNE Remand Order*) the CLECs may purchase capacity from Qwest at unbundled dedicated transport rates. In cases where capacity is limited or at exhaust, Qwest is required to either light additional fiber or change electronics to provide additional capacity in the same manner it would provide additional capacity for its own use.

Characterization Of Network Elements Priced At Retail Rates (UNE-C-21)

AT&T's Position

89 AT&T argues that Qwest should waive the local use restrictions on connecting UNEs to finished services where Qwest refuses to build UNEs. As an example, AT&T says a CLEC may order a UNE DS1 loop. Qwest takes the position that it is not required to build UNEs. Thus the CLEC may instead order a DS1 loop under the retail tariff. AT&T contends that because of its local use restrictions, Qwest refuses to permit the CLEC to connect the DS1 retail service to the CLEC's own multiplexer so the CLEC can multiplex the DS1 service onto its UNE transport. Consequently the CLEC incurs additional costs in having to purchase multiplexing and transport from Qwest on top of the increased costs the CLEC pays for the DS1 retail loop (distinguished from the DS1 UNE loop). *AT&T Brief at 42 and 43.*

Qwest's Position

90 Qwest argues that this issue is another rehash of the commingling issue using a slightly different configuration. Qwest's position is that this issue belongs under EEL-3 and UNE-C-4. *Qwest Brief at 19.*

Discussion and Decision

91 AT&T treats this issue as a "local use restriction" on "connecting UNEs to retail services." Qwest sees it as a CLEC paying "retail rates and charges for an element, but having that facility considered a UNE." AT&T points to restrictions that appear under SGAT section 9.19. However, section 9.19 deals with special construction costs that have been addressed in CL 2-15, UNE-C-11, and EEL-5. Qwest implies that finished services rates are lower than UNE rates, which is not necessarily the case. It is clear that if Qwest is not making UNEs available, the CLECs will be forced to purchase retail services (which are usually more expensive) in place of

UNEs. Placing restrictions on how these retail services (which CLECs are forced to purchase if they are to provide any service at all) will be used is inconsistent with the arrangements Qwest makes within its own network, and it disadvantages the CLECs and their customers. Consequently, it is discriminatory and improper.

92 The Commission believes that this issue is more closely related to issues EEL-5, UNE-C-11, and CL 2-15 than it is to issues EEL-3 and UNE C-4, as Qwest believes. Qwest cannot deny CLECs access to UNEs and then refuse to combine UNEs with the retail service the CLEC obtains in lieu of a UNE. If UNEs were available, as AT&T demonstrates in its example of DS1 loops, there would be no need to order DS1 loops as a retail service, and hence AT&T would not have a need to combine a UNE with a retail service. Therefore, Qwest is directed to remove in SGAT sections 9.1.5 and 9.23.1.2.2 any restrictions on combining UNEs with retail services when UNEs are not available

93 Qwest must modify the construction requirements in section 9.19 of the SGAT such that special construction charges for UNEs only apply when CLECs request UNEs outside of Qwest's current service area. Qwest's treatment of CLEC orders for UNEs must be consistent with the treatment of CLEC orders for retail services in a given area. CLECs should not have to substitute retail services for UNEs in order to avoid construction charges, or to obtain connectivity to end users in general.

Prohibiting the use of EELs to Bypass Special Access Charges - WA-EEL-1 and WA-EEL-4

94 Qwest defines an Enhanced Extended Loop (EEL) as a combination of a loop and dedicated interoffice transport, sometimes including multiplexing or connecting equipment.⁴⁷ At SGAT section 9.23.3.7.1, CLECs are prohibited from using combinations of UNEs that include unbundled loop and unbundled interoffice transport alternatives unless granted a waiver from the FCC applicable to the particular EEL, or unless the CLEC establishes it is using the combination of network elements to provide a significant amount of local exchange traffic to a particular end use customer.

Joint CLECs' Position

95 Joint CLECs argue that the FCC's *Supplemental Clarification Order*⁴⁸ concerning limitations on combinations of UNEs and loop transport alternatives is specifically limited to conversions from special access circuits to EELs. *CLEC Brief at 8*. Joint

⁴⁷ Described by the FCC as an Enhanced Extended Link. *UNE Remand Order* para. 477.

⁴⁸ *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183, Supplemental Order Clarification (June 2, 2000) ("*Supplemental Clarification Order*").

CLECs argue that Qwest's reading of the *Supplemental Clarification Order* ignores this, and that Qwest is attempting to unfairly burden CLECs with difficult and onerous certification requirements that should only apply to conversions from special access circuits to EELs. They contend that Qwest cannot broaden this requirement to new EELs. *Id. at 8, 10.*

96 Joint CLECs argue that the Commission has already required Qwest to combine network elements on behalf of a requesting CLEC and that the Commission did not condition Qwest's obligation on a "significant local usage" certification by the CLEC. *Id. at 9.*

Qwest's Position

97 Qwest argues that there is nothing in the FCC orders to support the Joint CLECs' notion that the limitations the FCC has set on use of unbundled network combinations and loop transport alternatives are limited to conversions from special access. Qwest argues that for the Commission to do other than to maintain the status quo as Qwest sees it set by the FCC would introduce unnecessary uncertainty because the FCC has only adopted an interim policy on the issue. *Qwest Brief at 24-26.*

Discussion and Decision

98 Qwest's SGAT provisions at 9.23.3.7.1 and 9.23.3.7.2.12.2 are rejected. While we disagree with Joint CLEC arguments (Joint CLECs' Brief at 8) that the FCC *Supplemental Clarification Order* contains "plain language" to limit applications of significant local usage tests to conversions of existing special access circuits to EELs, *Id.*, the Commission in August, 2000, rejected Qwest's argument. *In re the arbitration of Sprint Communications Company, L. P. and U S WEST Communications, Inc., Fifth Supplemental Order, August 28, 2000.*

99 At page 3, the Commission said,

Qwest urges us to depart from our consistent policies of . . . requiring ILECs to perform the functions necessary to combine requested UNEs in any technically feasible manner either with other UNEs from their networks, or with network elements possessed by requesting carriers . . .

100 The Commission rejected Qwest's contentions there, accepting Sprint interconnection agreement language that would require Qwest to combine UNEs in any manner, provided that the UNE combination is technically feasible and that it would not impair the ability of other carriers to obtain access to UNEs or to interconnect with Qwest. Sprint's language was taken nearly verbatim from FCC rule 315(c).

101 The Commission required the interconnection agreement to contain language consistent with Rule 315, and prohibited Qwest from imposing different standards when combining network elements for other carriers than it employed for itself.

102 We see no need at present to vary from the status quo that this Commission has established in Washington State. We acknowledge that the FCC is inquiring into the situation. If the FCC changes the requirements or the application of its rule, the Commission can accept a modification to the SGAT.

103 Qwest's current SGAT proposal is inconsistent with the Commission's prior rulings in Washington State. Qwest must submit modified proposals, consistent with this Order.

Connecting EELs to Qwest's tariffed services – WA - EEL-2

104 At SGAT section 9.23.3.7.2.7, Qwest proposes to prohibit connecting EELs to Qwest's tariffed services.

WorldCom's Position

105 WorldCom argues that Qwest should not be permitted to refuse to commingle UNE combinations with tariffed services. *WorldCom Brief at 6,7*. WorldCom cites paragraph 28 of the *Supplemental Clarification Order* as stating that the FCC's commingling determination does not imply a prejudgment as to whether unbundled network combinations may be combined with tariffed services. *Id.* Qwest acknowledged that the only reason for not allowing CLECs the opportunity to commingle services is an administration issue which Qwest argues will make sorting out traffic for billing purposes difficult. WorldCom cites AT&T as demonstrating such sorting is no different than sorting traffic for other types of circuits which Qwest is routinely required to do.

Qwest's Position

106 Qwest asserts that it is the FCC's clear position that commingling with tariffed services is not allowed. Qwest also cites paragraph 28 of the *Supplemental Clarification Order* in support of its argument. *Qwest Brief at 26*.

Discussion and Decision

107 Qwest's SGAT provisions at 9.23.3.7.2.7 are accepted. Loop transport combinations may not be connected to Qwest tariffed services. The FCC states not once, but three times that "[This] option does not allow loop-transport combinations to be connected

to the incumbent LEC's tariffed services."⁴⁹ The *Supplemental Clarification Order* clearly results in maintaining the *status quo* until it has further information on the issue.⁵⁰ The Commission may reconsider this issue in light of a prospective FCC decision lifting the prohibition, but should not do so now.

Waiver of TLAs – WA-EEL-15

108 Qwest's SGAT at 9.23.3.1.2 states that if a CLEC is obtaining services from Qwest under an arrangement or agreement that includes the application of termination liability assessment (TLA) or minimum period charges, and if the CLEC wishes to convert such services to UNEs or a UNE Combination, the applicability of such charges is governed by the terms of the original agreement, tariff or arrangement.

Joint CLEC's Position

109 Joint CLECs argue that the requirement to pay the TLA raises CLEC costs in an anticompetitive manner. Joint CLECs propose treating the circuits subject to termination liability as UNEs provided temporarily at a higher price so that the entire facility could be converted.

110 The Joint CLECs contend that TLAs should be waived for conversions of special access and private line circuits to EELS, along with a rebuttable presumption regarding the use of the circuits and the purpose of the TLA. *Joint CLEC Brief at 13-14.*

AT&T's Position

111 AT&T objects to being required to pay the TLAs when connecting special access or private line circuits to EELS. AT&T supports the CLECs' arguments that because of Qwest's refusal to make facilities available as unbundled network elements, the CLECs were forced to make uneconomic choices and sign long term agreements subject to TLAs, to obtain the needed facilities. The TLAs should be waived if the CLECs choose to be served via UNEs. *AT&T Brief at 41.*

Qwest's Position

112 Qwest disagrees but offers to waive certain TLAs. Qwest contends that when a termination liability exists it is due to a term or volume discount, or both, having been applied to the full rate for the service. Qwest applies the discount to the full rate for the service in return for a time commitment from the CLEC. Qwest argues that to the extent a CLEC is now attempting to "disconnect" this rate, having had benefit of the

⁴⁹ *Supplemental Clarification Order at Paragraph 22.*

⁵⁰ *Id at 28.*

discounted rate for a period of time that is less than agreed upon with Qwest, then clearly a termination liability should and does apply so that Qwest receives the benefit of its bargain with the CLEC. *Qwest brief at 27-28.*

113 Qwest also argues that the FCC has held that TLAs are not an appropriate issue for Section 271 cases. *Id.*

114 Qwest proposes to not apply TLAs if all of the following conditions are met:

- (1) CLEC's private line circuit(s) was ordered or augmented between October 9, 1999 (the effective date of the 9th Circuit decision)⁵¹ and May 16, 2001 (the date of this proposal);
- (2) Qwest did not have to build facilities to install the private line circuits at issue to meet CLEC's request;⁵²
- (3) CLEC identifies and communicates in writing to Qwest on or before August 1, 2001, each circuit it believes qualifies under this proposal; and
- (4) Each private line circuit so identified qualifies under one of the three local use options contained in Section 9.23.3.7.2 of the SGAT and CLEC identifies which option each circuit qualifies under.⁵³

Id. at 29.

115 If all of the conditions listed above are met, Qwest states that it will implement this proposal on an individual case basis with each CLEC. *Id.*

Discussion and Decision

116 Termination liabilities under long term contracts for special access services should not be abrogated just because the customer subsequently chooses to convert those

⁵¹ Qwest's proposal was footnoted as follows:

This date will be February 17, 2000, (the effective date of the UNE Remand Order) in non-9th Circuit states.

⁵² Qwest's proposal was footnoted as follows:

Qwest considers the following to be incremental facility work that would not be considered a "build" situation: conditioning, placing a drop, adding a network interface device, adding a card to existing equipment at the central office or remote locations, adding central office tie pairs, and adding field cross jumpers. SGAT 9.1.2.3. All other work, including, but not limited to installing fiber, conduit, or adding or upgrading electronics, is considered a "build" situation. See also Issue CL2-10 and UNEC-11 which address the obligation to build issue.

⁵³ Qwest's proposal was footnoted as follows:

For clarification, Internet traffic/ISP traffic cannot be counted as local traffic for purposes of meeting the local use restriction. See Issue EEL-16 for the discussion and authorities stating that Internet traffic is interstate, not local, traffic.

circuits to EELs. The Commission has no way of determining from this record the reasons why CLECs have entered into specific agreements containing TLAs. Therefore Qwest SGAT at 9.23.3.12 stands until the FCC provides further guidance. The Commission does not object to the proposal by Qwest to waive certain TLAs as set forth above, and approves its inclusion in the SGAT.

Is ISP traffic “local” if it is carried on an EEL? - WA-EEL-16

- 117 During the workshops AT&T asked Qwest how it would propose to treat ISP traffic for purposes of applying the “significant local use” restriction. *Tr. 3634*. The parties discussed whether the FCC’s recent decision on the treatment of ISP traffic for reciprocal compensation would affect the treatment of such traffic for EELs and agreed the issue was at impasse. *Tr. 3635, 3637*.

Joint CLECs’ Position

- 118 Joint CLECs contend that the FCC’s *ISP Remand Order*⁵⁴ has no impact on the “significant local usage” certification requirements for converting special access service to EELs. In that Order, the FCC once again concludes that ISP-bound traffic is jurisdictionally interstate, but the FCC does not revoke the access charge waiver granted ISPs and other enhanced services providers. *Joint CLEC Brief at 11*. Joint CLECs argue that service to ISPs for calls delivered within a local calling area is local exchange service, not special access. *Id.* Therefore, to the extent that the “significant local usage” certification requirements are specific to “traffic,” ISP-bound traffic should continue to be considered “local.” *Id.* A contrary position would permit Qwest to require that CLECs provide more costly special access service to ISPs, while Qwest provides its ISP customers with local exchange service. Such a result would be inconsistent not only with FCC orders but with principles of nondiscrimination and competitive parity. *Id.*

Qwest’s Position

- 119 Qwest contends that in the *ISP Remand Order*, the FCC found that state commissions no longer have authority to address the issue because the FCC has exercised its jurisdiction over Internet-bound traffic and declared that this traffic is jurisdictionally interstate. The *ISP Remand Order* clearly and unmistakably states that Internet-bound traffic is interstate and the Order pre-empts a state decision to the contrary. *Qwest Brief at 33*. Qwest concedes that the FCC did not preempt state commission decisions governing compensation for Internet-bound traffic for the period of time

⁵⁴ In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, and Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, FCC 01-131, (released April 27, 2001) (*ISP Remand Order*).

prior to the effective date of the Order. However, Qwest contends that the compensation schemes adopted for this interstate traffic are not at issue in this Section 271 proceeding. Qwest also argues that the “significant local use” provisions in the *Supplemental Clarification Order* only apply to voice traffic and that even if the Commission had discretion to define ISP traffic as local in nature, it could not be considered local traffic for purposes of meeting EEL requirements under the FCC’s rules. *Qwest Brief at 34.*

Discussion and Decision

120 This Commission has consistently ruled that ISP traffic is local and there is no reason to differentiate such traffic on the basis of how the loop carrying that traffic is regulated.

Qwest Contacts with CLEC End Users during Misdirected Calls – WA-UNEP-5(a)

121 SGAT section 9.23.3.17, discussing points of contact for CLEC end users of UNE-Ps, addresses the conduct of Qwest or CLECs when they receive misdirected calls from end users. The SGAT states, “nothing in this agreement shall be deemed to prohibit Qwest or CLEC from discussing its products and services with CLEC’s or Qwest’s end user customers who call the other Party.”

AT&T’s Comments

122 AT&T objects to this language as anticompetitive, and requests the Commission add the words “seeking such information” to the SGAT provision, so that marketing during misdirected calls could only take place at the request of the end user. *AT&T Brief at 18.* AT&T cites the U. S. Supreme Court as affording commercial free speech “a limited measure of protection.” AT&T argues that its proposed language is a narrowly tailored restriction which does not interfere with Qwest’s right to freedom of speech, while at the same time preventing anticompetitive behavior that threatens competition. *AT&T Brief, at 15-16.*

Qwest’s Position

123 Qwest contends that AT&T’s proposed restriction would be an inappropriate restriction on commercial free speech. *Qwest Brief at 19.*

Discussion and Decision

124 The Commission observes that this issue has arisen in connection with resale services and has been addressed in Workshop II orders; however, the Commission believes that this issue should be addressed on the merits. Qwest has agreed to advise the caller that Qwest is not the service provider, and will not disparage the competitor or

its product. Qwest states that it will communicate only truthful, accurate, and nonmisleading information regarding its products. Nevertheless, given the substantial interest in promoting full and fair competition, and the fact that Qwest will be dealing with a captive audience, the Commission will impose a further limitation, namely that, Qwest be required either to: (1) provide the caller with a number they may dial to obtain sales information, or (2) ask the caller whether they would like to hear sales information. Including these limitations in the SGAT will promote competition, and not restrict the CLECs' ability to obtain or retain new customers, without unreasonably restricting Qwest's right to market its services. The SGAT language should be revised accordingly.

Checklist Item 5, Unbundled Transport

Distinction between Unbundled Dedicated Interoffice Transport (UDIT) and Extended Unbundled Dedicated Interoffice Transport (EUDIT) -. (WA - TR-2)

125 Section 9.6 of the SGAT describes two rate elements for dedicated transport. The UDIT provides competitive LECs with a network element of a single transmission path between Qwest end office, serving wire centers or tandem switches in the same LATA and state. The EUDIT provides the competitive LEC with a bandwidth-specific transmission path between the Qwest serving wire center and the competitive LEC's wire center or an interexchange company's point of presence located within the same Qwest serving wire center.

AT&T's Position

126 AT&T requests that the Commission order Qwest to eliminate the EUDIT/UDIT distinction and provide dedicated transport between all required locations on a flat rate, distance-sensitive basis.⁵⁵ *AT&T Brief at 39.*

127 In its *UNE Remand Order*, the FCC reaffirmed its definition of dedicated transport as an unbundled network element contained in the Local Competition Order. *AT&T Brief at 35.* The Bell Operating Companies must provide unbundled network elements under section 251(c)(3), independent of its obligation under Section 271 to unbundle local transport. *Id. at 3.*

128 Defining the obligation to provide nondiscriminatory access, the FCC has said,

“The duty to provide unbundled network elements on ‘terms, and conditions that are just, reasonable, and nondiscriminatory’ means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all

⁵⁵ The UDIT prices are flat monthly recurring charges which, for some facilities, differ based on their length. See Ex. 274, Exhibit A, pp. 8-9.

requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.”

(Local Competition Order para. 315). AT&T Brief at 4.

129 AT&T believes SGAT section 9.6.1.1 creates an unwarranted and artificial distinction between dedicated transport provided between two Qwest wire centers and dedicated transport provided between a Qwest wire center and a CLEC wire center or interexchange carrier’s point of presence. The FCC makes no such distinction, and there is no legal authority for making such a distinction. *Exhibit 616-T at 27.* By defining transport in this manner, Qwest does not truly allow CLECs to obtain dedicated transport in the manner that the FCC says they are entitled to receive it. *Tr. 3000.*

130 AT&T argues that the distinction created between the forms of transport creates an unreasonable burden on CLECs. In particular, the pricing of EUDIT and UDIT is more expensive than if priced as UDIT alone. *Tr. 2986-2987.*

131 According to AT&T, there are additional problems with EUDIT pricing. As a general rule, costs for network elements must be recovered in a manner reflecting the way costs are incurred. Qwest’s rate structure for EUDIT does not follow these FCC guidelines because the rate for the EUDIT is non-distance sensitive. CLECs electing to build closer to the Qwest wire centers lose the cost benefits of doing so under EUDIT pricing. The pricing structure also imposes disincentives for CLECs to build facilities to a meet point. The CLEC will have to pay the entire EUDIT as if the CLEC had built none of its own facilities. *AT&T Brief at 36-37.*

132 AT&T asserts that it is also discriminatory that CLECs can use UDIT to connect to another independent telecommunications carrier and the CLEC can obtain UDIT for transport between Qwest wire centers. However, if the CLEC wishes to obtain dedicated transport to connect to a Qwest wire center it must use EUDIT. *AT&T Brief at 37.*

133 AT&T concludes that it would be appropriate to revisit the pricing issue in the next series of cost dockets. *Tr. 2994.*

WorldCom’s Position

134 WorldCom argues that the Qwest SGAT should be changed to eliminate the artificial distinction suggested between EUDIT and UDIT. *Exhibit 641-T at 10.*

135 Through its SGAT, Qwest improperly disaggregates unbundled dedicated transport into various subparts. WorldCom concurs in AT&T comments on this issue. As an

unbundled network element, CLECs are permitted to use UDIT with none of the restrictions imposed by Qwest by its disaggregating of UDIT in separate subparts, UDIT and EUDIT. The sole effect of this is to raise the costs of doing business for CLECs. *WorldCom Brief at 2.*

136 WorldCom contends that the rate structure does not justify departing from the FCC definition of the required element. Qwest's own examples of the Access and Private Line Tariffs include both distance sensitive and non-distance sensitive rate elements. There is no need to create a separate service classification to describe the different rate elements. *Exhibit 641-T at 9.*

137 WorldCom requests that the Commission address the relevant pricing issues in UT-003013, Part B.

Covad's Position

138 Covad argues that Qwest must prove that it complies with state and federal laws regard to transport before the Commission may grant Qwest's Section 271 application. Section 251(c)(3) of the Act requires incumbent LECs to provide access to unbundled network elements "at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." *Covad Brief at 2.*

Qwest's Position

139 Through its SGAT, Qwest provides CLECs with access to unbundled dedicated transport. *Exhibit 550-T at 47.* The pricing issues should be deferred to the cost docket. *Qwest Brief at 37.*

140 Qwest provides existing unbundled dedicated transport between all locations identified in the FCC rules and orders. Identifying EUDIT separately recognizes that this segment of dedicated *transport* has historically been recovered in cost models and resultant rate schedules as a non-distance-sensitive rate element. All other interoffice transport has been rated on a fixed and per mile basis. For example, Switched Access Services have a non-distance sensitive rate component called "entrance facilities" or "channel termination." *Exhibit 572-T at 4.*

141 Qwest Exhibit 559 demonstrates the difference between UDIT and EUDIT. The exhibit shows the UDIT connection between Qwest central offices and the EUDIT connection between a Qwest central office and a CLEC switch.

142

Qwest contends that UDITs and EUDITs are not two different unbundled network elements; they are a single unbundled *network* element with two rates. The EUDIT is the entrance facility component. *Tr. 2983-2984*

143 Qwest argues that the pricing structure is also consistent with the treatment of retail end-users, for which there is channel termination at the serving wire center at a fixed price and then the transport becomes fixed and per mile. *Tr. 3000.*

144 This pricing structure is standard industry practice. The FCC recognized this practice by suggesting the use of existing rates for interstate dedicated switched transport as a default proxy for unbundled dedicated transport. As an example, the FCC cited BellSouth's entrance facility charge, for transport from an IXC's point of presence to a BellSouth serving wire center, and its dedicated transport charge for 10 miles of interoffice transmission between a serving wire center and an end office. *Qwest Brief at 36-37.* The Texas 271 Agreement, or Statement of Generally Accepted Terms, provides another example of *this* standard industry price structure. *Exhibit 572-T at 5.*

145 Qwest believes cost and rate structure issues associated with EUDIT should be deferred to the cost docket. *Id. at 37.*

Discussion and Decision

146 The Commission agrees with the Intervenors' interpretation of the FCC's *Local Competition Order* and *UNE Remand Order*, which clearly categorized local transport as an unbundled network element subject to section 251(c)(3) of the Act requiring "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."

147 The *Local Competition Order* states at paragraph 315, "The duty to provide unbundled network elements on 'terms, and conditions that are just, reasonable, and *nondiscriminatory*' means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself."

148 Exhibit 559 shows that the only apparent difference between the UDIT and the EUDIT justifying different charges is the owner of the wire center at the far end of the transport. While Qwest has likened the EUDIT to an entrance facility, the record does not show that the EUDIT is sufficiently distinct from the UDIT.

149 In addition, Qwest's argument that the EUDIT pricing scheme is similar to a number of examples of standard industry practice is not persuasive given that many of the

interconnection agreements negotiated by Qwest in Washington make no distinction between UDIT and EUDIT.⁵⁶

150 As such, in its SGAT, Qwest should eliminate the distinction between unbundled dedicated interoffice transport (UDIT) and extended unbundled dedicated interoffice transport (EUDIT).

151 Finally, all parties agree that the pricing of unbundled dedicated transport should be addressed in the generic pricing docket. These rates are currently under consideration in UT-003013; briefs on the issue were filed on May 29, 2001.

Responsibility for provision of electronics at the CLEC end of unbundled dedicated transport – WA-TR-14

152 Qwest is providing unbundled transport with two different rate elements, that is discussed at issue WA-TR-2 above. Qwest is also refusing to provision electronics at the CLEC's end of the arrangement, and will not add more electronics within its own network if facilities are at exhaust. The CLECs object to the two-element rate structure and the lack of provisioning for electronics.

AT&T's Position

153 AT&T objects to Qwest's refusal to provide electronics with the EUDIT/UDIT arrangement. The CLEC end of the EUDIT does not have electronics. *Tr. at 3527-3528*. AT&T compares this situation to receiving "half the dark fiber," and notes the FCC specified that dedicated transport includes electronics that will "permit the transmission of voice or data." *AT&T Brief at 38*.

154 AT&T asserts it is unlawful for Qwest to require CLECs to pay for the CLEC's costs of electronics on the CLEC's end of the EUDIT. AT&T recommends that Qwest be

⁵⁶ The *Agreement For Local Wireline Network Interconnection and Service Resale Between AT&T Communications of the Pacific Northwest, Inc. and U.S. West Communications, Inc.*, filed July 25, 1997, provides in Attachment 3, section 7.1.1, that, "Dedicated Transport is an interoffice transmission path between AT&T designated locations to which AT&T is granted exclusive use." The *Interconnection Agreement Between U.S. West Communications, Inc. and Covad Communications Company for Washington*, dated February 27, 1998, provides in section 8.2.2 that, "U.S. West will provide unbundled access to dedicated transmission facilities between its central offices or between such offices and those of competing CLECs." Other interconnection agreements similarly make no distinction between unbundled dedicated interoffice transport and extended unbundled dedicated interoffice transport. See *Agreement For Local Wireline Network Interconnection and Service Resale Between MCImetro Access Transmission Services, Inc. and U.S. West Communications, Inc.* filed August 20, 1997; *MFS Intelenet, Inc. and U.S. West Communications, Inc. Arbitrated Interconnection Agreement for the State of Washington*, filed December 3, 1996; and *Sprint Communications Company, L.P. and U.S. West Communications, Inc. Negotiated/Arbitrated Terms of Agreement for Interconnection, Resale, and Unbundled Elements*, filed July 8, 1997.

ordered to provide electronics on dedicated transport at the CLEC's wire center.
AT&T Brief at 39.

Qwest's Position

155 Qwest indicates that the electronics issue associated with the EUDIT is the same issue that is addressed under Qwest's obligation to build. Qwest refers to the arguments and authorities cited in the discussions under CL2-15, CL2-18, and UNE C-11. *Qwest Brief at 37.* Qwest asserts that if it already has electronics available, Qwest will provide electronics for the UDIT arrangement. Qwest will not provide electronics, add electronics, or upgrade electronics at the CLEC's end of the EUDIT. Qwest does not agree to add electronics or upgrade electronics for either the UDIT or EUDIT where electronics are not available. Qwest believes it is only obligated to unbundle access to its *existing* network. Qwest characterizes the addition of electronics at the CLEC end of the EUDIT as falling outside the scope of the work it has agreed to perform in SGAT section 9.1.2.3. *Id. at 13-14.*

Discussion and Decision

156 As it has with other issues, Qwest continues to insist that it is not obligated to build additional facilities to provide unbundled transport beyond what it has defined as its *existing* network. Clearly the FCC has stated in the *UNE Remand Order* at paragraph 323 that Qwest is required to unbundle dedicated transport at rates DS1 through OC 192. At paragraph 324 the FCC concludes that "an LEC's unbundling obligation extends throughout its ubiquitous transport network." The incumbent LEC is not required to build facilities beyond its own point-to-point demand network. However, if a CLEC is located inside of Qwest's current point-to-point service area, Qwest is required to build facilities and provide electronics at the CLEC's wire center, if requested.

157 The Commission directs Qwest to provide electronics for the unbundled dedicated interoffice transport arrangements at the CLEC wire center if requested by the CLEC. The provisioning of unbundled transport elements requires a complete end-to-end connection. Electronics are already required to terminate the transport facility at the Qwest wire center. There is no reason for Qwest to provision only one-half of this element.

Checklist Item 6, Unbundled Local Switching

Availability of AIN Service Software - WA-SW-2

158 Qwest's SGAT Section 9.11 addresses Qwest's obligation to provide access to unbundled local switching. SGAT sections 9.13 and 9.14 contain provisions regarding signaling and Advanced Intelligent Network (AIN) services.

159 Qwest asserts that it complies with the obligation to provide access to unbundled local switching through its interconnection agreements and its SGAT.

AT&T's Position

160 AT&T objects to Qwest's position that it does not need to offer unbundled access to AIN service software, or features. *AT&T Brief at 23*. AT&T asserts that Qwest reads the FCC's *UNE Remand Order* too broadly and that the FCC disregarded its own criteria in determining that unbundled access to AIN service software was proprietary, and that it was not "necessary" under the "necessary" standard set forth for proprietary elements. *Id.*

161 AT&T claims that the FCC erred in finding that AIN service software met the criteria for a proprietary element, and that it did not conduct the analysis required to determine whether a proprietary element is required to be offered. That analysis requires a determination of whether: a) AIN service software differentiates an ILEC's services from its competitors, or is competitively significant; b) lack of access to the element would jeopardize the goal of the 1996 Act to bring rapid competition to the greatest number of customers; and, c) as a practical, economic and operational matter, CLECs are precluded from providing the services they seek to offer. *Id. at 26*.

162 AT&T asserts that Qwest has not demonstrated that its AIN services differentiate it from its competitors; that Qwest's refusal to provide AIN features through UNE-P will result in AIN features being lost for customers who switch service to a CLEC; and that the time and cost involved for CLECs to create their own AIN software, or to purchase it from an outside vendor, results in CLECs being precluded from providing the services they seek to offer. *Id. at 28*.

163 AT&T states that AIN services are not available from third party vendors, and that desired software is not available on Qwest switches. It asserts that it would take years for AT&T to develop its own software with the use of the unbundled elements Qwest provides, and that its AIN software would need to be functionally equivalent to Qwest's without infringing on Qwest's patents. *Id. at fn 119, 120*. AT&T therefore concludes that Qwest should be required to make its AIN service software available to CLECs that are using UNEs to provide telecommunications services. *Id. at 29*.

Qwest's Position

164 Qwest cites the FCC's *UNE Remand Order*, at paragraph 419,⁵⁷ as stating that AIN service software should not be unbundled. Qwest asserts that it makes available its

⁵⁷ We agree with Ameritech that unbundling AIN service software such as "Privacy Manager" is not "necessary" within the meaning of the standard in section 251(d)(2)(A). In particular, a requesting carrier does not need to use an incumbent LEC's AIN service software to design, test, and implement a

AIN platform, its Service Creation Environment, Service Management System, and Signaling Transfer Points (SCE, SMS, and STP, respectively), which are the components the CLEC needs to develop its own AIN service software. It states that it therefore complies with the FCC's requirements referred to above.

165 Qwest states that it also has agreed to leave software for existing vertical switch features on its switches for use by CLECs, even after it is itself providing the service from its AIN platform. It has agreed to load onto its switches vertical features that are currently unloaded. *Id. at 40.*

166 Qwest concludes that, because of the FCC's finding in the *UNE Remand Order*, its AIN service software is not required to be unbundled, even if it is not deemed proprietary; however, Qwest asserts that all of its AIN software is proprietary, through copyrights, patents, or trademarks. It also asserts that it owns all of its AIN products, and that its products are proprietary regardless of what entity owns the patents on the products. *Id. at 41.*

Discussion and Decision

167 While the FCC has appeared to decide the treatment of AIN service software, the Commission retains the responsibility to consider the issue on its merits. The FCC stated in the *UNE Remand Order*, paragraph 155, that the states are not precluded from requiring additional unbundling under certain conditions.⁵⁸ The FCC modified 47 CFR 51.317 to "bring it into compliance with our new standards and the Supreme Courts' decision. Modification of this rule will enable state commissions to add additional unbundling obligations consistent with sections 251(d)(3)(B) and (C) of the Act."

similar service of its own...Because we are unbundling the incumbent LECs' AIN databases, SCE, SMS, and STPs, requesting carriers that provision their own switches or purchase unbundled switching from the incumbent will be able to use these databases to create their own AIN software solutions to provide services similar to Ameritech's "Privacy Manager." They therefore would not be precluded from providing service without access to it. Thus, we agree with Ameritech and BellSouth that AIN service software should not be unbundled. *UNE Remand Order, para. 419.*

⁵⁸ We agree with commenters that section 251(d)(3) provides state commissions with the ability to establish additional unbundling obligations as long as the obligations comply with subsections 251(d)(3)(B) and (C). Section 251(d)(3) states:

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

does not substantially prevent implementation of the requirements of this section and the purposes of this part. *UNE Remand Order, para. 153*

168 Qwest is correct that paragraph 419 of the *UNE Remand Order* does not require ILECs to unbundle their AIN services. The FCC came to its conclusion by applying its standards to AIN services. First, it determined that AIN services are proprietary, and therefore must be considered under the “necessary” standard. Next, it determined that they did not meet the standard of being “necessary,” as defined in the *UNE Remand Order*. Third, the FCC declined to require the ILECs to unbundle AIN services under the criteria it established for requiring proprietary services to be unbundled.

169 In order to decide this issue in Washington, the Commission must first decide whether the Qwest AIN service software is proprietary. While AT&T states that Qwest’s “Caller ID with Privacy+” service appears to be similar to Ameritech’s “Privacy Manager” service, we cannot draw a conclusion that all Qwest AIN software is therefore not proprietary. AIN service software covers more products than “Caller ID with Privacy+.” *Ex. 565-C*. There has been no testimony offered to dispute Qwest’s contention that its other AIN products and features are proprietary in nature under the FCC’s definition.

170 Second, the Commission must determine whether the service is “necessary.” In the *UNE Remand Order*, paragraphs 44 through 46, the FCC discusses its definition of “necessary,” as follows: (footnotes omitted)

44. We conclude that a proprietary network element is “necessary” within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent’s network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer. We agree with NTIA that the proper focus of the “necessary” standard is whether access to the incumbent LEC’s proprietary element is absolutely required for the competitor’s provision of its intended service. We find, therefore, that an incumbent LEC must provide access to a proprietary element, if withholding access to the element would prevent a competitor from providing the service it seeks to offer. In other words, we conclude that an incumbent LEC’s proprietary network element would only be available to a competitor if the competitor is unable to offer service, without access to the element, because no practical, economic, and operational alternative is available, either by self-provisioning or from other sources.
45. The standard we assign to the term “necessary,” as used in section 251(d)(2)(A), is consistent with the Supreme Court’s decision because it considers alternatives available outside the incumbent’s network and gives substance to the meaning of “necessary.” Moreover, insofar as the

standard focuses on the competitor's ability to furnish a desired service, and not merely on whether profits are increased by using the incumbent's network, the standard is also consistent with the Court's instruction that we must "apply some limiting standard, rationally related to the goals of the Act."

46. This "necessary" standard differs from the "impair" standard we adopt below because a "necessary" element would, if withheld, *prevent* a carrier from offering service, while an element subject to the "impair" standard would, if withheld, merely limit a carrier's ability to provide the services it seeks to offer. We therefore disagree with the standards proposed by ALTS and other competitive LECs that access to a proprietary element is "necessary" if the entrant would experience a material loss in functionality without access to the element. A standard based on a test of "material loss" in functionality requires only that the competitive LEC's ability to compete be materially affected in some way, as opposed to precluded, and ignores the higher degree of protection normally afforded intellectual property rights. The incumbent LECs argue that the "necessary" standard is a higher standard that is intended to preserve their incentive to invest in proprietary protocols, and that access to a proprietary element is "necessary" only if lack of access to that element would deny an efficient competitor a meaningful opportunity to compete. We agree with the incumbent LECs' concerns regarding the preservation of their investment incentives. We believe that our standard, by requiring that a requesting carrier be precluded as a practical, economic, and operational matter from providing service without access to the proprietary information, sufficiently protects the incumbents' proprietary property from nonessential access by competitors.

171 In the case of AIN service software, AT&T has not made a showing that it would be precluded from offering the requested services. It has asserted, through statements made at the workshops, only that it will be costly and time consuming. *AT&T Brief at 28.*

172 Third, we must evaluate Qwest's AIN service software under the criteria set forth by the FCC for unbundling features even if they are proprietary. The FCC's rules at 51.317(a)(2) are as follows:

If access is not "necessary," FCC may require unbundling if it determines that:

- (A) The incumbent ILEC has implemented only a minor modification to qualify for proprietary treatment;

- (B) Information or functionality that is proprietary does not differentiate the ILEC's services from the requesting carrier's services; or
- (C) Lack of access to such element would jeopardize the goals of the 1996 Act.

- 173 AT&T contends that the FCC overlooked at least some of these criteria in determining that AIN service software was not "necessary." Specifically, AT&T questioned whether the proprietary aspects of Qwest's AIN services differentiate it from the requesting carrier's services, and asserts that lack of access to AIN features would jeopardize the goal of the 1996 Act.
- 174 As stated above, the Commission believes there has not been a showing that Qwest's proprietary information or functionality does not differentiate its services from those of a requesting carrier, or that Qwest's proprietary designation is the result of only minor modifications to the AIN software. While AT&T points out similarities between Qwest's and Ameritech's "Privacy" services, it does not address Qwest's other services, which Qwest states are proprietary using the FCC's standards.
- 175 With respect to subsection (C) above, the question is whether Qwest's refusal to unbundle its AIN services results in a lack of access to AIN services. AT&T points out that Qwest does not provide the current AIN features through its switches; the AIN service software is not available from a third-party vendor; and that AT&T will be subject to patent infringement concerns if it develops software that is too similar to Qwest's patents. *AT&T Brief at 27*. Nevertheless, these difficulties do not preclude AT&T from developing its own AIN software using the unbundled components that Qwest provides. Thus, we do not believe Qwest's AIN software meets the criteria necessary to require Qwest to offer it to CLECs as an unbundled element.
- 176 The Commission concludes that evidence has not been presented here that would demonstrate a need for Qwest to offer its proprietary AIN service software as an unbundled element. The elements Qwest offers in the SGAT are consistent with the level of unbundled elements offered in its interconnection agreements. *See, Ex. 232, Attachment 3, page 46*. Absent evidence that Qwest's AIN service software is not proprietary, or that it is necessary in order for CLECs to provide requested services, the Commission declines to require a change to the SGAT for this issue.
- Availability of EELs for the unbundled switching exemption, WA-SW-7***
- 177 Issue SW-7 addresses whether Qwest may restrict CLECs from access to unbundled switching in Density Zone 1 wire centers in the top 50 Metropolitan Service Areas (MSAs) when Enhanced Extended Links (EELs) are not available.

AT&T's Position

178 AT&T contends that Qwest is obligated to provide unbundled local switching in wire centers in Density Zone 1⁵⁹ if EELs are not available. AT&T argues that Qwest must provide unbundled switching in Density Zone 1 wire centers if Qwest cannot provision an extended electronic loop (EEL). *AT&T Brief at 29*. AT&T cites the *FCC UNE Remand Order* at paragraph 288 saying that unbundled local switching does not impair a CLEC's access to unbundled switching if EELs are available.⁶⁰ *Id. at 30*.

179 AT&T contends that a CLEC would not be impaired if it had its own switch in an MSA and could purchase EELs from the incumbent LEC. However, if an EEL is not available in a wire center, the CLEC must collocate in that wire center or use unbundled switching. If unbundled switching is not available the CLEC would be forced to provide multiple switches within an MSA and that would "impair" its operation. *AT&T Brief at 30*.

180 AT&T recommends language for Qwest's SGAT as follows:

9.11.2.5.3 This exclusion will not apply in wire centers where Qwest has held orders for transmission facilities needed for EELs or where CLECs are unable to obtain sufficient collocation space to terminate EELs.

181 Otherwise, AT&T says that Qwest would be out of compliance with Checklist Item 6. *AT&T Brief at 31*. AT&T also notes that Qwest is not relieved of its obligation to unbundle switching in wire centers in Density Zone 1 for customers having less than 4 lines. *Id.*

⁵⁹ The only counties in Washington that are in the top 50 MSAs are King, Snohomish, and Clark. The only Qwest wire centers in Density Zone 1 are Seattle Main and Seattle Elliott. Both wire centers are in downtown Seattle in King County.

⁶⁰ Our conclusion that competitors are not impaired in certain circumstances without access to unbundled switching in Density Zone 1 in the top 50 MSAs also is predicated upon the availability of the enhanced extended link (EEL). As noted in section VI(B) above, the EEL allows requesting carriers to serve a customer by extending a customer's loop from the end office serving that customer to a different end office in which the competitor is already collocated. The EEL therefore allows requesting carriers to aggregate loops at fewer collocation locations and increase their efficiencies by transporting aggregated loops over efficient-high capacity facilities to their central switching location. Thus, the cost of collocation can be diminished through the use of the EEL. We agree with ALTS that, if requesting carriers can obtain nondiscriminatory, cost-based access to the enhanced extended link, their collocation costs would decrease, and they would need to collocate in as few as one incumbent LEC central office in an MSA to provide service. *UNE Remand Order*, para. 288.

Qwest's Position:

182 Qwest claims that the FCC's exemption for unbundled switching is not dependent on the capacity availability for other services. Qwest argues that the FCC determined that the CLECs had alternatives to unbundled switching other than the incumbent LEC in Density Zone 1 wire centers. *Qwest Brief at 43*. Qwest states that the FCC analysis was not limited to wire centers not having exhaust issues. Qwest states that AT&T's and WorldCom's concerns about whether CLECs have access to a particular EEL or collocation is misplaced. *Id.* Qwest argues that the FCC's analysis is based upon the alternatives available to CLECs in the aggregate, and not as to whether a particular CLEC has access to a desired transport element. *Id.*

Discussion and Decision

183 The FCC has found that switch capacity, distance-sensitive transport costs, and collocation costs significantly impair a requesting carrier.⁶¹ We agree, and find that AT&T is correct that Qwest should not enjoy the exemption from the requirement relating to unbundled switching in Density Zone 1 unless the CLEC can obtain EEL from Qwest as a local transport alternative on a basis at parity with Qwest's self-provisioned local transport alternatives. We find Qwest's argument that the FCC's analysis is based on alternatives in the aggregate insufficiently persuasive to outweigh statutory consideration of the "impair" standard. AT&T's proposed paragraph SGAT 9.11.2.5.3 should be adopted.⁶²

To determine whether a requesting carrier serves end-users with four or more voice grade equivalent lines in Density Zone 1, are the lines counted using customer locations rather than the sum of customer locations in the wire center? - WA SW-10a

184 SGAT section 9.11.2.5 states that ... "unbundled local switching does not constitute a UNE...when CLEC end-user customer to be served with unbundled local switching has four access lines or more in Density Zone 1 in specified MSAs."

AT&T's Position

185 AT&T advocates that the "four or more" lines be counted for each location in a wire center, rather than for the wire center as a whole. *AT&T Brief at 32*. AT&T asserts that the SGAT is ambiguous regarding how lines should actually be counted, whether on per-wire center or per-location basis, and that the FCC provides no clarity. *Id.*

⁶¹ *UNE Remand Order* at para. 261.

⁶² *See AT&T brief* at 31.

186 AT&T asserts that it does not always possess the information necessary to determine the number of lines an end user may have at multiple locations, and that Qwest does not have a process available to allow a CLEC to determine line counts for a wire center. *Id.* The more practical way to implement the “3 lines or less” exception to Qwest’s obligation to provide the unbundled local switching network element is on a location basis. *Id.*

Qwest’s Position

187 Qwest states that the FCC has been clear that the number of lines is satisfied if the end user has “four or more lines within density zone 1.” Qwest argues that AT&T’s request to erode the FCC’s exception and make the end user have four or more lines at each geographic location within Density Zone 1 is contrary to the mandate of the FCC and should be rejected. *Qwest Brief at 44.*

Discussion and Decision

188 The FCC rule, at CFR 51.319(c)(2), is not clear on this point. However, in the order implementing the rule, the FCC used an unbundling analysis that takes into account the possibility that carriers will offer residential service, as well as considering the cost, quality, ubiquity and timeliness factors in the FCC “impair” standard. The FCC concludes that lack of access to unbundled switching, as a general matter, impairs the ability of a requesting carrier to provide service to consumers.⁶³

189 Also compelling is the discussion in the *UNE Remand Order* on the “four or more lines” issue at paragraphs 290-298. The FCC noted that competition has continued to develop, primarily for business customers or users with substantial telecommunications needs. *Id. at 291.* It acknowledges that exemptions from unbundling requirements are appropriate in areas with competition. However, it recognized that competitors have deployed switches to serve medium and large business customers, rather than the “mass market,” which is largely the residential market. *Id. at para. 292.* The FCC found that

...any business that has three or fewer lines is likely to share more characteristics of the mass market customer than a medium and large business. In particular, small businesses are likely to use the same number of lines as many residential subscribers and purchase similar volumes and types of telecommunications services.

Id. at 293.

⁶³ *UNE Remand Order*, para. 255.

190 The Commission believes a subscriber with less than four lines at a location, even if it has more than one location in a wire center, will exhibit characteristics more in common with small businesses or residential customers and will likely not be in the market segment in which competition is prevalent. To address the possibility of impairing the market's ability to provide competitive choices to consumers, we therefore conclude that the proper way to count the number of lines a requesting carrier's end-user has is by counting them per location, not per wire center.

Should unbundled local switching in Density Zone 1 for subscribers subject to the "four line or more" exemption be priced on a market or TELRIC basis? - WA-SW-10b and UNE P-12

Qwest's Position

191 Qwest relies on the FCC's *UNE Remand Order* to conclude that unbundled switching is available at UNE rates for CLEC end user customers "with three lines or less."⁶⁴ For customers with four or more lines in Density Zone 1, local switching is not required to be unbundled and is not a UNE.⁶⁵ Qwest also objects to the suggestion that if a CLEC end user with three lines adds a fourth line, the first three lines would remain at TELRIC prices. *Qwest Brief at 22-23.*

192 No other parties addressed this issue in briefs.

Discussion and Decision

193 Pricing of unbundled local switching when requesting carrier end-users have more than four lines remains subject to Commission regulatory oversight, and may be priced on a non-TELRIC basis. We agree with the FCC that in Density Zone 1, the increased demand and enhanced revenue opportunities associated with high-density areas make it possible for requesting carriers serving a dense area to make more efficient use of self-provisioned switching facilities, and requesting carriers can thus counter incumbent LEC scale economies. Therefore there is a rationale for limiting the unbundling requirement for local switching, and that same rationale supports allowing Qwest to charge prices based on something other than TELRIC for all lines at a location, if the end user meets the exemption criteria as determined by this Commission. We therefore accept Qwest's proposal.

Switch interfaces at the GR-303 and TR-008 level – Issue WA-SW-16

⁶⁴ *UNE Remand Order*, para. 293.

⁶⁵ *UNE Remand Order*, para. 299.

194 Issue SW-16 appears to be near resolution between the parties. CLECs want to be able to interconnect with Qwest's loop electronics at either the GR-303 or TR-008 interface.

AT&T's Position

195 AT&T points to the FCC statement on technical feasibility as it appears in its *Local Competition Order* at paragraph 198. *AT&T Brief at 33*. Section 251(c)(3) of the 1996 Act requires ILECs to provide access to UNEs at any "technically feasible point." AT&T goes on to point out that the "FCC has conclude[d] that the obligations imposed by sections 251(c)(2) and 251(c)(3) of the 1996 Act include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." The FCC concluded Congress' intent was to

"obligate the incumbent to accommodate the new entrant's network architecture... Consistent with that intent, the incumbent must accept the novel use of, and modification to, its network facilities to accommodate the interconnector or to provide access to unbundled elements."

AT&T Brief at 34. AT&T states that although the FCC concludes that consideration needs to be given to "legitimate threats to network reliability and security," the burden of proof, here, rests with the ILEC. *Id.*

196 AT&T also acknowledges that Qwest submitted language in a workshop in another jurisdiction, filed by Qwest in this proceeding as Exhibit 702, that is acceptable to AT&T. *AT&T Brief at 35*.

Covad's Position

197 Covad concurs with AT&T that Qwest be required to unbundle the high speed line ports from its digital loop carrier (DLC) systems for access by CLECs. Covad recommends that the SGAT be revised to allow this procedure. *Covad Brief at p. 11*.

Qwest's Position

198 Qwest indicates that although the parties were at impasse on this issue at the conclusion of the April 24-25 follow-up workshop, Qwest and AT&T have now agreed to SGAT language and have agreed to close this issue. *Qwests Brief at 44*.

Discussion and Decision

199 The Commission has reviewed Exhibit 702 and Qwest's proposed language for SGAT sections 9.11.1.1.2, and 9.11.1.1.2.1 through 9.11.1.1.2.10. The proposed language changes are not completely word-for-word descriptions from Exhibit 702.

However, it appears that the intent of Exhibit 702 has not been changed materially. The Commission has not received any response to the latest SGAT version from the interested parties.

200 The Commission will close this issue once both AT&T and Qwest verify that language based on the agreement between AT&T and Qwest in Exhibit 702 is correctly reflected in the SGAT.

FINDINGS OF FACT

201 Having discussed above in detail the oral and documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse between the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

- 202 (1) Qwest Corporation, formerly known as and sometimes referred to in this Order as U S WEST Communications, Inc., is a Bell operating company (BOC) within the definition of 47 U.S.C. Section 153(4), providing local exchange telecommunications service to the public for compensation within the State of Washington.
- 203 (2) The Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, to verify the compliance of Qwest with the requirements of Section 271(c) of the Telecommunications Act of 1996, and to review Qwest's Statement of Generally Available Terms, or SGAT, under Section 252(f)(2) of the Act.
- 204 (3) Section 271 of the Act contains the general terms and conditions for BOC entry into the interLATA market.
- 205 (4) Pursuant to 47 U.S.C. Section 271(d)(2)(B), before making any determination under this section, the FCC is required to consult with the state commission of any state that is the subject of a BOC's application under Section 271 in order to verify the compliance of the BOC with the requirements of Section 271(c).
- 206 (5) Pursuant to 47 U.S.C. section 252(f)(2), any BOC statement of terms and conditions filed with the state commission under Section 252(f)(1) must comply with Section 251 and 252(d) and the regulations thereunder in order to gain state commission approval.

- 207 (6) In October 1997 and in March 2000, the Commission issued Interpretive and Policy Statements addressing the process and evidentiary requirements for the Commission's verification of Qwest's compliance with Section 271(c).
- 208 (7) On March 22, 2000 and on April 28, 2000, Qwest submitted its SGAT for review and approval by this Commission.
- 209 (8) On June 6, 2000, the Commission consolidated its review of Qwest's SGAT in Docket No. UT-003040 with its evaluation of Qwest's compliance with the requirements of Section 271(c) in Docket No. UT-003022.
- 210 (9) During the third workshop in this proceeding held on March 12-15, 2001, and April 24-26, 2001, Qwest and a number of CLECs submitted testimony and exhibits to assist the Commission in evaluating Qwest's compliance with the requirements of Section 271(c) of the Act, as well as the review of Qwest's SGAT pursuant to Section 252(f).

Unbundled Network Elements Findings of Fact

- 211 (10) Qwest and AT&T each submitted a proposed SGAT section 12 regarding testing procedures during the April workshops. AT&T's proposed SGAT language contains, and Qwest's proposed section 12 language does not contain, an additional type of testing called Comprehensive Production Testing.
- 212 (11) Testing will be a topic for discussion in the context of Qwest's Co-Provider Industry Change Management Process, which will be discussed at the Commission's Workshop IV.
- 213 (12) SGAT section 9.1.2 states that Qwest will comply with all state wholesale service quality requirements when furnishing unbundled network elements (UNEs).
- 214 (13) SGAT section 9.23.1.2.2 provides that UNE combinations will not be directly connected to a Qwest finished service.
- 215 (14) SGAT section 4.23(a) defines finished services as including voice messaging, Qwest-provided DSL, Access Services, private lines, retail services and resold services.
- 216 (15) SGAT section 9.6.2.1 provides that when cross-connects are not ordered as part of a UNE combination, the CLEC is responsible for cross-connections, including any regeneration charges.

- 217 (16) SGAT section 9.6.2.3 specifies that when regeneration is required between an unbundled direct interoffice transmission point and a CLEC's collocation, the CLEC must order regeneration as specified in SGAT section 9.1.4.
- 218 (17) SGAT section 9.1.10 defines the channel regeneration charge required when the distance from a Qwest facility to the CLEC's facility is of sufficient length to require regeneration.
- 219 (18) SGAT section 9.1.2 provides that Qwest shall provide non-discriminatory access to UNEs on rates, terms and conditions that are non-discriminatory, just, and reasonable.
- 220 (19) SGAT section 9.1.2.1 restricts Qwest's obligation to build to facilities that Qwest would be legally obligated to build to meet provider of last resort obligations or Eligible Telecommunications Carrier obligations to provide primary basic local exchange service.
- 221 (20) SGAT section 9.1.2.4.2 provides that if no facilities exist and the facilities requested by the CLEC do not meet the criteria contained in SGAT section 9.1.2.1, Qwest will reject the CLEC's service request and require the CLEC to submit a request for construction of unbundled network elements, and pay for all construction, as specified in SGAT section 9.19.
- 222 (21) SGAT section 9.1.2.3 provides that Qwest will perform incremental facility work in order to make UNEs available.
- 223 (22) SGAT section 9.23.3.7.1 prohibits CLECs from using combinations of UNEs that include an Enhanced Extended Loop (EEL), unless granted a waiver by the FCC for the particular EEL or if the CLEC proves it is using the UNE combination to provide a significant amount of local exchange traffic to a particular end use customer.
- 224 (23) SGAT section 9.23.3.7.2.7 prohibits connection of EELs to tariffed services.
- 225 (24) SGAT section 9.23.3.12 states that when a CLEC converts services to UNEs or UNE combinations, that any termination liabilities applicable to such services will apply upon conversion.
- 226 (25) SGAT section 9.23.3.17 allows Qwest or CLECs to market their services to each other's end users when they receive misdirected calls from such end users.

Unbundled Transport Findings of Fact

- 227 (26) SGAT section 9.6 provides for dedicated transport to be offered in two components, Unbundled Dedicated Interoffice Transport (UDIT) and Extended UDIT (EUDIT).
- 228 (27) SGAT section 9.6.1.1 provides that UDIT prices are distance-sensitive flat rates, and EUDIT prices are non-distance sensitive flat rates.
- 229 (28) In oral testimony, Qwest stated that it does not provide electronics at the CLEC end of the EUDIT facility.

Unbundled Local Switching Findings of Fact

- 230 (29) FCC rules require Qwest to make available unbundled local switching to CLECs.
- 231 (30) SGAT sections 9.11.1, 9.13, and 9.14 provide that Qwest will make available to CLECs AIN databases and platforms, Signaling Transfer Points, Service Management Systems, and AIN Customized Services.
- 232 (31) FCC rules do not require an ILEC's AIN service software to be offered as an unbundled element to CLECs if certain conditions are met.
- 233 (32) FCC rules provide that ILECs need not offer unbundled switching in Density Zone 1 wire centers in the top 50 Metropolitan Service Areas (MSAs) when EELs are available.
- 234 (33) Qwest's Seattle Main and Seattle Elliott wire centers are the only Density Zone 1 wire centers qualifying for the FCC exemption.
- 235 (34) SGAT section 9.11.2.5 provides that unbundled local switching will not be offered at UNE rates when a CLEC's end-user customer has four or more access lines in Density Zone 1 in specified MSAs.
- 236 (35) SGAT section 9.11.1.1.2 has been revised by Qwest to reflect an agreement between Qwest and AT&T on conditions pertaining to the offering of GR-303 features and functionalities as unbundled switching.

CONCLUSIONS OF LAW

- 237 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following

summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

- 238 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.

Unbundled Network Elements Conclusions of Law

- 239 (2) Adequate testing is essential to providing CLECs a meaningful opportunity to compete, as required by the Telecom Act.
- 240 (3) A decision on testing should incorporate a review of the testing issues being addressed in Workshop IV.
- 241 (4) Qwest's failure to adhere to retail quality standards in the provision of UNEs violates its obligation to provide nondiscriminatory access to UNEs.
- 242 (5) Qwest's prohibition in the SGAT against combining UNEs with "finished services" violates the Commission's orders requiring the provision of UNEs in any technically feasible manner and in combination with others' network elements.
- 243 (6) Qwest's proposal that CLECs pay directly for regeneration required to provide UNEs unfairly burdens CLECs with costs they cannot avoid or control.
- 244 (7) Under the Telecom Act, Qwest must provide access to UNEs to any location currently served by Qwest's network. Qwest must construct new facilities to any location currently served by Qwest when similar facilities to those locations have exhausted. Qwest's failure to do so is a violation of its legal obligations under the Act.
- 245 (8) Qwest's SGAT provisions result in the failure to either "light" dark fiber or to modify electronics on fiber facilities to provide additional capacity for UNEs in the same manner it would provide additional capacity for its own use, and therefore are in violation of Qwest's obligation to provide UNEs in a nondiscriminatory manner as required by the Commission and the FCC.
- 246 (9) Qwest's SGAT construction requirements and its practices in constructing facilities for UNEs result in discriminatory treatment of CLECs compared to Qwest's practices in constructing like facilities for retail services.

- 247 (10) The FCC's *Supplemental Clarification Order* does not prohibit the "significant local usage" test being applied to new EELs as well as to EELs converted from special access facilities.
- 248 (11) Qwest's prohibition on the connection of EELs to tariffed services properly reflects the requirements of the FCC's *Supplemental Clarification Order*.
- 249 (12) Qwest's application of termination liability assessments (TLAs) when converting CLEC special access or private line circuits to EELs does not unfairly restrict the CLECs' opportunities to compete. Qwest's proposed waiver of TLAs as outlined in its brief will not violate Commission policy or regulations.
- 250 (13) To be consistent with Commission orders and policy, for purposes of applying the "significant local use" restriction on EELs, telecommunications traffic delivered to ISPs should be considered local traffic.
- 251 (14) Qwest's proposed procedures regarding the marketing of its services to CLEC customers during misdirected calls fail to promote full and fair competition.
- 252 (15) The modifications proposed by the Commission Staff to Qwest's procedures for marketing its services during misdirected calls promote competition without unreasonably restricting Qwest's right to market its services.

Unbundled Local Transport Conclusions of Law

- 253 (16) Qwest's distinction between UDIT and EUDIT in the SGAT results in discriminatory treatment of CLECs seeking to obtain unbundled transport, and violates the requirements of the *Local Competition Order* that Qwest provide unbundled transport to CLECs under equal terms and conditions to those under which the incumbent provides such elements to itself.
- 254 (17) Qwest's refusal to provision electronics at the CLEC end of unbundled dedicated transport if requested by the CLEC violates its obligation to provide unbundling throughout its ubiquitous transport network as required by the FCC.

Unbundled Local Switching Conclusions of Law

- 255 (18) Qwest's refusal to make its AIN service software available to CLECs is not a violation of its obligations under the FCC rules to provide unbundled local switching.

- 256 (19) Qwest's proposal to prohibit CLECs from obtaining unbundled local switching at UNE prices when EELs are not available, violates the FCC's rules requiring a local transport alternative to be available in order to qualify for an exemption to provide unbundled switching in Density Zone 1 areas.
- 257 (20) Qwest's proposal to include all customer lines in a wire center when determining whether the "four or more lines" exemption applies, fails to recognize the FCC's intent that "mass market" customers not be subject to the unbundling exemption.
- 258 (21) Qwest's proposal to price unbundled local switching in Density Zone 1 wire centers at market rates does not violate its unbundled switching obligations as set forth in the Act and in the *UNE Remand Order*.
- 259 (22) Qwest's proposed amendment to SGAT language regarding switch interfaces at the GR-303 and TR-008 level is consistent with its obligations to provide unbundled local switching.

ORDER

260 IT IS ORDERED That, to secure a recommendation that Qwest complies with Checklist 2 elements of Section 271 review, it must alter its SGAT as necessary, and alter its behavior, consistent with the following order as to impasse items.

Unbundled Network Elements

- 261 (23) A decision on the allowed or required scope of premarket testing is deferred pending consideration of testing issues in Workshop IV.
- 262 (24) Qwest must meet retail quality standards in its provision of UNEs to competing carriers.
- 263 (25) Qwest must delete its SGAT prohibition against combining UNEs with "finished services."
- 264 (26) Qwest must not require CLECs to pay directly for regeneration required to provide UNEs. Qwest is entitled to recover regeneration costs indirectly across the pricing of all facilities, including its own.
- 265 (27) Qwest must provide access to UNEs to any location currently served by Qwest's network. Qwest must construct new facilities to any location currently served by Qwest when similar existing facilities to those locations have exhausted.

- 266 (28) Qwest must provide either “light” or dark fiber, or must provide or modify electronics on fiber facilities, to provide additional capacity for UNEs in the same manner it would provide additional capacity for its own use.
- 267 (29) Qwest must modify its SGAT construction requirements so that special construction charges for UNEs apply only when CLECs request UNEs outside of Qwest’s current service area. CLEC orders for UNEs should be subject to the same provisioning criteria as CLEC orders for retail services in a given area.
- 268 (30) Qwest is entitled to apply the “significant local usage” test to new EELs as well as to EELs converted from special access facilities.
- 269 (31) Qwest may prohibit the connection of EELs to tariffed services **only to the extent** set forth in the FCC’s Supplemental *Clarification Order*.
- 270 (32) Qwest is not required to waive termination liability assessments (TLAs) when converting special access or private line circuits to EELs. However, Qwest must offer to CLECs its proposed waiver of TLAs as outlined in its brief.
- 271 (33) For purposes of applying the “significant local use” restriction on EELs, telecommunications traffic delivered to ISPs shall be considered local traffic.
- 272 (34) Qwest must modify its SGAT to add limitations on its ability to market its services to CLEC customers during misdirected calls.

Unbundled Transport

- 273 (35) Qwest must eliminate any distinctions between UDIT and EUDIT.
- 274 (36) Qwest must provision electronics at the CLEC end of unbundled dedicated transport if requested by the CLEC.

Unbundled Local Switching

- 275 (37) Qwest need not change its SGAT to make its AIN service software available to CLECs.
- 276 (38) Qwest must provide CLECs unbundled local switching at UNE prices when EELs are not available.
- 277 (39) When determining whether the “four or more lines” exemption from providing unbundled local switching as a UNE applies, Qwest must count the lines by customer location, rather than by wire center.

- 278 (40) Qwest is not required to price unbundled local switching in Density Zone 1
wire centers at TELRIC rates.
- 279 (41) Subject to dispute from other parties and the resolution of any such disputes in
post-order process, Qwest's proposed amendment to SGAT language regarding
switch interfaces at the GR-303 and TR-008 level is accepted.

Other Elements, as the Parties Have Agreed

- 280 (42) Qwest's SGAT provisions on other items within Checklist Items 2, 5, and 6, as
the provisions have been agreed by the parties, are satisfactory for adoption
and are approved. Those provisions -- so long as the Company demonstrates
that it acts in accordance with the provisions -- are sufficient for a favorable
recommendation in the FCC review of an application for Section 271 approval.

DATED at Olympia, Washington and effective this day of July, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL,
Administrative Law Judge

NOTICE TO PARTIES:

This is an Initial Order. The action proposed in this Initial Order is not effective until entry of a final order by the Utilities and Transportation Commission. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below.

WAC 480-09-780(2) provides that any party to this proceeding has twenty (20) days after the service date of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-09-780(3). WAC 480-09-780(4) states that an *Answer* to any Petition for review may be filed by any party within ten (10) days after service of the Petition.

WAC 480-09-820(2) provides that before entry of a Final Order any party may file a *Petition To Reopen* a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition To Reopen will be accepted for filing absent express notice by the Commission calling for such Answer.

One copy of any Petition or Answer filed must be served on each party of record, with proof of service as required by WAC 480-09-120(2).

An original and three copies of any Petition or Answer must be filed by mail delivery to:

**Office of the Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, WA 98504-7250**

or, by hand delivery to:

**Office of the Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive, S.W.
Olympia, WA 98504**