BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996	)	Docket No. UT-003022
In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996.	)	Docket No. UT-003040
	)	**QWEST'S COMMENTS ON THE DRAFT INITIAL ORDER ON WORKSHOP 3 ISSUES**

QWEST'S COMMENTS ON THE THIRTEENTH SUPPLEMENTAL ORDER; INITIAL ORDER ON WORKSHOP 3 (CHECKLIST ITEMS 2, 5, AND 6)

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INTRODUCTION

Qwest Corporation (hereinafter "Qwest") submits these Comments on the Thirteenth Supplemental Order, Initial Order on Workshop 3 ("Initial Workshop 3 Order") regarding Qwest's compliance with the checklist items at issue in Workshop 3: Checklist Item 2 (access to unbundled network elements), Checklist Item 5 (access to unbundled local transport), and Checklist Item 6 (access to unbundled local switching).

Qwest challenges several aspects of the Initial Workshop 3 Order that are inconsistent with governing law, the facts in the record, and commission decisions from other states. Qwest respectfully requests that the Commission reverse the Initial Workshop 3 Order on these issues.

Qwest does not challenge the Initial Workshop 3 Order lightly. In workshops across its region, Qwest has tried to limit its challenges to checklist item reports in the spirit of collaboration and to demonstrate its commitment to bringing competition to the local and long distance telecommunications markets as quickly as possible. Furthermore, Qwest operates as a CLEC out of region, and therefore must balance its advocacy to be consistent with both its ILEC and CLEC operations.[1] Accordingly, although Qwest contends that its policies, practices, and Statement of Generally Available Terms ("SGAT") in Washington meet the requirements of the Telecommunications Act of 1996 and all relevant FCC orders, it will accept many of the requirements contained in the Initial Workshop 3 Order and will modify its SGAT to comply with those requirements. However, Qwest must challenge those aspects of the Initial Workshop 3 Order where the conclusions are demonstrably inconsistent with the Act or

[1] The FCC recently remarked that Qwest's positions on local competition issues are particularly worthy of note because it operates as both a CLEC and incumbent LEC. *See* Fourth Report and Order, *Deployment of*

FCC rules and are otherwise unsupported in the record. Moreover, the decisions Qwest challenges are inconsistent with other commissions that have ruled on similar issues across Qwest's region.[2] Qwest respectfully requests that the Commission revise the Initial Workshop 3 Order on these issues.

COMMENTS

I. OBLIGATION TO BUILD UNES FOR CLECS: ISSUES CL2-15, UNE-C-11, EEL-5, CL2-18, TR-14, AND UNE-C-21

A. The Initial Workshop 3 Order Incorrectly Determines That Qwest Must Construct Facilities On Demand for CLECs In the Qwest Service Territory: Issues CL2-15, UNE-C-11, EEL-5, and UNE-C-21

The Initial Workshop 3 Order incorrectly requires Qwest to construct unbundled network facilities for CLECs anywhere in Qwest's service territory at no fee for CLECs.[3] Qwest respectfully requests that the Commission reverse the Initial Workshop 3 Order, and adopt Qwest's proposed SGAT language, which would require Qwest to evaluate a CLEC's request for "special construction" utilizing similar criterion to that Qwest uses to determine whether to construct facilities for retail customers.

The Initial Workshop 3 Order notes that the FCC in the *UNE Remand Order* explicitly declined to require incumbent LECs to construct facilities to meet a requesting carrier's demands where the incumbent has not deployed facilities for its own use.[4] It also recognized the FCC's standard that

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Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 01-204 ¶¶ 35, 80 (Aug. 8, 2001) ("*Collocation Remand Order*").

[2] As of the time of filing these comments, Colorado and the Multistate have issued orders on checklist items 2, 5 and 6. Arizona has issued an order on checklist item 5, only; however, none of the issues that Qwest challenges here are addressed in that order. These are the only 271 proceedings in Qwest's region that have issued orders on checklist items 2, 5 and 6.

[3] Qwest's TELRIC Cost studies do not capture the cost of adding new facilities to the network. This issue is discussed more fully in workshop 4. *See*, Rebuttal Testimony of Jean Liston, pp. 30-33 (June 22, 2001).

[4] Initial Workshop 3 Order ¶ 79.

ILEC's unbundling obligation extends throughout its ubiquitous transport network, but did not require incumbent LECs to "provision for 'point-to-point' demand requirements for facilities that the incumbent LEC has not deployed for its own use'".[5] The Initial Workshop 3 Order concludes: "In other words, the incumbent LECs '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."[6] However, that order then reaches a conclusion directly at odds with the FCC pronouncements upon which the Order purports to rely; specifically, "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."[7] The Order states that the use of the term "existing network" "applies to the 'area' (end offices, serving wire centers, tandem switches, interexchange points of presence, etc.) that Qwest's interoffice facilities serve."[8] However, there is no factual or legal support on the record to support that conclusion. The Initial Workshop 3 Order then concludes that Qwest is also required "to construct additional loops to reach customer's premises whenever local facilities reach exhaust."[9] Thus, although the Order recognizes that FCC orders do not require incumbent LECs to build facilities where the incumbent does not have facilities for its own use, the Initial Workshop 3 Order requires Qwest to construct new facilities (apparently without limitation) to "any location currently served by Qwest when

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[5] *Id.* (quoting *UNE Remand Order*).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* In SGAT § 9.1.2.1, Qwest agrees to build loops and line-side switch ports necessary to meet its ETC or POLR obligations.

similar facilities to those locations have been exhausted."[10] The Order then states that Qwest cannot charge a CLEC for the facilities it constructs on the CLEC's behalf in its serving territory, because Qwest would not always construct facilities for its retail customers, or would impose special construction charges if it did so.[11] Thus, the Order requires Qwest to construct UNEs for CLECs on demand, regardless of the type of UNE or the CLEC's own ability to construct and history of facility deployment. Under the Order, Qwest must do so under *better* terms than it would apply to its own retail customers in its service territory.

In sum, CLEC can demand that Qwest construct a network on its behalf and free of charge if the requested facilities would be in Qwest's service territory.[12] The Initial Workshop 3 Order is not only unsupported by any authority, it contradicts the Act, controlling precedent, relevant FCC guidance and decisions from other state commissions. Qwest respectfully requests that the Commission modify the Initial Workshop 3 Order on this issue.

1. The Act Makes Clear That Incumbent LECs Are Not Required To Construct UNEs for CLECs.

Section 251(c)(3) requires incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms of the [parties' interconnection] agreement and the requirements of this section and section 252 . . . ."[13] The Initial Workshop 3 Order is inconsistent with this obligation.

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[10] *Id*. ¶ 80.

[11] *Id*.

[12] Initial Workshop 3 Order ¶ 79.

The United States Court of Appeals for the Eighth Circuit, the court charged with interpreting the Act and the FCC's local competition regulations, agrees that the Act does not require Qwest to construct UNEs for CLECs. In the first *Iowa Utils. Bd.* case, the court held that "subsection 251(c)(3) implicitly requires unbundled access *only* to an incumbent LEC's *existing network--not to a yet unbuilt* superior *one*."[14] The Initial Workshop 3 Order is contrary to this holding. By requiring Qwest to construct facilities in any "area" served by Qwest's interoffice facilities on demand, whether it has network facilities deployed or not, the Order requires Qwest to construct not only a "yet unbuilt" network, but also a "superior" one. It is not a fair reading of the Eighth Circuit's decision to claim, as CLECs do, that the vacature of the FCC's "superior quality" rules is unrelated to the issue of construction. To the contrary, the Eighth Circuit's rejection of the superior quality rules is controlling. The Eighth Circuit conclusively held that the Act does not require incumbent LECs to provide unbundled access to an "unbuilt" network, regardless of whether that network is in the incumbent's service territory or not.

The Eighth Circuit reaffirmed its decision to vacate the FCC's "superior quality" rules as inconsistent with the plain language of the Act in *Iowa Utils. Bd. v. FCC,* 219 F.3d 744, 757-58 (8th Cir. 2000), *cert. granted*, 121 S. Ct. 877 (2001) ("*Iowa Utils Bd. III*"). Discussing both its rejection of the FCC's Total Element Long Run Incremental Cost ("TELRIC") methodology and its rejection of

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[13] 47 U.S.C. § 251(c)(3).

[14] Iowa Utils. Bd. v. FCC, 120 F.3d 753, 812 (8th Cir. 1997), aff'd in part, rev'd on other grounds, sub nom, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) ("Iowa Utils. Bd. I") (emphasis added). See also MCI Telecommunications Corp. v. Illinois Bell Tel. Co., 222 F.3d 323, 328 (7th Cir. 2000) ("Section 251 of the Act requires incumbent LECs to allow new entrants to interconnect with existing local networks, to lease elements of existing local networks at reasonable rates, and to purchase the incumbents' services at wholesale rates and resell those services to retail customers.") (emphasis added).

the FCC's superior quality requirements, the Eighth Circuit again made clear that Congress did not require incumbent LECs to build the CLECs' networks for them. For example, discussing the plain meaning and intent of the Act in the context of its TELRIC ruling, the Eighth Circuit stated:

> The reality is that Congress knew it was requiring the existing ILECs to share their existing facilities and equipment with new competitors as one of its chosen methods to bring competition to local telephone service, and it expressly said that the ILECs' costs of providing those facilities and that equipment were to be recoverable by just and reasonable rates. Congress did not expect a new competitor to pay rates for a 'reconstructed local network,' . . . but for the existing local network it would be using in an attempt to compete.
>
> It is the cost to the ILEC of providing its *existing* facilities and equipment either through interconnection or by providing specifically requested unbundled network elements that the competitor will in fact be obtaining for use that must be the basis for the charges. *The new entrant competitor, in effect, piggybacks on the ILEC's existing facilities and equipment*. It is the cost to the ILEC of providing that ride on those facilities that the statute permits the ILEC to recoup.[15]

Accordingly, the Eighth Circuit has been clear (not once but twice) that an incumbent LEC is only required to unbundle and provide access to a network it has already constructed. There is nothing in either decision that equates the incumbent's "existing network" with an "area" where *no* facilities are in place.

2. FCC Rules Are Unambiguous That Incumbent LECs Are Not Required To Construct UNEs for CLECs.

All of the relevant FCC pronouncements are consistent with Qwest's interpretation of its unbundling obligations as well. For example, when the FCC issued its first order implementing the Act it made clear that an incumbent's obligation to unbundle facilities applies only to the incumbent's *existing*

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[15] *Iowa Utils. Bd. III*, 219 F.3d at 750-51 (citation omitted; emphasis added).

and deployed network, not to the incumbent's entire service territory:

> [W]e conclude that an incumbent LEC must provide unbundled access to interoffice facilities between its end offices, and between any of its switching offices and a new entrant's switching office, *where such interoffice facilities exist*.
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> * * * *
>
> 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.*[16]

In the November 1999 *UNE Remand Order*, the FCC made this point again, even more emphatically:

> 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*.[17]

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[16] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499 at ¶¶ 443, 451 (Aug. 8, 1996) ("*Local Competition Order*"). AT&T has suggested that this ruling is limited to rural LECs only. However, the FCC was clear that its pronouncement applies to all incumbent LECs.

[17] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 3696, ¶ 324 (Nov. 5, 1999) (emphasis added) ("*UNE Remand Order*").

As this excerpt from the *UNE Remand Order* makes clear, the FCC rule that incumbent LECs need only provide access to their "existing" networks means that incumbents must only provide access to facilities they have actually "deployed," not to facilities they "could" deploy in their service area. Despite this clear ruling, the Initial Workshop 3 Order expands this requirement and orders that "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 UNEs available to competitors."[18] This FCC statement, however, is unremarkable: there is no dispute that wherever Qwest Corporation has facilities in place, it must unbundle them upon CLEC request. The key to the FCC's statement is the sentence the Initial Workshop 3 Order disregards: ". . . *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.*"[19] As this sentence amply demonstrates, the FCC imposes no construction obligation on incumbent LECs.[20]

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[18] Initial Workshop 3 Order ¶ 79.

[19] *Id. See also Collocation Remand Order* ¶ 76 ("We recognize that incumbent LECs . . .are not required to provide competitors with better interconnection or access to network elements than *already exists*. This requirement *merely allows the collocator to use the existing network in as efficient a manner* as the incumbent uses for its own purposes.") (emphasis added).

[20] This interpretation of an incumbent LEC's obligation to provide UNEs has been endorsed by other state commissions. For example, in an arbitration between the former U S WEST and AT&T Communications of the Midwest, Inc., the Iowa Utilities Board was asked to resolve disputes regarding the scope of service quality requirements in the parties' interconnection agreement. Specifically, the Board addressed whether U S WEST should be required to provide all of the features and functions of switches even if those features and functions were not turned up. The Board held that U S WEST would be required to provide such features. In its decision, the Board noted that its decision was consistent with the Eighth Circuit's interpretation of the Act because it did not require U S WEST to construct facilities for CLECs: "The [Eighth Circuit] Court's language is limited to the point that ILECs cannot be required to construct new network facilities for CLECs. It does not mean that an ILEC can deny CLECs the full functionality of the ILEC's existing network." *AT&T Communications of the Midwes*t , Inc., Docket No. AIA-96-1, (ARB 96-1), Final Arbitration Decision on Remand, Order Denying Motion to File Rebuttal Testimony, Granting Motion to Strike, and Denying Motion for Sanctions, 1998 WL 316248 (IUB May 15, 1998). As the Iowa Board recognized the Act and FCC rules require Qwest to provide ubiquitous access to its *existing* network, not to construct a ubiquitous network for CLECs.

AT&T has claimed that the FCC's statements in these orders created an "exception" to the supposed rule that incumbent LECs must construct UNEs on demand for CLECs. In other words, AT&T suggests that the specific references to “transport” in these orders means that while there is no obligation to build transport facilities, there is an obligations to build all other UNEs. As an initial matter, the FCC did not describe this ruling as an "exception." Rather, it is simply an example that demonstrates the Act’s limitations on an incumbent’s unbundling obligations. Moreover, neither AT&T nor any other CLEC has cited the supposed "rule" that requires construction in the first instance.[21] The simple reason for their failure is that the Act does not impose any such obligation on incumbents. Where facilities are not already in place, CLECs are in just as good a position as Qwest to construct the new facilities. Thus, even under AT&T’s view, the Initial Workshop 3 Order erred by requiring Qwest to construct interoffice facilities on behalf of CLECs.

Similarly, in the *BellSouth Louisiana II Order*, the FCC held that BellSouth was not required to provide vertical features that were not loaded into the switch software because to do so would require BellSouth to build a superior network for CLECs.[22] The FCC reasoned that for software that is

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[21] In its briefs on checklist item 2, AT&T cited 47 C.F.R. § 51.309(c) as supposedly encompassing this obligation. This provision, however, is patently inapplicable. This provision simply states that when an incumbent leases a particular UNE to a CLEC, the incumbent still has the duty to maintain, repair, or replace that specific network element that it leased to the CLEC. The FCC made this clear in paragraph 268 of the *Local Competition Order*: "The ability of other carriers to obtain access to a network element for some period of time does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element." (Footnotes omitted). In adopting the repair/replacement requirement for existing UNEs, the FCC never suggested that incumbents must build the UNE or loop facility in the first instance.

Likewise, the generic statements in 47 C.F.R. § 51.313(b) simply state that "where applicable," the terms and conditions under which the incumbent LEC provide access to network elements must be no less favorable than terms and conditions under which the incumbent LEC offers the UNE to itself. The rule plainly addresses the terms of access to *existing* network elements.

[22] Memorandum Opinion and Order, Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, interLATA Services in Louisiana, CC Docket No. 98-121, 13 FCC Rcd 20599 ¶ 218 (1998) ("*BellSouth Louisiana II Order*").

loaded on the switch, but not activated, BellSouth is required to provide access because those features are part of BellSouth's existing network that it has chosen not to use. However, it drew the line at requiring BellSouth to install new vertical features: "we agree with BellSouth's claim that it is not obligated to provide vertical features that are not loaded into the switch software, because this would require BellSouth to build a network of superior quality."[23]

As demonstrated herein, the FCC has been consistent with its rulings on an incumbent's unbundling obligations under the Act: Section 251(c)(3) requires only unbundling of Qwest's existing network, not network facilities that do not currently exist. The Initial Workshop 3 Order cites no FCC order or rule in support of the decision on this issue.

3. Other States Disagree With the Initial Workshop 3 Order.

a. Colorado

The Initial Workshop 3 Order stands alone among the states considering Qwest 271 applications in its requirement that Qwest construct unbundled network elements in its service territory for CLECs, regardless of whether Qwest has network facilities in place. For example, on August 16, 2001, the Colorado Hearing Commissioner issued his decision on the same checklist items (2, 5 and 6)

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[23] *Id.*. Likewise, with regard to loop qualification information that must be provided as a part of OSS access, the FCC has held, consistent with its other rulings on the scope of incumbent LEC unbundling, that incumbent LECs are not required to construct a loop qualification database for CLECs if they have not created a loop qualification database for themselves.

> We disagree . . .with Covad's unqualified request that the Commission require incumbent LECs to catalogue, inventory, and make available to competitors loop qualification information through automated OSS even when it has no such information available to itself. *If an incumbent LEC has not compiled such information for itself, we do not require the incumbent to conduct a plant inventory and construct a database on behalf of requesting carriers.*

UNE Remand Order ¶ 429 (footnotes omitted; emphasis added). Although this holding is in a different context, it is further evidence that where an incumbent LEC has not provided a network element for itself, it is not required to create or construct that element for a CLEC.

and held that Qwest has no obligation to build UNEs on demand for CLECs.[24]

The arguments presented by Qwest and the CLECs in Colorado – and the Multistate proceeding as well – were the same as those presented in Washington. For example, addressing the CLECs' claims that *Iowa Utils Bd. I* has no bearing on whether Qwest must construct UNEs for CLECs, the Hearing Commissioner adopted Qwest's position regarding the meaning and significance of the Eighth Circuit's decision:

> AT&T and WCom correctly point out that [the] *Iowa Utilities Board* decision invalidated FCC rules that would have required ILECs to provide superior network elements when requested. However, the Eighth Circuit's rationale was based upon the premise that section 251(c)(3) requires unbundled access *only* to an incumbent LEC's *existing* network. [25]

Furthermore, the Hearing Commissioner rejected out of hand AT&T's claim that FCC rules requiring incumbent LECs to repair or replace UNEs leased to CLECs as "essentially the same thing" as requiring incumbent LECs to construct UNEs on demand, reasoning (as Qwest does) that "[t]here is a fundamental difference between repairing or replacing that which you are legally obligated to provide in the first place and building that which you are not legally obligated to provide at all."[26] The Hearing Commissioner also rejected AT&T's reading of paragraph 324 of the *UNE Remand Order* as "disingenuous:"

> AT&T's argument that the *UNE Remand Order* requires ILECs to construct facilities by negative implication is disingenuous. The FCC has never expressly imposed construction requirements in all

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[24] Decision No. R01-846, *Investigation into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Volume 4A Impasse Issues Order at pp. 8-10 (Aug. 16, 2001) ("Decision No. R01-846")

[25] *Id*. at 9 (emphasis in original).

[26] *Id*.

> circumstances on ILECs. One would surmise that the Commission would have directly imposed this potentially burdensome responsibility on ILECs in unequivocal terms.[27]

The Colorado Hearing Commissioner concluded as follows:

> The Eighth Circuit emphasized that nondiscriminatory access to unbundled elements does not lead to the conclusion that 'incumbent LECs cater to every desire of every requesting carrier.' *Qwest, simply put, is not a UNE construction company for CLECs. Qwest should not be required in all instances to expend the resources in time and manpower, at an opportunity cost to itself, to build new facilities for competitors who have the option of constructing those facilities at comparable costs.*[28]

This holding is in accord with the ruling by the Multistate Facilitator, referenced below.

In Colorado, the Hearing Commissioner determined that to ensure that Qwest provides UNEs to CLECs in a nondiscriminatory manner, Qwest should amend Section 9.19 of the SGAT to include the sentence: "Qwest will assess whether to build for CLEC in the same manner that it assesses whether to build for itself." Qwest agrees with the Colorado Hearing Commissioner that this language fully addresses reasonable CLEC concerns.[29] Qwest is prepared to implement this language by ensuring it constructs facilities pursuant to the special construction provisions of the SGAT (§9.19) using the same assessment criterion.

b. Multistate - Antonuk

The Multistate Facilitator, John Antonuk, issued his report on Checklist Items 2, 5, and 6 on Monday August 20, 2001 ("Multistate Report"). The Multistate Report addresses the issue of whether Qwest has an obligation to construct unbundled network elements for CLECs. Mr. Antonuk

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[27] *Id*. at 10 (footnote omitted).

[28] Id. at 9 (emphasis added).

determined that the decision is clear: "Qwest should not generally be required to construct new facilities to provide CLECs with UNEs."[30]

The Multistate Report makes many of the same arguments that Qwest has made. First, the Multistate Report discusses that requiring Qwest to be a construction company for CLECs at TELRIC rates inappropriately shifts all investment risk to Qwest while CLECs are only on a month-to-month obligation to pay for the unbundled network elements that they have requested be constructed.

> First, there is a substantial risk that Qwest will not recover actual costs in the event that AT&T's proposal is accepted. AT&T is not correct in arguing that UNE rates are compensatory for the installation of new or enhanced electronics on dark fiber. UNE rates are monthly in nature and generally without minimum term commitments. They can be said to compensate Qwest for investments that it has already made for its own purposes; at least that is a conceptual underpinning of the FCC's pricing approach for UNEs. However, a CLEC that requires a new investment altogether should have more than an obligation to pay month-to-month. Absent a term commitment, Qwest could be significantly under-compensated in cases where CLECs abandon UNEs before new investment is recovered.
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> In essence, asking that Qwest be required to provide new construction is tantamount to requiring Qwest to take investment risk in new facilities. Nothing in the Act or in the rulings of the FCC suggests that promoting competition requires altering the risks of new investments. Moreover, AT&T has proposed no language that would mitigate this risk to Qwest. Instead, AT&T proposes merely to move the obligation to Qwest, which actually would encourage AT&T to require Qwest to make investments in situations where neither AT&T nor any other rational competitor would risk its own resources on the chance that customer use would continue for long enough to provide investment recovery. It is wholly inconsistent with the promotion of effective

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[29] Decision No. R01-846 at p.10.

[30] Multistate Report at p.25.

> competition to sever connections between risk/reward by transferring all of the former to a competitor.[31]

Next, the Multistate Facilitator underscored the importance of facilities based competition and the distinction between existing and new facilities:

> A key premise of the Act and of the FCC's implementing actions with respect to it is the development of facilities-based competition. For existing facilities, it is correct to place the burden on Qwest to show why access to them is not appropriate. For new facilities, the burden should be on Qwest's competitors to show why access to them is appropriate.
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> There is no evidence of record to support any claim that Qwest has a monopoly position with respect to new facilities. In fact, circumstances would suggest that all carriers competent enough to have a future in the business have the capability either to construct new facilities themselves, or to contract with third party construction experts (much as incumbents do themselves on occasion) who do.[32]

In this docket, just as in the Multistate, there is no evidence to support any claim that Qwest has any advantage over CLECs with respect to new facilities.

In conclusion on the general obligation to build question, the Multistate Facilitator ordered that:

> Thus there is not a clear basis for concluding that the failure to require Qwest to undertake the obligation to construct new facilities will significantly hinder fulfillment of the Act's general objectives, let alone its specific requirements. Even were there some demonstrated basis to so conclude, one would have to consider the goal of promoting facilities-based competition. Requiring Qwest to serve indefinitely and ubiquitously as both a financing arm (by taking investment risk under month-to-month UNE leases to CLECs) and as a construction contractor (by being forced to perform the installations required) is not appropriate. Not only will it not promote the goal, it may well hinder it. If CLECs can transfer the economic risks of new construction to

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[31] Multistate Report at p.24.

[32] *Id.* at 25.

> Qwest, there is little reason to expect that they will have an incentive to take facilities risks or develop efficient installation capabilities.[33]

The Colorado Hearing Commissioner and Multistate Facilitator agree that Qwest should not be required to construct UNEs for CLECs. Requiring Qwest to construct UNEs for CLECs is contrary to the terms of the Act, FCC orders, and to the public policy goals of the Act and the state of Washington.

c. Other Washington Orders

In fact, the Initial Workshop 3 Order exceeds this Commission's past decisions on build obligations. In the arbitration between the former U S WEST Communications and AT&T Wireless, the Commission rejected contractual provisions that would have required Qwest to construct facilities on demand for AT&T Wireless as well as language proposed by Commission Staff that would have imposed a "geographic" zone in which Qwest would be required to construct facilities. Instead, the Commission approved contract language that required U S WEST to provide DS1 and DS3 facilities where available. Where facilities were not available, AT&T Wireless was required to pay U S WEST special construction changes for new facilities. U S WEST was not required at all to build facilities outside its normal service areas.[34] The Commission stated that the language it approved was "consistent with the public interest, convenience, and necessity, and it is nondiscriminatory."[35]

4. The Initial Workshop 3 Order Is Contrary to the Public Policy Goals of the Act.

Requiring Qwest to construct UNEs for CLECs is not only unlawful under the Act, it is contrary

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[33] *Id*.

[34] Commission Order Adopting Arbitrator's Report And Approving Interconnection Agreement, Petition for Arbitration of an Interconnection Agreement Between AT&T Wireless Services, Inc. and U S WEST Communications, Inc. Pursuant to 47 U.S.C. Section 252, Docket No. UT-960381, 1997 Wash. UTC LEXIS 65, at *10 n.5 and *16 (Oct. 6, 1997).

to the public policy goals of the Act and the state of Washington. The FCC has increasingly emphasized the importance of facilities-based competition by CLECs as an important means of bringing competition to the local telecommunications market. In its August 8, 2001 *Collocation Remand Order*, the FCC stated that "[t]hrough its experience over the last five years in implementing the 1996 Act, the [FCC] has learned that only by encouraging competitive LECs to build their own facilities or migrate toward facilities-based entry will real and long-lasting competition take root in the local market."[36] According to the FCC, "the greatest long-term benefits to consumers will arise out of competition by entities *using their own facilities*."[37] In addition, the FCC states that "[b]ecause facilities-based competitors are less dependent than other new entrants on the incumbents' networks, they have the greatest ability and incentive to offer innovative technologies and service options to the consumers."[38] Thus, whereas the Act and the FCC *encourage* CLECs to construct their own networks, the Initial Workshop 3 Order discourages facilities-based competition by eliminating any incentive that CLECs construct their own competing networks.

Public policy goals in Washington will also be furthered with a decision that encourages CLECs to invest in and construct certain network facilities. RCW 80.36.300 contains a policy statement with regard to telecommunications services in Washington, providing, in relevant part as follows:

> The legislature declares it is the policy of the state to:

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[35] *Id*. at *16, ¶ 13.

[36] *Collocation Remand Order* ¶ 4.

[37] First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket Nos. 96-98, 88-57, FCC 00-366, ¶ 4 (rel. Oct. 25, 2000) ("*MTE Order*").

[38] *Id*.

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> (5) Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state[.]

Clearly, promoting diversity of supply is not accomplished though the imposition of a ubiquitous obligation to build on one carrier, thereby concentrating the source of supply in a single entity.[39] The Commission should strongly reconsider a ruling that will discourage CLECs from investing in their own competing networks.[40]

Furthermore, with respect to high capacity facilities, Qwest hardly enjoys control of the market. For example, in the Rebuttal Testimony of Jean M. Liston in Workshop 4 on loops, Qwest presented Exhibit JML-46, a study of the high capacity market in Seattle. As this study shows, Qwest's high capacity market share is steadily decreasing. In the provider market of high capacity facilities, for example, competitors provided roughly 31% of DS-1 facilities and 40.8% of DS-3 facilities and account for far more market growth than Qwest. Likewise, in the transport market, CLECs were responsible for three-quarters of the market growth.

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[39] The Colorado Staff agreed that a blanket requirement that Qwest construct UNEs for CLECs is imprudent and discourages facilities-based competition, stating: "the ultimate goal of this Commission, consistent with that of the FCC, is to promote facilities based competition. Forcing Qwest to build UNEs that the CLECs can just as easily build themselves impedes this goal." Volume IV A Impasse Issues: Commission Staff Report On Issues That Reached Impasse During The Workshop Investigation Into Qwest's Compliance With Checklist Item Nos. 2, 5, and 6, at ¶ 28 (Staff, Colorado Public Utilities Commission, July 31, 2001) ("*Colorado Staff Vol. IVA Report*")

[40] *See also Collocation Remand Order* ¶ 7 ("[W]e have previously recognized that, in adopting the 1996 Act, Congress consciously did not try to pick winners or losers, or favor one technology over another. Rather, Congress set up a framework from which competition could develop, one that attempted to place incumbents and competitors on generally equal footing, so that each could share the efficiencies of an already ubiquitously-deployed local infrastructure while retaining independent incentives to deploy new, innovative technologies and alternative infrastructure.")

5. Qwest Has Made Significant Accommodations That Obviate Imposing An Obligation To Construct CLECs' Networks For Them.

In imposing a requirement that Qwest construct UNEs for CLECs, the Initial Workshop 3 Order does not discuss the numerous concessions Qwest has made, beyond the requirements of the Act, to meet CLEC requests for unbundled network elements. For example, Qwest has already agreed to perform significant UNE construction activity for CLECs. Qwest has agreed to construct loops and switch ports when necessary to meet its provider-of-last-resort and ETC obligations.[41] This significant obligation does not appear to be considered in the Initial Workshop 3 Order. Qwest also agrees to perform incremental facility work (which Qwest distinguished from "building new facilities" or "constructing UNEs" in that entirely new facilities are not being constructed) which includes the following: 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.[42] This work may well require Qwest to dispatch a truck and/or technician to perform the work. Thus, Qwest has already agreed to perform significant work on behalf of CLECs.

Additionally, if there is a funded construction job pending that would meet the CLEC's requirements, Qwest will take the CLEC's order and hold it, notifying the CLEC and holding the order until the construction job is completed. Furthermore, CLECs can request construction under the special construction provisions of the SGAT,[43] and Qwest will consider those requests using the same assessment process it uses for itself to determine whether to build for retail customers. Thus, to the

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[41] SGAT 9.1.2.1.

[42] SGAT 9.1.2.3.

extent a CLEC wishes Qwest to construct UNE facilities for it, it may request that Qwest undertake the construction on the CLEC's behalf. CLECs also have the option of self-provisioning the facility or obtaining it from a third party.

Furthermore, Qwest made a significant concession to CLECs since Workshop 3 that undercuts any claim that Qwest somehow enjoys an unfair advantage by declining to construct loop facilities on demand for CLECs. In Arizona workshops and in the Washington Workshop addressing unbundled loops, CLECs claimed that if Qwest would not build all loop facilities for them on demand, Qwest should share its own loop construction plans with CLECs. CLECs argued that this would permit them to determine the type of facilities that Qwest will deploy in different neighborhoods so that CLECs could adjust their planning and marketing strategies accordingly. As discussed in workshop 4, Qwest offered to share this information with CLECs.[44]

AT&T has claimed in briefing this issue that "any other holding" than requiring Qwest to build facilities on demand for CLECs "would allow Qwest to deny a CLEC's request for a UNE and then build the network element itself to provide the service to the same customer."[45] AT&T, however, completely ignores the fact that it (or any another CLEC) is fully capable of building that same network element itself on any terms and conditions it deems appropriate. As discussed above, for example,

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[43] *See, e.g.*, SGAT § 9.19.

[44] *See* SGAT § 9.1.2.4:

Qwest will provide CLEC notification of major loop facility builds through the ICONN database. This notification shall include the identification of any funded outside plant engineering jobs that exceeds $100,000 in total cost, the estimated ready for service date, the number of pairs or fibers added, and the location of the new facilities (e.g., Distribution Area for copper distribution, route number for copper feeder, and termination CLLI codes for fiber). CLEC acknowledges that Qwest does not warrant or guarantee the estimated ready for service dates. CLEC also acknowledges that funded Qwest outside plant engineering jobs may be modified or cancelled at any time.

[45] AT&T's Brief on Impasse Issues Regarding Checklist Items 2, 5, and 6 at 9.

AT&T and WorldCom routinely build high capacity facilities and, in fact, have a larger share of some segments of the high-capacity market than Qwest. There is no "economy of scale or scope" that Qwest can share with the CLEC. As a result of the Initial Workshop 3 Order, CLECs already are emboldened and have escalated their demands that Qwest construct their networks for them. In Workshop 4 addressing loops, CLECs claim that Qwest must construct copper loops for CLECs when they desire to provide DSL to a particular customer.[46] They make this demand even if the customer is served by digital loop carrier, technology incompatible with DSL. It is difficult to imagine a more perfect example of a demand that Qwest build a "yet unbuilt superior network" in violation of the Act solely to meet the demands of CLECs.

The Act contemplates three mechanisms for permitting CLECs to provide service in competition with Qwest: (1) the construction of new competing networks by CLECs; (2) purchase of unbundled network elements from Qwest to create a finished service or "fill in the gaps" in the CLEC's own network; and (3) resale.[47] The Initial Workshop 3 Order, however, creates an unheard of fourth option: requiring Qwest to construct a competing network for CLECs free of charge and shifting all of the risk of capital investment to Qwest. The Initial Workshop 3 Order far exceeds any requirements Congress and the FCC imposed. The Commission should reject the recommended decision.

B. Purchasing, Installing and Connecting Electronics to Fiber for CLECs: Issues CL2-18 and TR-14

The Commission should reverse the recommendation in the Initial Workshop 3 Order requiring Qwest to add electronics to dark fiber. Adding electronics to dark fiber is *not* incremental facility

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[46] Transcript Volume XXXVII (Aug. 1, 2001) at 5617-19.

[47] *Local Competition Order* ¶ 12.

work, but constitutes a requirement to construct or build transport facilities for CLECs. Adding electronics that are not there is different from providing existing electronics. Qwest agrees that it will activate the electronics (consistent with the unbundling requirement of Section 251(c)(3)) if the electronics are already in place on the fiber but simply have not been turned on. However, *adding* electronics does not fall under the umbrella of the unbundling requirement of Section 251(c)(3). This is consistent with the FCC's unwillingness to impose on Incumbent LECs an obligation to construct new facilities for the provision of unbundled transport.[48] As stated above, Qwest agrees in SGAT Section 9.1.2.3 to perform incremental facility work and identifies what falls under the heading of incremental facility work.[49] However, adding electronics at a CLEC's request does not constitute incremental facility work.[50]

The Colorado Hearing Commissioner and the Multistate Facilitator agree that Qwest is not required to add electronics to dark fiber. The Colorado Hearing Commissioner agreed with Qwest that the Act and FCC rules require Qwest to provide *dark*, not lit, fiber and that the addition of electronics impermissibly exceeds the bounds of a modification necessary for access to UNEs:

> Here, the unbundled network element is dark fiber, *not* lit fiber. It is a subtle, yet critical distinction. I agree with Qwest that the addition of electronics to dark fiber means that dark fiber is no longer being offered. This goes beyond a mere modification to provide access to an unbundled element. *In essence, the addition of electronics to unlit fiber constitutes the construction of a new, 'functional' dedicated transport facility, which is plainly prohibited by the UNE Remand Order*. Additionally, Staff has found that adding electronics at the

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[48] *See, e.g., Local Competition Order* ¶ 451("[W]e expressly limit the provision of unbundled interoffice facilities to *existing* incumbent LEC facilities.") (emphasis added).

[49] SGAT § 9.1.2.3 expressly clarifies that incremental facility work does not include the upgrade of electronics.

[50] *Id*.

> termination locations of dark fiber can be a time consuming and expensive process. Therefore, AT&T's argument falls outside the scope of the FCC's requirement for modifications to LEC facilities. *Just as there is no obligation upon Qwest to build dark fiber in the first instance, there is no obligation to add electronics to the segment once it is built*.[51]

In the Multistate workshop, adding electronics to dark fiber was considered under the umbrella of the obligation to build UNEs section. The Multistate Facilitator held that Qwest is not required to add or install electronics on dark fiber:

> AT&T's brief expressly argued that failing to require Qwest to install electronics to light dark fiber would allow Qwest to retain the fiber solely for its own use. This argument ignores the self-evident point that AT&T can gain access to the dark fiber, and install its own electronics, using its rights of access to Qwest's poles, ducts, conduits, and rights of way. * * * [T]here is no basis for concluding that CLEC's cannot make such installations in a way that gives them a meaningful opportunity to compete with Qwest.[52]

This decision is consistent with Qwest and the Colorado Hearing Commissioner.

The Commission should reject the Initial Workshop 3 Order and hold that Qwest is not required to add electronics to dark fiber.

1. The FCC Does Not Require the Installation of Electronics in CLEC Wire Centers.

The FCC has not instituted a requirement that incumbent LECs add electronics for dedicated transport facilities. In fact, the FCC has indicated the opposite: "[W]e do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand

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[51] Decision No. R01-846 at 12 (emphasis added and in original).

[52] Multistate Report at pp.25-26; *see also id*. at pp.78-79.

requirements for facilities that the incumbent LEC has not deployed for its own use."[53] The addition of electronics to existing, unlit fiber constitutes the provision of new transport facilities, so Qwest is under no obligation to do so.

The FCC has, of course, imposed on incumbent LECs an obligation to unbundle dark fiber.[54] But neither the *UNE Remand Order* nor any subsequent FCC decision states that the incumbent LEC must also provide the electronics at the CLEC end of the fiber or add or upgrade electronics.[55] In fact, the FCC has stated that the obligation to add electronics belongs to the CLEC leasing the fiber.[56] Additionally, such a requirement would be contrary to the FCC's explicit refusal to impose an obligation to build in the transport context.

The FCC defined dark fiber as "fiber that has not been activated through connection to the electronics that 'light' it."[57] By definition, dark fiber does not have electronics attached to it and electronics would have to be added to light the dark fiber to make dedicated transport. Adding electronics changes dark fiber into dedicated transport, a separate and distinct UNE. The FCC has been clear that there is no obligation to build dedicated transport. The argument that Qwest is required to add electronics to dark fiber is an attempt to circumvent the direct FCC order that incumbent LECs

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[53] *UNE Remand Order* ¶ 324.

[54] *Id. at* ¶¶325-26.

[55] *Cf. Id*. at n.292. The FCC has mentioned the provision of electronics in the transport context. *See UNE Remand Order* ¶ 323; *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 00-297, 15 FCC Rcd 17806 ¶ 120 (rel. Aug. 10, 2000). However, the FCC has never stated or required that an ILEC must provide electronics *at a CLEC wire center*.

[56] *Id.* ("The [carrier] leasing the fiber is expected to put its own electronics and signals on the fiber.") (quoting definition of dark fiber in Newton's Telecom Dictionary, 14th ed.).

[57] *UNE Remand Order* ¶ 174. *See also id*. ¶325.

are not required to build dedicated transport facilities.[58]

Qwest will make dark fiber available to CLECs. CLECs can, and do, light that dark fiber and create dedicated transport at virtually the same cost as Qwest would incur. Qwest should not be required to incur significant up-front investments to finance CLEC expansions. Moreover, there is no assurance that the CLEC would not disconnect the dedicated transport circuits the day after installation, leaving Qwest and its ratepayers responsible for recovering the cost of the CLEC abandoned facilities investment. It is inappropriate to force the financial risk of these new network requirements on Qwest and its ratepayers. To the extent a CLEC would like to request that Qwest add electronics to light dark fiber, the CLEC can utilize Section 9.19 of the SGAT, the special construction provision, to make such a request. Qwest can then evaluate the CLEC request, and make an informed decision about any network expansion plans. Qwest will evaluate CLECs requests under Section 9.19 using the same assessment criteria as it does for itself. Again, the Commission should reject any attempt by CLECs to erode the clear FCC direction that Qwest is not obligated to build UNEs for CLECs.

2. The Addition of Electronics Constitutes the Construction of New Facilities.

The Initial Workshop 3 Order required Qwest to provide access to unbundled dedicated transport between Qwest wire centers, CLEC wire centers, and the wire centers of other carriers. In addition, where a CLEC requests transport facilities of a specific optical capacity, Qwest must provide it. Qwest does not dispute these conclusions as applied to transport facilities deployed in Qwest's network. However, the Initial Order went a step further and ordered that where capacity is limited or at exhaust, "Qwest is required to either light additional fiber or change electronics to provide additional

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[58] *UNE Remand Order* ¶ 324.

capacity in the same manner it would provide additional capacity for its own use."[59] By ordering Qwest to light fiber for CLECs, the Initial Order exceeds Qwest's obligations to provide transport and dark fiber. In keeping with the FCC's requirements for unbundled network element access, Qwest has agreed in its SGAT that it will perform incremental facility work as needed to provide UNEs.[60] But adding electronics cannot be categorized as incremental facility work: the cost and logistics of electronics installation set it apart from incremental facility work.

The addition of "electronics" can mean anything from a multiplexing unit to a digital cross connect device. In the case of placing an "FLM-150 multiplexer," the actual material and placement costs are $36,880 per node and two nodes are required to establish new bandwidth capability. This assumes that all supporting framework and power are in place in the central office; otherwise the cost could be even higher. The recent installation of a "Titan 5500" digital cross connect at Qwest's Columbine central office in Colorado cost $1,237,053. In installations such as this, floor space must be acquired, infrastructure evaluated, and power needs assessed. The process can take four to five months to complete. Therefore, the addition of electronics at the CLEC's wire center is distinguished from incremental facility work (*e.g.* adding a card, placing a drop etc.) due to the significant cost and logistics issues involved. It is not part of providing Qwest's *existing* network to CLECs.

In the provision of interoffice transport, Qwest makes every effort to respond to CLECs' wishes and to comply with the FCC's requirements. For example, in SGAT § 9.1.2.3[61], Qwest agrees to do

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[59] Initial Workshop 3 Order ¶ 88.

[60] *See* SGAT § 9.1.2.3.

[61] In the Verizon 271 application with the FCC for Pennsylvania, intervenors have complained that Verizon, which has three states already approved by the FCC, is not agreeing to add cards for CLECs. Qwest agrees to add cards to existing equipment at the central office or remote locations and provides for this in SGAT § 9.1.2.3.

many things for CLECs like placing a drop, adding a card to existing equipment at the central office or remote locations, or adding field cross jumpers. But installing electronics within a CLEC's wire center clearly constitutes the construction of new transport facilities and is therefore not required by the FCC. Qwest should not be expected to bear the significant expense of adding electronics on a CLEC's premises when it is not legally obligated to do so.

As stated above, there is no statute, rule or case that imposes upon Qwest the obligation to construct all UNEs. The Act requires "access to *only* an incumbent LEC's *existing* network." Therefore, the obligation to provide access to UNEs in 251(c)(3) of the Act does not require Qwest to build or construct facilities for CLECs. The Commission should reverse the Initial Workshop 3 Order on these disputed issues.

II. THE FCC'S LOCAL USE RESTRICTION APPLIES TO EELS, REGARDLESS OF WHETHER THEY ARE NEW EEL ORDERS OR ORDERS FOR CONVERSIONS OF SPECIAL ACCESS TO EELS: ISSUES EEL 1 AND EEL 4

Qwest makes available Enhanced Extended Loops ("EELs"), a combination of loop and dedicated interoffice transport, to requesting carriers consistent with FCC rules.[62] In fact, Qwest has already gone beyond FCC rules. The FCC requires incumbent LECs to provide new EELs in limited circumstances, specifically in density Zone 1 of the top 50 MSAs, which in Washington would only include two wire centers in Seattle. However, Qwest offers CLECs new EELs throughout its 14-state region.

The FCC also established a local use requirement on the use of EELs until the FCC was able to

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[62] SGAT § 9.23.3.7 *et seq*.

fully investigate the impact of EELs on the exchange access market.[63] This local use requirement dictates that requesting carriers must provide a "significant amount of local exchange service to a particular end user customer" on a particular circuit in order to purchase an EEL.[64] The dispute centers around SGAT § 9.23.3.7.1, which reads, in pertinent part:

> Unless CLEC is specifically granted a waiver from the FCC which provides otherwise, and the terms and conditions of the FCC waiver apply to CLEC's request for a particular EEL, CLEC cannot utilize combinations of unbundled network elements that include Unbundled Loop and unbundled interoffice dedicated transport to create a UNE Combination unless CLEC establishes to Qwest that it is using the combination of network elements to provide a significant amount of local exchange traffic to a particular end user customer.[65]

CLECs acknowledge that it is appropriate to apply a local use restriction when converting a special access circuit to an EEL; however, CLECs claim that this restriction should only apply to "conversions" and not to requests for new circuits.

Issues EEL-1 and EEL-4, relate to whether the local use requirement should apply to EELs, or just to a subset of EELs - EELs that were converted from special access circuits. The Initial Workshop 3 Order holds that the "significant amount of local exchange services" requirement applies only to conversions of tariffed special access circuits to EELs and not to new installations of EELs. Qwest believes that this holding is in error.

The clear language of the FCC's order regarding the local use restriction states otherwise. Furthermore, even if that language were ambiguous, the FCC also noted that EELs cannot be

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[63] Supplemental Order Clarification, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183, 15 FCC Rcd 9587 ¶ 2 (June 2, 2000) ("*Supplemental Order Clarification*").

[64] *Id*. at ¶ 22.

substituted for tariffed special access service . The FCC could not have meant to subject only conversions to the rule, when that would undercut the very rationale the FCC used for adopting the local use requirement in the first place.

This issue was not raised in Colorado, but it was in the Multistate proceeding. The Multistate Report agrees with Qwest that the local use restriction applies to all EELs, both new EELs and conversions from special access circuits.[66]

A. The Clear Language of the FCC's *Supplemental Order Clarification* Demonstrates That The Local Use Restriction Should Apply to All EELs - Both New and Conversions

In the *Supplemental Order Clarification*, the FCC clearly found that the local use restriction applies to all EELs:

> To reduce uncertainty for incumbent LECs and requesting carriers and to maintain the status quo while we review the issues contained in the Fourth FNPRM, we now define more precisely *the "significant amount of local exchange service" that a requesting carrier must provide in order to obtain unbundled loop-transport combinations*.[67]

This provision states that requesting carriers must meet the local use requirement to obtain EELs. CLECs obtain EEL irrespective of whether they purchase it new or convert an existing special access circuit. The FCC has also said that:

> Permitting the *use* of combinations of unbundled network elements in lieu of special access services could cause substantial market

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65 SGAT § 9.23.3.7.1.

66 Multistate Report at p. 82.

67 *Supplemental Order Clarification* at ¶ 21(emphasis added).

> dislocations and would threaten an important source of funding for universal service.[68]

From the FCC's language quoted above, the harm of substantial market dislocations and the threatening of an important source of funding for universal service is triggered by permitting the use of EELs in lieu of special access service. The FCC distinguishes special access circuits from EELs by virtue of whether there is a significant amount of local use on the circuit. These threats would apply equally to the use of new EELs and EEL conversions. If IXCs were able to order new EELs instead of placing orders for new special access circuits, the IXCs such as AT&T would simply order a new EEL along the same path as a special access circuit, turn up that circuit, place the traffic from the special access circuit on the EEL and discontinue use of the special access circuit. This issue is compounded by the Initial Workshop 3 Order requiring that Qwest must build EELs upon request. Thus, according to that Order, AT&T could ask Qwest to construct a new transmission path along side an old, at no cost, for the specific purpose of replacing an old circuit. An IXC would always purchase EELs at TELRIC rates in lieu of special access rates if allowed. This "important source of funding for universal service" referenced by the FCC would, therefore, quickly vanish.

The CLECs argument that the local use restriction only applies to conversions emanates from paragraph five of the UNE Remand Supplemental Order Clarification which provides that "IXCs may not convert special access services" to EELs..[69] However, the fact that in that in one instance the FCC emphasized that carriers cannot convert special access circuits to EELs without meeting the local use

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[68] *Supplemental Order Clarification*, at ¶ 7 (emphasis added); *see also Id.* at ¶ 4..

[69] *Id*. at ¶ 5 (referring to Supplemental Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-370, 15 FCC Rcd 1760 (rel. Nov. 24, 1999) ("*UNE Remand Supplemental Order*").

requirements does not mean that the local use requirement does not apply to all EELs. The FCC's statements quoted in the preceding paragraphs apply equally to new EELs and conversions of EELs. Therefore, the FCC's narrow statement that the local use restriction applies to conversions of EELs is both correct, and not mutually exclusive of its other statements that the local use restriction applies to all unbundled loop-transport combinations (EELs).

B. EELs Cannot Be Substituted for Tariffed Special Access, Either as a Newly Installed Combination or as a Conversion of Existing Service

The FCC has stated in the *Supplemental Order Clarification* that carriers cannot substitute EELs for special access unless they provide a significant amount of local exchange services to a particular customer.[70] A newly installed EEL could be used as a substitute, or to replace, special access service. The service provided would be no different than if an existing special access service were converted to an EEL. If the FCC's rule requiring a significant amount of local exchange service were applied only to the conversion of EELs, as the Initial Workshop 3 Order requires, then carriers could circumvent the entire FCC rule by simply placing new orders for EELs instead of converting existing service which would render the FCC's order meaningless.

Furthermore, the FCC noted that it was implementing the temporary rule "to reduce uncertainty" and "to maintain the status quo."[71] Excluding the FCC's rule for new installations would not further either of those stated goals. Therefore, the only conclusion is that the FCC meant for the "local use" requirement to apply to both new installations of EELs and conversions of existing special access services to EELs.

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[70] *Supplemental Order Clarification* at ¶ 8.

[71] *Id*. at ¶ 21.

As stated above, the Multistate Report supports Qwest's position that the local use requirement must be applied to all EELs and that there is no sound reason for distinguishing between new EELs and conversions in this regard:

> EELs, whether converted from special access circuits or not, are unbundled loop-transport combinations. Therefore, *special new EELs are subject to the same local use certification requirements as are converted access circuits*, as was more fully discussed in the *Third Report* from these workshops. Ultimately, it must be concluded that there is *not a sound reason for distinguishing between the circumvention of access charges on converted UNEs versus new UNEs. The impact is the same; preservation of the status quo pending final FCC decision therefore requires that each be treated similarly.*[72]

In Washington, there is no sound reason for distinguishing between the circumvention of access charges on converted UNEs versus new UNEs. The Commission should reverse and modify the Initial Workshop 3 Order to apply the local use requirement to new EELs as well as converted EELs.

C. Allowing EELs to be Used for the Purpose of Providing Special Access Service Would Undercut the Market Position of Facilities-Based Competitive Access Providers

An independent reason to prohibit the use of EELs for providing special access service is that an immediate policy to allow IXCs to obtain UNE-based special access could undercut the market position of facilities-based competitive access providers.[73] If the holding in the Initial Workshop 3 Order were to stand, the competitive access market would be severely impacted. Additionally, this policy would penalize competitive providers that have made facilities-based investments contrary to the

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[72] Multistate Report at p. 82 (emphasis added).

[73] *UNE Remand Order*, ¶18.

FCC's goal of promoting such competition.[74]

For the foregoing reasons, the Commission should reverse the Initial Workshop 3 Order on these disputed issues.

III. ISP TRAFFIC CANNOT BE COUNTED AS LOCAL TRAFFIC FOR PURPOSES OF THE LOCAL USE RESTRICTION APPLICABLE TO EELS (ISSUE EEL-16)

Qwest provides to CLECs the combination of unbundled loop and transport network elements known as Enhanced Extended Link ("EEL") pursuant to rules established by the FCC. As stated above, to prevent IXCs from using EELs to bypass special access services, the FCC requires that requesting carriers provide a "significant amount of local exchange service" in order to obtain EELs from incumbent LECs.[75] The issue here is one familiar to this Commission: is Internet-bound traffic local traffic that meets the FCC's local use requirement?

It is true that this Commission has historically and repeatedly found that ISP traffic is local. However, in April 2001, the FCC issued a dispositive decision stating that such traffic is interstate and that the state commissions are prevented from finding otherwise. The Initial Workshop 3 Order provides that ISP traffic[76] is local traffic, presumably because to date this Commission has so held.[77] The entire "Discussion and Decision" section of the Initial Workshop 3 Order consists of the following sentence: "This Commission has consistently ruled that ISP traffic is local and there is no reason to

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[74] The FCC's goal of promoting facilities-based competition is discussed in more detail in the obligation to build section.

[75] *UNE Remand Supplemental Order* at ¶¶ 4-5.

[76] Qwest often uses the term Internet-bound traffic because Qwest believes that it more accurately describes the end-to-end analysis of the FCC. Other entities use the term ISP traffic or ISP-bound traffic. These are all terms for the same traffic.

differentiate such traffic on the basis of how the loop carrying that traffic is regulated."[78] The Initial Workshop 3 Order does not attempt to distinguish the *ISP Remand Order*[79] or the controlling effect of the FCC's holding that all ISP traffic is interstate traffic, not local. Qwest can only presume that the ALJ believes he does not have authority to overrule a binding Commission precedent. Qwest expects that the ALJ believes the Commission (and only the Commission) can change its holdings on this issue.

The FCC's recent *ISP Remand Order* left no room for equivocation on the subject.[80] There is no debate on this point. This issue of counting ISP traffic toward local use requirements for EELs was not addressed in Colorado, but it was addressed in the Multistate proceeding. The Multistate Report agrees with Qwest, and specifically finds:

> The FCC's recent order on reciprocal compensation leaves little doubt that ISP traffic is interstate in nature and has nothing to do with the provisions of the Telecommunications Act of 1996 as they relate to reciprocal compensation for the exchange of local traffic. *Therefore, on its face, ISP traffic cannot count under any practical application of the FCC's requirements, as local usage.*[81]

Parties have not contested Qwest on this subject in states that are only now deciding reciprocal compensation issues. Key aspects of the decision merit brief discussion.

First, and fundamentally, traffic bound for information service providers ("ISPs"), including

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[77] It is important to note that no intervenor raised this issue in testimony. It was raised by AT&T for the first time at the conclusion of the EELs section during the April follow-up workshop.

[78] Initial Workshop 3 Order, ¶ 120.

[79] Order on Remand and Report and Order *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic,* CC Docket Nos. 96-98 & 99-68, FCC 01-131 (rel. April 27, 2001) ("*ISP Remand Order*").

[80] The appropriate type of intercarrier compensation for Internet-bound traffic is addressed in the *ISP Remand Order*. However, the type of intercarrier compensation for Internet-bound traffic is not at issue for purposes of this checklist item 2 EEL issue. The only relevant issue for Issue EEL-16 is whether the Internet-bound traffic is local traffic of the type that can be counted toward the EEL local use requirement.

Internet access traffic, is not local traffic.[82] Second, the FCC's ruling preempts any state action to the contrary.[83] Third, even if Internet-bound traffic were local in nature, the FCC's require that the local traffic must be local voice traffic.[84] Internet-bound traffic is data traffic, not voice traffic. Internet-bound traffic cannot be counted by CLECs as local exchange traffic contemplated by the local use restrictions.

A. Internet-Bound Traffic Is Not Local Traffic

A dispositive decision was handed down by the FCC on the jurisdictional nature of Internet-bound traffic after the conclusion of the April follow-up workshop in Washington. The FCC held that traffic delivered to an ISP, including Internet access traffic, is "*indisputably interstate* in nature when viewed on an end-to-end basis."[85] For jurisdictional purposes, the FCC has long conducted an "end-to-end analysis", *i.e.*, an analysis of the end points of the communication to determine jurisdiction of a specific communication.[86] The FCC determined that Internet-bound traffic must be properly classified as interstate, and therefore falls under the FCC's Section 201 jurisdiction.[87]

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[81] Multistate Report at p. 88.

[82] *ISP Remand Order* at ¶58.

[83] *ISP Remand Order* at ¶¶ 65 and 82.

[84] *Supplemental Order Clarification* at ¶¶ 21-22.

[85] *ISP Remand Order* at ¶ 58(emphasis added). In an order issued more than two years ago, the FCC first ruled that traffic delivered to an ISP is interstate, and not local, in nature. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (rel. February 26, 1999) (the "*FCC ISP Order*"). The United States Court of Appeals for the District of Columbia Circuit vacated the *FCC ISP Order*. *Bell Atlantic Tel. Cos. v. FCC*, No. 99-1094, 2000 WL 273383 (D.C. Cir. March 24, 2000). However, in vacating the *FCC ISP Order*, the court did not hold that the FCC's conclusion that ISP traffic is interstate in nature is incorrect. To the contrary, the court ruled that the FCC had not yet provided an adequate explanation of why such traffic is exchange access rather than telephone exchange service. The FCC's most recent decision, the *ISP Remand Order*, was on remand from the D.C. Circuit.

[86] *ISP Remand Order* at ¶ 53.

[87] *ISP Remand Order* at ¶ 52. The FCC has found that traffic bound for the Internet often has an interstate component. Although some of the traffic may be intrastate, the interstate and intrastate components

As the FCC noted in its *ISP Remand Order*, the fact that Internet traffic is interstate in nature is also demonstrated by that traffic's similarities to other long distance traffic.[88] When a caller makes an ordinary long distance call, the call originates on the network of a local exchange provider, which then routes the call to an interexchange carrier's ("IXC's") point of presence ("POP"). The IXC then routes the call to the local exchange carrier serving the called party, which in turn delivers the call to that party. The Internet works in the same way. When a caller accesses the Internet, the call originates on the network of a provider that routes the call to the ISP. The ISP then routes the call onto an Internet backbone, to be terminated at the website that the caller seeks to contact.

The FCC has unambiguously ruled that ISP traffic is interstate *traffic* and it is axiomatic that interstate traffic cannot be counted as local traffic for purposes of meeting the local use restriction for EELs. Accordingly, Qwest proposes that its SGAT language at Section 9.23.3.7 be retained without changes.

B. The FCC Has Exclusive Jurisdiction Over All Interstate Services, Including Internet-Bound Traffic

The Initial Workshop 3 Order fails to follow the FCC's *ISP Remand Order* which mandates that ISP-Bound traffic is interstate traffic and falls within the purview of its Section 201 authority.[89] The FCC's Section 201 jurisdiction is exclusive jurisdiction and pre-empts state law decisions that conflict

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cannot be reliably separated. As such, the traffic is property identified as interstate and subject to the jurisdiction of the FCC. *ISP Remand Order* at ¶ 52

[88] *ISP Remand Order* at ¶ 60.

[89] *ISP Remand Order*, ¶¶ 52, 65 and 82.

with it.[90] In the *ISP Remand Order*, the FCC specifically 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 FCC went on to hold that since it has jurisdiction over this traffic under Section 201, state commissions are without any authority to address the issue of intercarrier compensation for Internet-bound traffic since the effective date of its Order.[91] Therefore, the statement in the Initial Workshop 3 Order that the Washington Commission "has consistently ruled that ISP traffic is local" does not change the clear state of current law based on the recent *ISP Remand Order*. The Commission should reverse this holding in the Initial Workshop 3 Order because it is in direct violation of the FCC's *ISP Remand Order* regarding interstate traffic over which the FCC has exclusive jurisdiction.

IV. THE COMMISSION SHOULD CLARIFY THE ORDER TO SPECIFY THAT QWEST MUST PROVIDE RETAIL *PARITY* FOR UNES WITH RETAIL ANALOGUES: ISSUE CL2-5b

The Initial Workshop 3 Order requires Qwest to modify the last sentence of Section 9.1.2 to state: "In addition, Qwest shall comply with all state wholesale *and retail* service quality standards."[92] The Initial Order reasoned that without this provision Qwest could provide service that would prevent CLECs from meeting "applicable standards" for provision of retail service.[93] As explained below, a blanket requirement that Qwest comply with retail service quality requirements when providing wholesale service is inappropriate and unnecessary. The performance indicator definitions ("PIDs")

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[90] 47 U.S.C. § 201; *Ivy Broadcasting Co. v. American Tel. & Tel. Co.,* 391 F.2d 486 (C.A.N.Y. 1968); *Komatz Constr. Inc. v. W.U. Tel. Co.,* 186 N.W.2d 691, 290 Minn. 129 (1971), *cert. den'd* 404 U.S. 856; *Mellman v. Sprint Comm. Co.,* 975 F.Supp. 1458 (N.D. Fla. 1996).

[91] *ISP Remand Order*, ¶82.

[92] Initial Workshop 3 Order ¶ 46.

negotiated in the ROC, which are referenced in and will become Exhibit B to the SGAT, ensure that Qwest meets service levels to which the CLECs agreed. Qwest requests that the Commission clarify the ruling on this issue to require Qwest to provide service at parity to Qwest's retail service, which is the standard set forth in the Act and the PIDs.

A. The SGAT Obligates Qwest to Provision UNEs in Accordance with FCC Standards.

As an initial matter, it is critical for the Commission to recognize that the FCC has addressed this issue conclusively in its Section 271 Orders. In numerous Section 271 Orders, the FCC has addressed the distinction between provisioning UNEs and other services, such as resale, that are comparable to Qwest's finished retail services. In its recent *Verizon Connecticut Order*, the FCC repeated the well-established standards for evaluating a BOC's performance:

> First, for those functions the BOC provides to competing carriers that are analogous to the functions a BOC provides to itself in connection with its own retail service offerings, the BOC must provide access to competing carriers in "substantially the same time and manner" as it provides such access to itself. Thus, where a retail analogue exists, a BOC must provide access that is equal to (*i.e.*, substantially the same as) the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness. For those functions that have no retail analogue, the BOC must demonstrate that the access it provides to competing carriers would offer an efficient carrier a "meaningful opportunity to compete."[94]

Virtually every UNE has a retail analog. The appropriate and negotiated retail analogs are set

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[93] *Id.* ¶ 45.

[94] Memorandum Opinion and Order, *Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, CC Docket No. 01-100, FCC 01-208, Appendix D, ¶ 5 (July 20, 2001) ("*Verizon Connecticut Order*"). The FCC set forth the same standards in its previous orders. *See, e.g.*, *SBC Texas Order* ¶ 44; Memorandum Opinion and Order, *Application of Bell Atlantic New York for Authorization Under*

forth in the PIDs; therefore, the SGAT and federal law require Qwest to provision these UNEs in "substantially the same time and manner" as Qwest provides the comparable retail service for itself. Thus, Qwest must provision EELs, dedicated transport (UDIT), and high-capacity loops at parity to that which it provides similar services to itself. The sole exception to retail parity is in the provision of 2-wire loops (analog, ADSL Compatible and 2-wire non-loaded). For these loops, in ROC workshops Qwest and CLECs negotiated "benchmarks" that requires Qwest to deliver these loops to CLECs in an average of 6.0 days and to meet commitment obligations 90.0% of the time. The FCC has recognized that the negotiation of these performance standards provide CLECs with a meaningful opportunity to compete:

> [F]or functions for which there are no retail analogues, and for which performance benchmarks have been developed in the ongoing participating of affected competitors and the BOC, those standards may well reflect what competitors in the marketplace feel they need in order to have a meaningful opportunity to compete.[95]

In the recent *Verizon Massachusetts Order*, the FCC further elaborated on this standard:

> [W]here, as here, [performance] standards are developed through open proceedings with input from both the incumbent and competing carriers, *these standards can represent informed and reliable attempts to objectively approximate whether competing carriers are being served by the incumbent in substantially the same time or manner or in a way that provides them a meaningful opportunity to compete.*[96]

As the Commission is well aware, Qwest and interested CLECs spent months in the Regional Oversight Committee ("ROC") collaborative process negotiating PIDs to measure Qwest's provision of

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Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, 15 FCC Rcd 3953 ¶ 44 (1999) ("*Bell Atlantic New York Order*").

[95] *Bell Atlantic New York Order* ¶ 55.

service and UNEs to CLECs. Many UNEs have performance measures that compare Qwest's provision of UNEs to CLECs with Qwest's provision of service to its retail customers. In other words, these PIDs require Qwest to provide UNEs in parity with various analogous retail services.[97] However, not all UNEs have a retail parity comparison for ordering and provisioning purposes. Instead, at the request of CLECs, the PIDs for some UNEs (such as certain loop types) have a specific performance benchmark.[98]

Significantly, the FCC has determined that there is a retail analogue to repair functions.[99] Accordingly, the repair and maintenance PIDs for UNEs require Qwest to provide repair functions to CLECs in parity with analogous retail services. Thus, all of the maintenance and repair PIDs require Qwest to provide repair services in parity with retail and the Commission will be able to verify Qwest's performance through the reported results. This commitment is also reiterated in SGAT § 12.3.1.1.[100] With these commitments, the Commission can be assured that Qwest will provide repair services in a

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[96] *Verizon Massachusetts Order* ¶ 13 (emphasis added).

[97] The PIDs for different UNEs specify the retail analogues. For example, for the OP-3 (percent installation commitments met) and OP-4 (installation interval) PIDs for UNE-P, the standard is parity with the like retail service. For DS1 UDIT, the OP-3 standard is parity with retail DS1 private line. Certain unbundled loop types also have retail analogues in the PIDs.

[98] For example, the benchmark under OP-3 for analog loops, two-wire non-loaded loops and ADSL-qualified loops is 90%, meaning that to meet the measurement Qwest must meet its installation interval 90% of the time. For OP-4, these loops have a benchmark of six days, which means that to meet the OP-4 measure for these loops, Qwest must provision the loop in six days or fewer.

[99] Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, CC Docket No. 97-137, 12 FCC Rcd 20543 ¶ 140 (1997) ("*Ameritech Michigan Order*").

[100] SGAT § 12.3.1.1 ("Qwest will provide repair and maintenance for all services covered by this Agreement in substantially the same time and manner as that which Qwest provides for itself, its End User Customers, its Affiliates, or any other party. Qwest shall provide CLEC repair status information in substantially the same time and manner Qwest provides for its retail services.") and SGAT § 12.3.1.3 ("Qwest will perform repair service that is substantially the same in timeliness and quality to that which it provides to itself, its end user customers, its Affiliates, or any other party. Trouble calls from CLEC shall receive response time priority that is substantially the

manner that discriminates against CLECs or prevents them from meeting their retail service quality objectives.

The ROC PIDs are precisely the type of negotiated performance measures upon which the Commission should rely to determine whether Qwest meets its performance obligations to CLECs. For those UNEs that are compared to Qwest's retail performance, the Commission can be assured that Qwest will provision service that is at parity with retail. For those UNEs for which performance benchmarks have been set, CLECs have determined by agreeing to these benchmarks that the benchmarks provide them a meaningful opportunity to compete. For UDIT, UNE-P, and unbundled loops, the PIDs provide that Qwest will repair those UNEs in parity with analogous retail services. To ensure that the SGAT properly aligns with Qwest's obligations under the PIDs, Section 20.0 of the SGAT will incorporate the final version of the PIDs.

The Initial Order recognized that for some UNEs, such as loops, Qwest and CLEC participants in the ROC collaborative negotiated performance benchmarks that are different from Qwest's retail intervals.[101] Nevertheless, the Order has proposed SGAT language that requires Qwest to adhere to retail service quality requirements for all UNEs, presumably even the UNEs for which benchmarks have been negotiated. If the Commission adopts this language and requires Qwest to comply with retail service quality requirements, the negotiated performance benchmarks will be entirely undermined, and there will be a complete disconnect between Qwest's obligations under the SGAT and its obligations under the PIDs. Therefore, consistent with the negotiations at the ROC, Qwest requests that the

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same as that provided to Qwest End User Customers, its Affiliates, or any other party and shall be handled in a nondiscriminatory manner.")

[101] Initial Workshop 3 Order ¶ 45.

Commission clarify that Qwest is required to provide UNEs in parity with retail for those UNEs with retail analogues in the PIDs.

B. The FCC's 271 Decisions Reject Requests That ILECs provide Service in Excess of Retail Parity.

The entire premise of the Act is that ILECs must provide nondiscriminatory service.[102] The Act itself contains such references in numerous locations.[103] Despite these references, the FCC's initial inclination was to enact "superior service rules." The Eighth Circuit promptly repudiated these rules stating that they went beyond the plain language of the Act.

Since that decision, CLECs in 271 decisions have asked the FCC to set standards higher than retail parity, effectively establishing minimum levels of performance that would be deemed acceptable. This is exactly what the CLECs have asked this Commission to do in this 271 proceeding. The FCC has uniformly rejected such requests as inconsistent with the Act and unnecessary in light of the fact that negotiated performance objectives existed.

The FCC has determined that for those functions that the BOC provides to CLECs that are analogous to the functions a BOC provides to itself in connection with its own retail service offerings, the "BOC must provide access to competing carriers in 'substantially the same time and manner' as it provides to itself."[104] This standard articulated by the FCC is retail *parity* so that the CLEC receives its

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[102] For example, in the Bell Atlantic New York Order, the FCC has determined that "the BOC must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis." Memorandum Opinion and Order, *Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 ¶ 44 (1999) ("*Bell Atlantic New York Order*"), *aff'd sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) (citing 47 U.S.C. § 271 (c)(1)(b)(i),(ii)).

[103] 47 U.S.C. § 271 (c)(1)(b)(i),(ii).

[104] *Bell Atlantic New York Order* at ¶ 44.

service in "substantially the same time and manner" as Qwest's retail customers. Requiring Qwest to provide a superior level of service to wholesale customers, than it does to its retail customers, is contrary to the requirements of the Act.

Moreover, just as with other 271 applications approved by the FCC, Qwest will have a Performance Assurance Plan (QPAP) in place that will provide for automatic fines and penalties for Qwest's failure to meet retail parity. In other words, the CLECs already have the legal protection they need. Requiring the Qwest perform to a different standard goes beyond everything that the Act stands for.

C. The SGAT Contains Numerous Assurances That Qwest Will Treat CLECs In a Nondiscriminatory Manner.

In addition to conflicting with the negotiated PIDs, the Initial Order's recommended SGAT language is unnecessary. The SGAT contains numerous assurances that Qwest will provide CLECs with UNEs in a nondiscriminatory manner.

As noted above, the PIDs will be incorporated into Section 20.0 of the SGAT. Thus, the obligation for Qwest to provide those UNEs with retail analogues in parity with its retail services and to repair UNEs in parity with analogous retail services will be part of the SGAT. For those UNEs without retail analogues, the provisioning benchmarks will be part of the SGAT. Thus, Section 20.0 of the SGAT fully ensures that Qwest will provision UNEs in accordance with the measures and requirements CLECs agreed provide them a meaningful opportunity to compete.

Beyond Section 20.0, numerous other SGAT sections ensure that Qwest will meet its nondiscrimination obligations. For example, Section 9.1.2 of the SGAT provides the following assurances regarding Qwest's provision of UNEs to CLECs:

> Qwest shall provide non-discriminatory access to Unbundled Network Elements on rates, terms and conditions that are non-discriminatory, just and reasonable. The quality of an Unbundled Network Element Qwest provides, as well as the access provided to that element, will be equal between all carriers requesting access to that element; second, where technically feasible, the access and Unbundled Network Element provided by Qwest will be provided in "substantially the same time and manner" to that which Qwest provides to itself or to its affiliates. In those situations where Qwest does not provide access to network elements to itself, Qwest will provide access in a manner that provides CLEC with a meaningful opportunity to compete.

Section 9.1.2 of the SGAT also ensures that Qwest will provide access and UNEs in accordance with Section 20 of the SGAT and that Qwest will comply with wholesale service quality standards. SGAT §§ 9.23.3.1 and 9.2.2.1 contain similar assurances for specific types of UNEs.

Moreover, Section 9.2.2.2 provides that if there are state service quality rules in effect at the time a CLEC requests an analog unbundled loop, Qwest will provide an analog unbundled loop that meets the state technical standards.[105] Additionally, Section 12.0 contains numerous assurances regarding Qwest's provision of OSS services in a manner substantially similar to what it provides itself.[106]

This is only a sample of the SGAT provisions that commit Qwest to provide to CLECs nondiscriminatory access to UNEs. These provisions, in addition to the incorporation of the PIDs in the SGAT, provide full assurance that Qwest will provide CLECs with UNEs in accordance with its obligations under the Act. Moreover, any doubt that Qwest will meet its responsibilities to CLECs are eliminated by the Performance Assurance Plan ("QPAP") currently under review by the Commission in the multi-state collaborative process. Between the SGAT and the QPAP, Qwest's obligations and incentives to comply with its service obligations are iron-clad. The Commission should hold that no

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[105] SGAT § 9.2.2.2.

further SGAT language is necessary.

D. Other State Commissions Agree That A Blanket Obligation To Comply With Retail Service Quality Requirements Is Inappropriate.

Since issuance of the Initial Workshop 3 Order, the Colorado Hearing Commissioner (Chairman Gifford) has weighed in on this issue in his order on checklist items 2, 5, and 6.[107] This issue was not addressed in the Multistate proceeding. The Colorado Hearing Commissioner properly recommends that the SGAT need not include an obligation to comply with retail service quality standards by holding that:

> It is inappropriate to apply the state retail requirements to wholesale elements and combinations of those elements. Qwest's SGAT meets the requirements set forth by the FCC.[108]

First, the Colorado Hearing Commissioner observes that SGAT sections 9.1.2 and 9.23.3.1, which pertain to UNEs and UNE combinations, respectively, both recite the FCC's mandates that the access and unbundled network element provided by an ILEC must be at least equal-in-quality to that which the ILEC provides to itself and that ILECs provide UNEs under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete.[109] The Colorado Hearing Commissioner then found:

> AT&T seeks access to UNE-P in order to reap the benefits of TELRIC pricing, while extending the state retail quality service rules to elements that are wholesale in nature. AT&T can't have it both ways. If a CLEC desires the protection afforded by the retail quality service

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[106] *E.g.*, SGAT §§ 12.1.2, 12.2.1.9.1, 12.3.1.1, 12.3.9.1, 12.3.10.1.

[107] Procedurally, in Colorado the Staff of the commission initially issues a draft report, followed by a comment cycle, followed by a final Staff report. The Hearing Commissioner then issues his report.

[108] Decision No. R01-846 at p. 5.

[109] *Id*.

> rules, then it has the option of reselling Qwest's services, albeit at lower profit margins.
>
> (3) Moreover, granting an extension of the retail quality service rules would contradict the PAP. The PAP focuses on achieving the proper penalties and service credits to achieve compensation of the CLECs, as well as the proper performance incentives for the ILEC.[110]

Therefore, the Colorado Hearing Commissioner recognized the difference between provisioning a finished retail service, such as resale, and provisioning UNEs. He also recognized the contradiction between the PAP and the application of retail quality service rules.

The Colorado Hearing Commissioner agreed with the decision recommended by the Colorado Staff. In adopting this conclusion, Colorado Staff recognized that when Qwest provisions UNEs to CLECs, the CLEC, not Qwest determines the use to which the UNE is put. Because Qwest has no control over (and may not even know) the service for which a UNE is used,[111] it is unreasonable to require Qwest to provide that UNE in accordance with specific retail service quality requirements. Thus, Colorado Staff recommends as follows:

> *It is Staff's opinion that the nature of the UNE product only requires Qwest to comply with the Commission's wholesale service requirements.* Staff feels that, in the context of UNEs, Qwest is providing individual "parts" of the telecommunications service to its customer, the CLEC. (This is in contrast to the resale of Qwest services.) This is true whether Qwest is simply providing individual network elements or bundling them into a complete UNE Platform. Thus, in accordance with the FCC's guidelines, Qwest must only provide those "parts" in parity with the "parts" it provides itself. *The final product received by the CLEC's end-use customer is determined by the CLEC and is out of Qwest's responsibility or*

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[110] *Id*. at p.6.

[111] For example, when Qwest provides an two-wire non-loaded loop for a CLEC, that loop can be used to support a variety of DSL services that the CLEC (not Qwest) chooses. The CLEC determines if the service is for residential or business customers and to what use the UNEs will be put.

> *control. Put simply, UNEs are a wholesale service, provided at wholesale prices (TELRIC) and subject to wholesale rules.*[112]

UNEs are wholesale services, provided at wholesale prices, to wholesale customers. Consistent with the recommendation of Colorado Staff, the Commission should clarify that Qwest's obligations to CLECs are measured by the PIDs, the QPAP, and wholesale service quality standards.

V. ISSUES CL2-6, UNE-C-4, AND UNE-C-21: COMMINGLING

Qwest maintains the soundness of its legal and policy grounds on these issues as outlined in its brief. Qwest believes the Initial Order has gone too far in ordering that UNEs can be combined with all finished services except for tariffed special access services.[113] *The FCC has never required the connection of UNEs to the items listed in SGAT § 4.23a as finished services. To the contrary, connecting UNEs should be limited to services that are necessary for the provision of local exchange service which is consistent with the public policy goals of the Act. Qwest asks that the Commission clarify the Initial Order and delete the last two sentences of paragraph 56 because they are too broad and are contrary to existing law.*[114] *As the Colorado Hearing Commissioner found, existing rules, independent of the commingling prohibition contained in the FCC's Supplemental Order Clarification, prohibit connecting UNEs to the items identified by Qwest as finished services in its SGAT. Therefore, it is contrary to the law to order*

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[112] *Colorado Staff Vol. IVA Report* at ¶ 12, page 8 (emphasis added; footnotes omitted).

[113] The Colorado Hearing Commissioner recently observed that "existing rules currently prohibit the connection of UNEs to the finished services that Qwest currently lists in section 4.23 of the SGAT. . ." Decision R01-846, p.22. Therefore, it is inappropriate to connect UNEs to the finished services Qwest defines in SGAT § 4.23 because existing FCC rules currently prohibit it.

[114] Paragraph 56 of the Initial Order provides that "In accordance with current FCC policy, 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

that Qwest may not prohibit connection of UNEs to "finished services".

In an effort to resolve issues, Qwest will not oppose the connection of UNEs to local exchange services. The purpose of the Act was to open the local exchange market to competition. However, allowing UNEs to be connected to non-local exchange services does not further this goal. Qwest also points out that connecting UNEs to other services also involves significant operational concerns related to working orders that may reside in different billing systems and service order systems.

VI. ISSUES CL2-11, TR-6, AND TR-2: ISSUES TO BE ADDRESSED IN THE WASHINGTON SGAT COST DOCKET PROCEEDING

A. Issues CL2-11 and TR-6: Regeneration

Qwest appreciates that "[t]he Commission agrees with Qwest that it is entitled to recover its costs."[115] *Qwest also acknowledges the statement in the Initial Workshop 3 Order that "[t]he Commission will allow Qwest to include non-CLEC-requested regeneration costs as indirect costs that are spread equitably to all users of its facilities, including itself."*[116] *This ruling is consistent with the Commission's ruling on regeneration costs for collocation in its 15th Supplemental Order on August 17, 2001. Qwest will address this issue in response to that later order.*

B. Issue TR-2: Distinction Between UDIT and EUDIT

Qwest continues to maintain the soundness of its legal and policy distinction between

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defined at SGAT section 4.23." These requirements are also inappropriate in the absence of a necessary and impair analysis.

115 Initial Workshop 3 Order, p. 14, para. 63.

116 Initial Workshop 3 Order, p. 14, para. 64.

UDIT and EUDIT. As the Initial Workshop 3 Order acknowledges, "all parties agree that the pricing of unbundled dedicated transport should be addressed in the generic pricing docket."[117] *The issue of the appropriate pricing structure of unbundled dedicated transport has already been briefed in the generic pricing docket. Qwest believes that the Commission should decide the issue in that docket where both policy issues and underlying cost information were presented and briefed for consideration. Thus, in the cost docket the Commission has a full record on which to make a decision. Therefore, Qwest will not repeat its arguments here. Qwest understands that by making this request, the results from the cost docket are controlling in this docket as well.*[118] *Qwest provides this placeholder so that all interested parties have notice that it will address this matter in the cost docket.*

CONCLUSION

The Initial Workshop 3 Order should be revised. Many of the initial determinations in the order go far beyond the scope of this proceeding and Qwest's obligations under the Act. They are also inconsistent with the goals of the Act and public policy goals of the FCC and the state of Washington. Accordingly, for the reasons set forth herein, the Commission should reverse and modify the provisions of the Initial Workshop 3 Order as discussed above.

Dated this 23rd of August, 2001.

Respectfully submitted,

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[117] Initial Workshop 3 Order, p. 33, para. 151.

[118] SGAT § 2.2 requires Qwest to modify its SGAT to conform with decisions from the Commission's cost docket.

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