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

AT&T'S POST WORKSHOP BRIEF
ON LOOPS, LINE SPLITTING AND NID

(WORKSHOP IV)

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AT&T Communications of the Mountain States, Inc. and AT&T Local Services on behalf of TCG SEATTLE and OREGON (collectively, "AT&T") file their Post Workshop Brief on checklist item 4, Loops, including line splitting and Network Interface Devices ("NID").

I. INTRODUCTION

The United States Congress conditioned Qwest Corporation's (formerly known as U S WEST Communications, Inc., hereinafter "Qwest") entrance into the in-region interLATA long distance market on Qwest's compliance with 47 U.S.C. § 271. To be in compliance with section 271, Qwest must "support its application with actual evidence demonstrating its *present* compliance with the statutory conditions for entry."[1]

As AT&T has previously stated in its Comments in this proceeding, the states involved in this Section 271 investigation are charged with the important task of ensuring that their state's local telecommunications markets are open to competition and that Qwest is complying with its obligations under both the state and federal law. Although the Federal Communications Commission ("FCC") is the final decision-maker on Qwest's compliance with its section 271 obligations, the FCC looks to the state commissions for rigorous factual investigations upon which the FCC may base its conclusions.

To conduct a rigorous investigation, one must understand both the legal standards that Qwest is held to and investigate Qwest's actual implementation of those standards. Permitting Qwest to compete in the interLATA long distance market before it has fully

[1] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404, ¶ 37 (released December 22, 1999) ("*BANY 271 Order*").

and fairly complied with its obligations under section 271 will discourage, if not destroy, competition in both the local and long distance markets in the states.

Many local competitors, including AT&T, have invested heavily on the promise of open, fair competition in the local exchange market. AT&T requests that the commissions, through rigorous investigation of Qwest's claims in this proceeding, ensure that the nascent local competitors realize that promise. To that end, AT&T respectfully submits this Brief addressing the topic of loops, line splitting, and network interface device ("NID").

Through these workshops, the Washington Utilities and Transportation Commission ("Commission") is conducting its investigation of both Qwest's Statements of Generally Available Terms ("SGAT") and Qwest's actual compliance, or lack thereof, with the checklist items contained in 47 U.S.C. § 271(c)(2)(B). With respect to the SGAT review, a "State commission may not approve such statement unless such statement complies with [section 252(d)] and [section 251] and the regulations thereunder." 47 U.S.C. § 252(f). Furthermore, a state commission may establish or enforce other requirements of state law in its review of the SGAT. *Id*.

To demonstrate compliance with the requirements of section 271's competitive checklist, Qwest must show that "it has 'fully implemented the competitive checklist [item]… .'"[2] Thus, Qwest must plead, with appropriate supporting evidence, the facts necessary to demonstrate it has complied with the particular requirements of the checklist item under consideration.[3] Qwest must prove each element by a preponderance of the

[2] *BANY 271 Order*, ¶ 44.
[3] *Id*., ¶ 49.

evidence.[4] Furthermore, the FCC has stated that the most probative evidence is commercial usage along with performance measures providing evidence of quality and timeliness of the performance under consideration. Finally, as with any application, the "ultimate burden of proof that its application satisfies all the requirements of section 271, even if no party files comments challenging its compliance with a particular requirement[,]" rests upon Qwest.[5]

II. ARGUMENT

A. Checklist Item 4 - Unbundled Loops

1. Legal Requirements.

Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[6] The FCC has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises.[7] This definition includes different types of loops, including "two-wire and four-wire analog voice-grade loops, and two-wire and

[4] *Id*., ¶ 48.
[5] *Id*., ¶ 47.
[6] 47 U.S.C. § 271(c)(2)(B)(iv).
[7] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, FCC 99-325, ¶ 380 (released August 8, 1996), ("*Local Competition Order*"); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, CC Docket No. 96-98, FCC 99-238, ¶¶ 166 - 167, n. 301. (released November 5, 1999) ("*UNE Remand Order*") (retaining definition of the local loop from the Local Competition First Report and Order, but replacing the phrase "network interconnection device" with "demarcation point," and making explicit that dark fiber and loop conditioning are among the features, functions and capabilities of the loop).

four-wire loops that are conditioned to transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level signals."[8]

In order to establish that it is "providing" unbundled local loops in compliance with section 271(c)(2)(B)(iv), Qwest must demonstrate that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors demand and at an acceptable level of quality.[9]

Qwest claims that the sheer volume of loops provisioned in its region is indicia that it is in compliance with Checklist Item 4. However, for Washington, Qwest fails to present evidence that the number of unbundled loops provisioned by Qwest for CLECs is significant. The evidence presented by Qwest hardly constitutes the "sheer volumes" that Qwest claims. In addition, Qwest fails to indicate how many loops were requested by CLECs but not provisioned in a timely manner or at all due to difficulties encountered by CLECs in ordering and provisioning the UNE Loop from Qwest or with related services, such as number portability. The level of quality for loop provisioning, not claims of "sheer volume," is central to the determination of whether this checklist item is met.[10]

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[8] *Local Competition Order*, ¶ 380; *UNE Remand Order*, ¶¶ 166 - 167.

[9] *BANY 271 Order*, ¶ 269; *Application of BellSouth Corporation Pursuant to Section 271 of the Communications Act of 1934, As Amended, To Provide In-Region InterLATA Services in Louisiana*, CC Docket No. 98-121, FCC 98-271, ¶ 54 (released October 13, 1998), ("*BellSouth Second Louisiana 271 Order*").

[10] *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238, ¶ 247 (released June 30, 2000) ("*SBC Texas 271 Order*").

Qwest must also demonstrate that it provides nondiscriminatory access to unbundled loops.[11] Specifically, Qwest must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested.[12] In order to provide the requested loop functionality, such as the ability to deliver ISDN or xDSL services, Qwest may be required to take affirmative steps to condition existing loop facilities to enable competing carriers to provide services not currently provided over the facilities, with the competing carrier bearing the cost of such conditioning.[13] Qwest must provide competitors with access to unbundled loops regardless of whether Qwest uses integrated digital loop carrier (IDLC) technology or similar remote concentration devices for the particular loops sought by the competitor. Again, the costs associated with providing access to such facilities may be recovered from competing carriers.[14]

In the *UNE Remand Order*, the FCC concluded that "LECs must provide access to unbundled loops, including high-capacity loops, nationwide" and that "requesting carriers are impaired without access to loops, and that loops include high-capacity lines, dark fiber, line conditioning, and certain inside wire."[15]

Accordingly, the FCC redefined the "local loop," stating that:

> The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises, including inside wire owned by the incumbent LEC. The local

[11] *BANY 271 Order*, ¶ 269; *BellSouth Second Louisiana 271 Order*, ¶ 185.
[12] *BANY 271 Order*, ¶ 271; *BellSouth Second Louisiana 271 Order*, ¶ 187.
[13] *BANY 271 Order*, ¶ 271.
[14] *Local Competition Order*, ¶ 384.
[15] *UNE Remand Order*, ¶ 165.

> loop network element includes all features, functions, and capabilities of such transmission facility. Those features, functions, and capabilities include, but are not limited to, dark fiber, attached electronics (except those electronics used for the provision of advanced services, such as Digital Subscriber Line Access Multiplexers), and line conditioning. The local loop includes, but is not limited to, DS1, DS3, fiber, and other high capacity loops.[16]

The FCC stated that its intent in adopting this definition is to "ensure that the loop definition will apply to new as well as current technologies…"[17]

Thus, the termination of the loop must be clearly defined in the manner set forth by the FCC in the *UNE Remand Order*. Moreover, the FCC concluded that defining the loop termination point as the demarcation point is preferable to the NID "because, in some cases, the NID does not mark the end of the incumbent's control of the loop facility."[18] Citing Section 68.3 of its rules, the FCC determined that:

> the demarcation point is defined by control; it is not a fixed location on the network, but rather a point where an incumbent's and a property owner's responsibilities meet. The demarcation point is often, but not always, located at the minimum point of entry (MPOE), which is the closest practicable point to where the wire crosses a property line or enters a building. In multiunit premises, there may be either a single demarcation point for the entire building or separate demarcation points for each tenant, located at any of several locations, depending on the date the inside wire was installed, the local carrier's reasonable and nondiscriminatory practices, and the property owner's preferences. Thus, depending on the circumstances, the demarcation point may be located at the NID, outside the NID, or inside the NID.

In addition, Qwest must provide high capacity loops, including "DS1, DS3, fiber, and other high capacity loops."[19] The FCC determined that "high-capacity loops retain the

[16] 47 C.F.R. § 319(a)(1).
[17] *UNE Remand Order*, ¶ 167.
[18] *Id*., ¶ 168.
[19] 47 C.F.R. § 51.319(a)(1)

essential characteristic of the loop: they transmit a signal from the central office to the subscriber, or vice versa."[20]

The FCC concluded, the definition of the loop includes "attached electronics including multiplexing equipment used to derive the loop transmission capacity" because the definition of a network element is not limited to facilities, but includes features, functions, and capabilities.[21] Further, the expanded definition requires the RBOC to provide all types of loops, including, DS1 and DS3 loops and fiber loops, which would include OC3 and OC12 loops, at a minimum.

In addition, because the FCC drafted its definition to specifically encompass new technologies, the SGAT must allow CLECs to obtain other "fiber" and "high capacity" loops as new technology emerges.

Finally, for some disputed issues, Qwest has asserted that because another RBOC is provisioning loops, line splitting or NIDs in a certain manner and that RBOC was awarded Section 271 relief, that determination is dispositive on the issue and the matter should be resolved in Qwest's favor, even if no party raised that particular issue. That is not the case. If no party raised the issue before the FCC, the FCC had no opportunity to confront the issue. Therefore, there is no binding ruling by the FCC on that issue simply by virtue of the FCC awarding the RBOC Section 271 authority. In order for the FCC's Section 271 orders to have precedental effect, the FCC must have confronted and ruled on a particular disputed issue.

[20] *UNE Remand Order*, ¶ 176.
[21] *Id.*, ¶ 175.

2. Disputed Issues on Loops.

Qwest's provisioning of unbundled loops and its SGAT provisions related to unbundled loops insufficient to demonstrate compliance. There are numerous examples of evidence that Qwest's performance is unsatisfactory in provisioning unbundled loops and where Qwest policy positions are contrary to the Act, FCC Orders and will deter the development of competition. Until Qwest's performance and its position on the disputed issues are brought into compliance with the Act and FCC Orders, Qwest cannot be deemed to be in compliance with Checklist Item 4.

a. Obligation to Build (Loop – 1 and 8).

The Telecommunications Act of 1996 ("Act") requires Qwest and other incumbent local exchange companies ("LECs") to provide access to UNEs "on rates, terms and conditions that are just, reasonable, and nondiscriminatory."[22] Qwest currently constructs facilities for customers requesting service under the terms and conditions established in its federal and state tariffs. Qwest's SGAT permits Qwest to refuse to provide service to a requesting CLEC if no facilities are available, except under very narrow conditions.[23]

Specifically, Qwest will only build DS0 loops for CLECs if Qwest has an obligation to build under its provider-of-last-resort obligations.[24] This offer is limited to the "first voice grade line per address." For all other loops, Qwest will not add capacity to its network to meet CLEC demand.[25] Qwest's SGAT does not go far enough and does

[22] 47 U.S.C. § 251(c)(3).
[23] *See, e.g.*, SGAT §§ 9.1.2 & 9.23.1.4-6. See also, Exhibits 922, policy statement that was sent to CLECs prior to the SGAT revisions described herein outlining Qwest's change in policy.
[24] *See* SGAT, Section 9.1.2; Exhibit 922.
[25] Id.

not comply with the Act and the FCC's rules. Qwest construes its carrier-of-last-resort obligations to extend only to basic residential and business service. Qwest, however, provides far more services than these services to Washington customers, including DS-1, DS-3, and other high capacity circuits. The language in Qwest's SGAT would permit Qwest to deny a CLEC's request to provision these circuits as UNEs due to lack of facilities when Qwest's tariffs, price lists, or contracts would obligate Qwest to construct those same facilities for other customers. Indeed, the CLEC itself could require Qwest to construct those facilities if the CLEC ordered them as tariff or price list services, rather than as UNEs. Such blatant discrimination violates federal law.

This was the conclusion reached by the Administrative Law Judge in the Workshop 2 Initial Order, which required Qwest to revise its SGAT to reflect that Qwest has an obligation to build UNES in any areas currently served by Qwest's network.[26] In fact, the Initial Order appears to conclude that the Workshop 2 ruling applies equally to loops.[27] The conclusion reached in the Initial Order have a sound basis in law and fact and there is no reason those conclusions should not apply equally to unbundled loops.

The FCC has stated that:

> [t]he duty to provide unbundled network elements on "terms, and conditions that are just, unreasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.[28]

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[26] *In re Investigation Into U S WEST's Compliance With Section 271*, WUTC Docket Nos. UT-003022 & 003040, Thirteenth Supp. Order ¶¶ 79 –80 (July 24, 2001) ("Washington Initial Order").
[27] *Id*.
[28] *Local Competition Order*, ¶ 315. In an accompanying footnote, the FCC stated that "[t]he term 'provisioning' includes installation." *Id*., n. 684.

The FCC's rules also require that the ILEC provision network elements to CLECs on terms and conditions no less favorable than the terms and conditions under which the ILEC provides such elements to itself.[29]

In its *Local Competition Order*, the only limitation the places on the ILEC's obligation relates to unbundled interoffice facilities. In that Order, the FCC stated:

> Rural Telephone Coalition contends that incumbent LECs should not be required to construct new facilities to accommodate new entrants. We have considered the economic impact of our rules in this section on small incumbent LECs. In this section, for example, we expressly limit the provision of unbundled interoffice facilities to existing incumbent LEC facilities. We also note that section 251(f) of the 1996 Act provide relief for certain small LECs from our regulations under section 251.[30]

While the FCC recognized the economic impact on small ILECs of having to build transport and explicitly held that all ILECs need not build transport, it made clear that for all other network elements, section 251(f) provides the relief for *rural* ILECs from any economic impact imposed on the *rural* ILECs as a result of having to build network elements for CLECs.[31] The clear inference to be drawn from this portion of the Order is that, with the exception of interoffice transport, the ILECs do have an obligation to construct UNEs to meet CLEC demand.

As further evidence of the FCC's intent, when citing to this section of its order in the *UNE Remand Order*, the FCC states:

> In the *Local Competition First Report and Order*, the Commission limited an incumbent LEC's transport unbundling obligation to existing facilities, and did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use. Although we conclude that an

[29] 47 C.F.R. § 313(b).
[30] *Id*., ¶ 451. *See also, UNE Remand Order*, ¶ 324.
[31] Section 251(f) applies only to rural ILECs; therefore, ILECs such as Qwest cannot seek exemption from it obligation to build under section 251(f).

> incumbent LEC's unbundling obligation extends throughout its ubiquitous transport network, including ring transport architectures, we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use.[32]

Specifically, in this paragraph, the FCC concludes that "the ILEC's unbundling obligation extends throughout its ubiquitous transport network." The inescapable conclusion is that the only limitation on the ILEC's obligation to build is for interoffice facilities to existing facilities. For all other UNEs, Qwest has an obligation to build to meet CLEC demand throughout its service territory.

In addition, the FCC has held that the ILECs have an obligation to replace UNEs that are being provided to CLECs.[33] An obligation to replace UNEs is essentially the same thing as an obligation to build UNEs. Finally, the FCC's rules also require that the ILEC provision network elements to CLECs on terms and conditions no less favorable than the terms and conditions under which the ILEC provide such elements to itself.[34]

Nothing in the Eighth Circuit's ruling in *Iowa Utilities Board* requires a different result. Qwest claims under *Iowa Utilities Board,* it is not required to build an unbuilt "superior network."[35] Qwest's reliance on *Iowa Utilities Board* is misplaced. The Eighth Circuit's superior network statement was made in the context of the Court's rejection of the FCC's superior quality rules – rules that required an incumbent LEC, if requested by the CLEC, to provide UNEs at a level of quality superior to that which the incumbent LEC provides to itself. That is not the nature of the CLECs' request here. CLECs are

[32] UNE Remand Order, ¶ 324.
[33] *Local Competition Order*, ¶ 268; 47 C.F.R. § 51.309(c).
[34] 47 C.F.R. § 313(b).
[35] Exhibit 926-T, p. 28.

requesting that Qwest augment its existing network with added capacity - the same type of facilities it provides to its existing retail customers. That can hardly be characterized as a superior network.

The Commission, therefore, should refuse to approve Qwest's SGAT, or permit Qwest to rely on the SGAT for purposes of Section 271, until Qwest revises the SGAT to require Qwest to construct UNEs for CLECs throughout its service territory.

An additional reason that Qwest must be required to build facilities for CLECs is that CLECs are already paying for the build of new facilities in the price they pay for UNEs. In Washington, a fill factor was used in the calculation of UNE prices. A fill factor is used to ensure that sufficient capacity is always available. Once a certain percentage fill is achieved, a new facility is built. If a fill factor of 50% were used in the calculation of UNE prices, then the CLEC is being charged for a whole facility when only 50% of the facility is only being used to 50% of its capacity.[36] The effect of using fill factors, especially low fills, is that the CLEC is being charged to build new facilities in order to ensure that the fill level remains constant and Qwest does not run out of capacity.[37] The fact that fill is included in UNE pricing means that CLECs are being charged for building new capacity, yet because of Qwest's new policy, only Qwest would be the beneficiary of that new capacity. That is inappropriate and a clear basis for rejecting Qwest's SGAT language in Section 9.1.2.

Finally, with respect to high capacity loops, Qwest claims that these loops are

[36] WA Transcript, pp. 4193-94.
[37] *Id*.

subject to competition services.[38] In fact, Qwest has asserted that AT&T and WorldCom are routinely building such facilities and have a larger share of some segments of the high-capacity market than Qwest.[39] Of course, the evidence that Qwest relies upon for this assertion shows that AT&T and WorldCom rely on Qwest for the facilities they use to provide such high capacity services in Qwest's region and that Qwest has a monopoly foothold on the capacity for the wholesale side of this market.[40]

At the same time Qwest informed CLEC's of its new build policy, Qwest also indicated that it had altered its policy on held orders. Specifically, Qwest has now determined that orders that are currently in held status will be rejected if there are no facilities and no current construction jobs planned.[41] For new services orders placed by CLECs, if no facilities are available and no construction jobs are planned, the LSR will be rejected, rather than place the order in a held order status.[42]

Numerous CLEC expressed concerns with this new policy. Qwest's unilateral decision to reject previously held orders and to reject future orders for no facilities available is problematic on several levels. The policy appears to be primarily designed to alleviate Qwest's PID performance, creating the false perception that Qwest is provisioning network elements, and as relevant here, loops, at a quantity that CLECs may demand.[43] Clearly, that would not be the case as Qwest would be rejecting and not

[38] WA Transcript, p. 4198.
[39] Exhibit 926-T; Exhibit 931.
[40] WA Transcript, pp. 4252-53; Exhibit 931.
[41] Exhibit 922; Section 9.1.2.1.
[42] Exhibit 922; SGAT Section 9.1.2.1; WA Transcript, pp. 4226-27.
[43] WA Transcript, pp. 4227-28, 4237-38.

counting CLEC demand in its PID data, while the retail order would be accepted and, because no facilities are available, would count as a hit against Qwest's retail performance.

Second, Qwest has not invoked a similar policy for its retail customers.[44] Therefore, Qwest is discriminating against its wholesale customers by refusing to keep track of CLEC held orders and failing to take those held orders into account in developing its construction plans.

Third, CLECs questioned Qwest's ability to get in queue for new facilities ahead of CLECs on the basis that Qwest will always possess superior and advanced knowledge regarding its own build plans. Qwest agreed to add a provision to the SGAT that would provide CLECs with notice of major facilities build that states as follows:

> 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 job that exceeds $100,000 in total cost, the estimated ready for service date, the number of pair 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 modifies or cancelled at any time.

However, this proposed SGAT revision does not completely alleviate CLEC concerns that Qwest will be able to give its customer preferential treatment in the design, development and access to future facilities builds initiated by Qwest.

Accordingly, the language "provided that facilities are available" should be stricken from SGAT sections 9.2.4.3.1.2.4, 9.23.1.4, 9.23.1.5, 9.23.1.6 and

[44] *Id*., pp. 4227, 4241.

9.23.3.7.2.12.8 and any other conforming changes required to remove any limitation on Qwest's obligation to build and that permit Qwest to reject LSRs for no facilities available, rather than allowing such orders to go held. Furthermore, SGAT section 9.19 should be amended. The first sentence of this section should be amended to read: "Qwest will conduct an ~~individual financial~~ assessment of any request which requires construction of network capacity, facilities, or space for access to or use of unbundled loops." The Commission should also make clear that under section 9.1.2 of the SGAT and related provisions, Qwest is obligated to build UNEs, except dedicated transport, on a nondiscriminatory basis at cost-based rates under section 252(d).

b. Qwest must refund conditioning charges when Qwest's performance causes the end user to abandon the CLEC/DLEC (Loop – 2(b)).

Loop 2(a) concerns the legitimacy of Qwest's imposition of a charge for conditioning unbundled loops. Specifically, AT&T disputed this charge on the grounds that Qwest is already recovering the cost of conditioning in its UNE loop charge.[45] This issue was deferred to the cost case.[46]

With respect to Loop 2(b), AT&T contends that if Qwest is permitted to assess a conditioning charge, it should be required to refund such charge when Qwest's performance causes the end user to abandon the CLEC/DLEC. Throughout these workshops, AT&T and other CLECs have raised concern regarding the quality and timeliness of delivery of conditioned unbundled loops. Under the terms of Qwest's

[45] WA Transcript, pp. 4290-91.
[46] Id., pp. 4294-95.

SGAT, the CLEC end users' experience could be adversely affected by Qwest's poor performance, causing the end user to abandon the CLEC, and the CLEC would still be obligated to pay the conditioning charges.[47]

Initially, AT&T proposed language that would require Qwest to refund to the CLEC a pro rata portion of the conditioning charges if the customer migrated away from the CLEC within a certain period after the service was requested, irrespective of Qwest's fault. As a result of discussions in workshops, AT&T now proposes the following language, which could be a new Section 9.2.2.4.1 in the SGAT:

> 9.2.2.4.1 If CLEC's end user customer, for which CLEC has ordered x-DSL capable Unbundled Loops from Qwest, (i) never receives x-DSL service from CLEC, (ii) suffers unreasonable delay in provisioning, or (iii) experiences poor quality of service, in any case due to Qwest's fault, Qwest shall refund or credit to CLEC the conditioning charges associated with the service requested. This refund or credit is in addition to any other remedy available to CLEC.[48]

This language would ensure that Qwest is compensated when it performs the loop conditioning in a timely manner and delivers a quality loop, as contracted for by the CLECs. If Qwest fails to do so, the CLEC should not have to bear the conditioning cost. This acts as an incentive for Qwest to perform and works toward making the CLEC whole. Arguably, even with this type of provision, the CLEC cannot be made whole if Qwest does not perform and causes a bad end user experience. Not only will the CLEC lose future revenue, but its reputation will be damaged. Customers do not care that it is Qwest rather than the CLEC who causes their bad experience. From the customers' perspective, the experience with the CLEC was bad.

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[47] Id., pp. 4296-97.
[48] Exhibit 955.

Qwest took issue with this proposal, stating that it should be addressed as a billing dispute.[49] This is not an appropriate resolution. It would enable Qwest to collect payment for a service when it performed badly, and force the CLECs to pursue dispute resolution for each line that is misprovisioned. Dispute resolution is not a quick process and could be very costly depending on the number of disputes. According to Qwest's SGAT, a billing dispute would take in excess of 2 months just to get in front of a decision maker.[50] Arbitration will likely take several months to complete. This process is untenable for refund of conditioning charges, especially when Qwest purports to hold the funds while the dispute is pending and would be incented to keep that money as long as possible.

Some claims for conditioning charge refund may end up in dispute resolution, but there should be an obligation up front that Qwest will refund the conditioning charge if Qwest fails to perform. AT&T believes that many cases of fault are clear-cut and not subject to debate. In those cases, this provision would be a quick and efficient mechanism to address the problem.

Qwest has suggested that CLECs should enter into termination liability agreements with end user customers to compensate for the conditioning cost if the customer leaves after requesting CLEC xDSL service. This is unacceptable and side-steps the real issue, which is Qwest's failure to perform.

[49] WA Transcript, pp. 4299, 4301-02.
[50] SGAT Sections 5.4.4 and 5.18.

AT&T requests that its proposed language be added. This provision would help to ensure that CLECs have a meaningful opportunity to compete consistent with the intent of the Act.

c. Qwest Must Provide CLECs with access to Qwest Databases that Contain Loop Information, Including LFACs (Loop-3(a)).

Qwest is required to provide access to its LFACs database and any other database or source that contains information regarding Qwest's loop plant. Qwest refuses to provide such access. AT&T seeks access to these databases in order to obtain loop qualification information and to learn whether spare facilities, including "fragments" of loops, can be made available by Qwest.

The FCC has made clear that CLECs must have access to this loop and loop plant information for loop qualification purposes. Specifically, in the *UNE Remand Order*, the FCC stated:

> We clarify that pursuant to our existing rules, an incumbent LEC must provide the requesting carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent, so that the requesting carrier can make an independent judgment about whether the loop is capable of supporting the advanced services equipment the requesting carrier intends to install. Based on these existing obligations, we conclude that, at a minimum, incumbent LECs must provide requesting carriers the same underlying information that the incumbent LEC has in any of its own databases or other internal records.[51]

In its *Kansas/Oklahoma 271 Order*, the FCC clearly required RBOCs to provide carriers with the same underlying information that they have in any of their own databases or internal records for pre-ordering, loop qualification purposes and how such access must be afforded:

[51] *UNE Remand Order*, ¶ 427.

> In this proceeding, we require a BOC to demonstrate for the first time that it provides access to loop qualification information in a manner consistent with the requirements of the *UNE Remand Order*. In particular, we require SWBT to provide access to loop qualification information as part of the pre-ordering functionality of OSS. In the *UNE Remand Order*, we required incumbent carriers to provide competitors with access to all of the same detailed information about the loop that is available to themselves, and in the same time frame, so that a requesting carrier could make an independent judgment at the pre-ordering stage about whether a requested end user loop is capable of supporting the advanced services equipment the requesting carrier intends to install. At a minimum, SWBT must provide carriers with the same underlying information that it has in any of its own databases or internal records. We explained that the relevant inquiry is not whether SWBT's retail arm has access to such underlying information but whether such information exists anywhere in SWBT's back office and can be accessed by any of SWBT's personnel. Moreover, SWBT may not "filter or digest" the underlying information and may not provide only information that is useful in the provision of a particular type of xDSL that SWBT offers. SWBT must provide loop qualification information based, for example, on an individual address or zip code of the end users in a particular wire center, NXX code or on any other basis that SWBT provides such information to itself. Moreover, SWBT must also provide access for competing carriers to the loop qualifying information that SWBT can itself access manually or electronically.[52]

In this case, the FCC has established the parity standard as any loop or loop plant information that "any Qwest employee has access to," not what is accessible by Qwest's retail operations.

As the FCC indicates, CLECs need access to loop and loop plant information so they can make an independent judgment at the pre-ordering stage about whether a

[52] *In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, ¶ 121 (released. January 22, 2001) ("*BellSouth Kansas/Oklahoma 271 Order*")(Citations omitted).. *See also UNE Remand Order*, ¶ 430; *In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, CC Docket No. 01-8, FCC 01-130, ¶ 54 (released April 16, 2001) ("*Massachusetts Verizon 271 Order*").

requested end user loop is capable of supporting the advanced services equipment the requesting carrier intends to install. In addition, CLECs need access to this loop information in order to determine whether they can provision service to areas that are served by IDLC loops.[53] Qwest has claimed that unbundling IDLC loops is difficult and can take a significant amount of time and that it is not always technically feasible to unbundled these loops. As a result, CLECs need the ability to understand, in those areas where IDLC has been deployed, what spare copper facilities are available, including loop fragments, to determine whether they can provision service in these areas. A CLEC may determine that it is too risky to market to that area because they would face delays in provisioning due to IDLC issues. This particular issue is not confronted by Qwest's retail arm, because Qwest does not need to unbundle IDLC to provision service over IDLC.

Qwest has refused to provide access to LFACs or to any other source of loop information available to its employees. During the course of the loop workshops, obtaining information regarding where loop or loop plant information resides in Qwest's database(s) or back office systems that are accessible by any Qwest employee has been like pulling teeth. Qwest has dodged these queries or has spun a record so confusing that it is impossible to tell what systems CLECs are entitled to access under the FCC UNE Remand Order. At varying times, Qwest claimed this information resides in LFACs, or LEIS and LEAD, which are subset of LFACs.[54] Irrespective of where it resides, if there is loop or loop plant information that is accessible to any Qwest employee, the FCC Orders mandate that CLECs are entitled to access that same information.

[53] WA Transcript, p. 4315.
[54] Colorado Tr. (05/25/01), pp. 74-76. (Attachment A); WA Transcript, pp. 4319-20.

Because of the uncertainty regarding what databases Qwest personnel access for loop information, the only way to determine where this information resides is to allow CLECs to audit, on an ongoing basis, the company's records, back office systems and databases in each state, to assure that Qwest is providing nondiscriminatory access. This is what SBC agreed to provide and the Texas Commission has ordered because of the uncertainty surrounding where this information resides.[55]

Qwest has claimed that all of the information on LFACs is available on the raw loop data tool.[56] As an initial matter, whether that is true or not is irrelevant. The FCC has made clear that CLECs are entitled to access the same loop information that any Qwest employee has access to and such information may not be filtered by Qwest. The information in the raw loop data tools has been filtered by Qwest.

In any case, Qwest admits that not all loop qualification information is in the raw loop data tools. For example, information on loop conditioning and spare facilities is not in the raw loop data tools.[57] Information regarding all spare facilities, including fragments, is necessary for CLECs to have a meaningful opportunity to compete. Qwest maintains records of spare facilities, including loop fragments, somewhere in its back office systems. Qwest's witness in Colorado stated that this information is available to

[55] See Attachment B, *Petition of IP Communications Corporation to Establish Expedited Public Utility Commission of Texas Oversight Concerning Line Sharing Issues*, Public Utility Commission of Texas, Arbitration Award, Docket Nos, 22168 and 22469, pp. 105-07 (dated July 13, 2001)
[56] WA Transcript, pp. 4316-17.
[57] CO Transcript (04/18/01), pp. 25-53 (Attachment C), (05/25/01), pp. 74-77 (Attachment A).

Qwest engineers.[58] Qwest is required to provide CLECs with access to this information.

Next, Qwest has asserted that LFACs is not a search engine, rather it is an assignment tool. Again, this is a red herring. Qwest employees have access to LFACs and other databases for obtaining loop information.[59] As Ms. Liston stated in the Colorado workshop, "the information [on spare facilities] is stored in different portions of the LFACs database. The tools are built strictly from a provisioning standpoint to provision services in terms of looking for, how do you get from Point A to Point B. They are engineering tools."[60] Moreover, Exhibit 908 demonstrates that Qwest has the ability to use LFACs to locate loop information. Specifically, Step 3 of the FOC trial process indicates that once Qwest receives an accurate LSR, it will access LFACS to attempt to assign pairs not in need of conditioning and create a design of the loop.[61] As Exhibit 908 reveals, Qwest takes this step for CLECs "because LFACS may reveal information not available through the RLDT, especially with regard to loops not already connected to a switch. The RLDT provides information from the Loop Qualification Database (LQDB), which in turn is derived from LFACS and other sources. But the LQDB covers only loops connected to a switch. LFACS, on the other hand, contains information for all facilities, even those not connected to a switch, but does not contain some of the information available through the RLDT, such as the results of the MLT."[62]

That is precisely why CLECs need access to LFACs or whatever database has loop plant and spare facilities information. They need the ability to determine if they can

[58] CO Transcript (05/25/01), p. 74 Attachment A).
[59] *Id*, pp. 73 - 76.
[60] *Id*., p. 78.
[61] Exhibit 908, p. 3.
[62] Exhibit 908, footnote 2.

provision service in an area that is served by IDLC with the services they seek to provide, just as Qwest' engineers do.

Qwest may also claim that such access is unnecessary because Qwest plans to put the spare facilities information in the raw data tool.[63] This promise by Qwest is insufficient to resolve this issue. Qwest provided no details on how that would be accomplished and whether Qwest will populate the raw loop data tool with all of the spare facilities data that is available to Qwest via its LEIS, LEAD, TIRKS, LFACs or other databases. Ms Liston claimed that this information would be included in the tool in "some fashion or meaningful representation," but could provide no details on how this will occur.[64] In addition, Qwest could not provide a commitment as to when this would occur.[65] In any event, this would be filtered information and, under the FCC's Orders, CLECs are entitled to this information on an unfiltered basis.

Qwest has also asserted that the information that a CLEC can obtain is equal to that available to Qwest's retail arm.[66] Ms. Liston claims that there is nothing in the FCC rules that requires Qwest to give CLECs more information."[67] Qwest's interpretation of the FCC's requirements is completely off the mark. The FCC has made it clear that CLECs must have access to the same information as any Qwest employee, not just its retail personnel. Therefore, Qwest's claim that the ROC test will measure whether Qwest is providing wholesale customer the same access to the same information as Qwest's

[63] CO Transcript (05/25/01), p. 77 (Attachment A)
[64] *Id*., pp. 75 - 76.
[65] *Id*.
[66] *Id*., pp. 78 - 79; CO Transcript (05/23/01), pp. 141 – 44 (Attachment D).
[67] *Id*., pp. 143 - 45.

retail customers is not sufficient to satisfy the FCC's requirement.[68] The ROC process is not testing whether Qwest is affording CLECs access to the same information databases that any Qwest employee has access to. Thus, the ROC test will not provide the correct analysis.

Finally, Qwest has claimed that it cannot provide access to LFACs or other databases because they contain information proprietary to Qwest, other CLECs or end user customers. This claim is unavailing. Qwest has access to all of this so-called competitive information. There is no reason that CLECs could not be afforded the same access. In fact, AT&T would support the inclusion of an SGAT provision that would restrict CLEC use of information contained in LFACs, or other databases that may be made available, for proper purposes and not for gathering competitive information of competing carriers. AT&T is certain that accommodation can be made to ensure no improper access to or use of proprietary information results from CLEC access to LFACs. Verizon and Southwestern Bell provide access to LFACs, apparently finding some solution to the proprietary information issue.[69]

By denying competing carriers access to loop qualification information as required by the *UNE Remand Order*, Qwest fails to meet its obligation to provide a competitor a meaningful opportunity to compete. Accordingly, AT&T recommends the following provision be added to the SGAT to afford CLECs the access to Qwest loop information that is permitted under the Act and FCC orders:

> Qwest shall provide to CLEC on a non-discriminatory basis access to all company's records, back office systems and databases where loop or loop plant information, including information relating to spare facilities, resides

[68] *Id*., pp. 148 - 50.
[69] *BellSouth Kansas/Oklahoma 271 Order*, ¶ 122; *Massachusetts Verizon 271 Order*, ¶ 57.

that is accessible to any Qwest employee or any affiliate of Qwest. CLECs shall have the ability to audit Qwest's company records, back office systems and databases in each state to determine that Qwest is providing the same access to loop and loop plant information to CLECs that any Qwest employee has access. Such audit will be in addition to the audit rights contemplated by Section 18 of this Agreement, but the processes for such audit shall be consistent with the processes set forth in Section 18. CLEC agrees the access afforded to CLEC to Qwest's records, back office systems and databases and the use by the CLEC of any information obtained under this section shall be limited to performing loop qualification and spare facilities checks.

d. Qwest must allow CLECs to perform or request a pre-order MLT (Loop –3(b)).

Mechanized loop testing (MLT) enables a carrier to test an actual loop and retrieve information regarding the loop length and other characteristics. A CLEC needs the ability to perform, or to have performed on its behalf, an MLT before provisioning of that loop in order to verify that the loop can support the services the CLEC intends to provide over that loop facility. In addition, an MLT would allow the CLEC to verify the presence of digital loop carriers or other facilities – valuable information for assessing whether the loop is capable of providing the services the CLEC seeks to offer. Access to MLT would assist in solving a serious problem CLEC are encountering in getting access to good, accurate prequalification information on loops, in particular for line sharing on loops.[70]

Qwest claims that Qwest's retail operations do not have the ability to order MLTs on an individualized basis.[71] Qwest has no need to do so for several reasons. First, Qwest knows where it has deployed digital loop carrier and can assess for itself whether it can deploy the services it seeks in those areas. Second, Qwest has already performed

[70] WA Transcript, p. 4334; CO Transcript (05/23/01), pp. 195 – 96 (Attachment D).
[71] Exhibit 926-T, p. 9.

the MLT in the areas where it has determined it will market Megabit service. Indeed, in the Colorado workshop, Qwest testified that it had performed an MLT on every copper loop in its network.[72] In the Oregon workshop, Qwest claims that it did an MLT for all wire centers, but not necessarily all loops, but rather in some instances the MLT was done on service terminals.[73] Whatever the truth is, Qwest had, and has, the ability to run MLT for its services on a pre-order basis if it desires. Qwest has conceded that it has the ability to perform MLT on its switched based services.[74] In addition, it had the ability to choose which wire centers to test and which loops or service terminals to test. CLECs must have the same access to be afforded parity.

Qwest claims that an MLT test cannot be done by a CLEC or on the CLEC's behalf because the test is invasive and may result in the customer being disconnected.[75] This assertion is a red herring. Qwest concedes that the customer's line is put out of service momentarily, less than a minute.[76] Mr. Wilson also confirmed that MLT has the ability to determine whether the line is in use, so interference with customer's usage can be minimized.[77] Moreover, Qwest's own performance of MLTs on all loops/wire centers undermines any claims that MLTs are invasive.

Qwest's claim that MLT is only performed for repair purposes[78] is also rebutted by Qwest's performance of MLT on all of its copper loops to generate loop qualification data to populate its databases, which Qwest uses for its own Megabit service.

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[72] CO Transcript (05/23/01), p. 200 (Attachment D); CO Transcript (04/18/01), pp. 250 – 52 (Attachment C).
[73] OR Transcript, pp. 250-51 (Attachment E).
[74] CO Transcript (04/18/01), p. 248 (Attachment C).
[75] WA Transcript, p. 4335.
[76] WA Transcript, pp. 4335-36.
[77] Id., p. 107.
[78] WA Transcript, pp. 4336-37; CO Transcript (05/23/01), p. 194 (Attachment D).

Qwest asserts that there is no need for CLECs to run MLT because the information the CLECs require is already in the raw loop data tool.[79] Again, Qwest's assertion misses that mark and is contrary to the FCC's requirements. As summarized in the FCC's *Kansas/Oklahoma 271 Order*, the *UNE Remand Order* clearly required RBOCs to provide carriers with the same underlying information that they have in any of their own databases or internal records for pre-ordering, loop qualification purposes:

> In this proceeding, we require a BOC to demonstrate for the first time that it provides access to loop qualification information in a manner consistent with the requirements of the *UNE Remand Order*. In particular, we require SWBT to provide access to loop qualification information as part of the pre-ordering functionality of OSS. In the *UNE Remand Order*, we required incumbent carriers to provide competitors with access to all of the same detailed information about the loop that is available to themselves, and in the same time frame, so that a requesting carrier could make an independent judgment at the pre-ordering stage about whether a requested end user loop is capable of supporting the advanced services equipment the requesting carrier intends to install. At a minimum, SWBT must provide carriers with the same underlying information that it has in any of its own databases or internal records. We explained that the relevant inquiry is not whether SWBT's retail arm has access to such underlying information but whether such information exists anywhere in SWBT's back office and can be accessed by any of SWBT's personnel. Moreover, SWBT may not "filter or digest" the underlying information and may not provide only information that is useful in the provision of a particular type of xDSL that SWBT offers. SWBT must provide loop qualification information based, for example, on an individual address or zip code of the end users in a particular wire center, NXX code or on any other basis that SWBT provides such information to itself. Moreover,

[79] WA Transcript, p. 4337.

> SWBT must also provide access for competing carriers to the loop qualifying information that SWBT can itself access manually or electronically.[80]

Thus, having access to filtered information in the loop qualification databases is insufficient.

In any case, the raw loop data tools do not contain all of the information that could be derived from an MLT. Ms. Liston verified that the information in the raw loop data tool associated with MLT is the MLT distance.[81] Covad's witness, Mr. Zulevik, testified in the Colorado Loop Workshop that the information in the raw loop data tool is the loop resistance information and that is not sufficient. There is no information regarding load coils and other basic electrical characteristics of the loop.[82]

Finally, contrary to Qwest's claims, at least one other incumbent carrier recognized the need for this test and includes it as one way for CLECs to obtain loop qualification information prior to provisioning the unbundled loop. Verizon offers competing carriers manual loop qualification as one of four methods of obtaining loop make-up information. Upon request for manual loop qualification by a competing carrier, Verizon personnel examine the Verizon databases (LiveWire and LFACS) and then perform what Verizon calls a mechanized line test on the loop to verify the actual

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[80] *In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, ¶ 121 (released. January 22, 2001) ("*BellSouth Kansas/Oklahoma 271 Order*")(Citations omitted).. *See also UNE Remand Order*, ¶ 430; *In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, CC Docket No. 01-8, FCC 01-130, ¶ 54 (released April 16, 2001) ("*Massachusetts Verizon 271 Order*").

[81] CO Transcript (04/18/01), p. 257 (Attachment D).

[82] *Id*., pp. 253 - 54.

loop length. If this test does not provide adequate information, Verizon engineers examine paper records to determine loop length, whether or not the loop is qualified and, if not, why.[83] According to the *Massachusetts Verizon 271 Order*, Verizon "has begun implementing access to manual loop qualification as a pre-order function . . . with complete implementation expected in October 2001."[84] Thus, it cannot be disputed that Verizon is offering MLTs on a pre-order basis.

The *UNE Remand Order* requires Qwest to provide requesting carriers with access to the same detailed information about the loop that is available to itself, in the same timeframe, "so that a requesting carrier could make an independent judgment at the pre-ordering stage about whether a requested end user loop is capable of supporting the advanced services equipment the requesting carrier intends to install."[85] Incumbent carriers must provide competitors with access to "the same underlying information that it has in any of its own databases or internal records."[86] The relevant inquiry is not whether Qwest's retail arm "has access to such underlying information but whether such information exists anywhere in [Qwest's] back office and can be accessed by any of [Qwest's] personnel."[87]

Qwest has the ability to perform an MLT on a copper loop connected to its switch at any time, and can perform this test to obtain loop qualification information prior to provisioning Megabit. Indeed, as described above, Qwest performed thousands of MLTs

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[83] *Massachusetts Verizon 271Order*, ¶ 58.
[84] *Id*.
[85] *Massachusetts Verizon 271 Order*, ¶ 54. *See also UNE Remand Order*, ¶ 427.
[86] *Massachusetts Verizon 271 Order*, ¶ 54; *BellSouth Kansas/Oklahoma 271 Order*, ¶ 121.
[87] *Massachusetts Verizon 271 Order*, ¶ 54; *BellSouth Kansas/Oklahoma 271 Order*, ¶ 121. *See also UNE Remand Order*, ¶ 430.

on its copper loops for the purpose of obtaining loop qualification information to populate its databases. AT&T requests access to the same information to which Qwest personnel have access, which includes the ability to perform and MLT prior to the provisioning an unbundled loop. This access is consistent with and required by the UNE Remand Order.[88] Qwest's failure to provide this access is discriminatory.

e. Installation hours definition (Loop – 4).

This issue was distilled to a discussion of the appropriate definition of installation hours, and whether they should be based on switch time, customer's local time or some other standard. This issue was deferred to the general terms and conditions workshop. AT&T also questions whether it is appropriate to have different, presumably higher, rates after 5:00. It is not clear that Qwest personnel are paid a higher rate just because they work non-standard hours. AT&T indicated that it will raise the appropriateness of differing rates for "out-of-hours" work in the cost case.[89]

f. Qwest is not making address validation adequately available (Loop – 7).

AT&T has had problems confirming addresses in Qwest pre-ordering and ordering interfaces.[90] AT&T and Qwest have exchanged information on sample orders where AT&T encountered these problems. Qwest has acknowledged that AT&T's order logs confirm that AT&T encountered problems on loop orders, but they do not concede that it is a problem with Qwest's system. During the Multistate workshop on June 8, 2001, AT&T agreed to determine whether this issue would be tested as part of the ROC

[88] *UNE Remand Order*, ¶ 427.
[89] WA Transcript, pp. 4348-56.
[90] *Id*., p. 4365.

OSS testing process. AT&T has attempted to do so. While it is unclear whether all of the potential sources of the address validation problem will be tested by the ROC test, it does appear that some address validation issues may surface and be addressed during the course of the test.[91] At least one potential cause of address validation problems has already surfaced in the ROC test and is the basis for an observation.[92] Accordingly, AT&T agreed to defer this issue to the ROC test.[93] If, however, AT&T is still encountering address validation problems that have not surfaced during the course of either test, AT&T reserved the right to raise this issue again at the conclusion of the OSS test.

g. Spectrum Management (Loop – 10).

Spectrum compatibility refers generally to the ability of loop technology to reside and operate in the same or an adjacent "binder group" as another loop technology.[94] The FCC has stated that the continuing development of spectrum compatibility standards should help to minimize crosstalk, the noise caused by extraneous signals combining with the intended signal and that such noise can result in the degradation of the intended signal.[95] Spectrum compatibility is achieved when energy that transfers into a loop pair, from services and transmission system technologies on other pairs in the same cable, does not cause an unacceptable degradation of performance.[96] Spectrum management refers to loop plant administration, such as binder group management, and other deployment

[91] *Id*., pp. 4370-72.
[92] *See* Memorandum Regarding Observation 2030, dated 6/14/01. (Attachment E).
[93] WA Transcript, pp. 4445-46.
[94] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order, CC Docket No. 98-147, FCC 99-355, ¶ 178 (released December 9, 1999) ("*Line Sharing Order*").
[95] *Id*.
[96] *Line Sharing Order*, ¶ 178.

practices that are designed to result in spectrum compatibility, preventing harmful interference between services and technologies that use pairs in the same cable.[97]

AT&T supports the revised SGAT language proposed by Rhythms in the Multistate Loop workshop regarding Spectrum Management and the arguments made by Rhythms at that workshop. Rhythms proposed language best reflects competitively neutral spectrum management practices, is consistent with FCC Orders and advances the goals of Section 706 of the Act to "encourage the deployment on a reasonable and timely basis of advance telecommunications capability to all Americans."[98]

The problems posed by Qwest's SGAT language and its spectrum management position are several fold. First, Qwest opposes SGAT language that would explicitly require Qwest to convert its T-1s to alternative technology where its facilities are causing interference. The FCC has clearly determined that T-1s are "known disturbers" and has established an exception to the first-in-time rule for T-1s. Specifically, in the *Line Sharing Reconsideration Order*, the FCC stated:

> We also reject Bell Atlantic's argument that the Commission's decision to permit newly deployed technologies to prevail against "known disturbers" in interference disputes is inconsistent with its "first-in-time" precedent. We find that the *Line Sharing Order* provides a limited exception to our "first-in-time" interference precedent that is reasonable based on the intent of section 706 of the Act and our policy goal, supported by the record, that deployment of innovative technologies that will result in less interference should not be disadvantaged by favoring known disturbers like AMI T1. As we stated in the *Line Sharing Order*, any approach to resolving interference disputes that favors incumbent LEC services in a manner that automatically trumps, without further consideration, innovative services offered by new entrants is neither consistent with section 706 nor with the Commission's goals as set out in the *Advanced Services First Report and Order*. With respect to known disturbers, we sought to ensure that "noisier" technologies that are at or near the end of their useful life cycles

[97] *Id.*
[98] 47 U.S.C. § 157.

> do not perpetually preclude deployment of newer, more efficient and spectrally compatible technologies.[99]

The FCC left to state commissions to determine the disposition of known disturbers in the network.[100] The FCC declined to order a nationwide sunset period for known disturbers, but concluded that states are better equipped to take an objective view of the disposition of known disturbers because ILECs have a vested interest in their own substantial base of known disturbers.[101] The FCC did, however, encourage carriers to discontinue deployment of known disturbers and emphasized that carriers should replace known disturbers with new and less interfering technologies.[102]

That is precisely what Rhythms has proposed. They have not suggested a complete sunsetting of T-1s and hDSL technology. Rather, Rhythms has proposed a less onerous and invasive solution that would merely require Qwest to replace T-1s and hDSL technology where the facilities are causing interference.[103] Qwest acknowledges that T-1s are known disturbers, but Qwest seeks to place limiting language on its obligation to change out T-1s. Qwest contends that it is not always possible to replace T-1s with alternative technology.[104] Rhythms disputed this.[105] The best way to resolve this dispute is to adopt the Rhythms proposed language, but permit Qwest, if no alternative technology exists in a particular case, to seek a waiver of the requirement from the state commission.

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[99] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order on Reconsideration, CC Docket No. 98-147, FCC 01-26, ¶ 54 (released January 19, 2001) ("*Line Sharing Reconsideration Order*").
[100] *Id*.
[101] *Id*.
[102] *Id*.
[103] Exhibit 941, Multistate Transcript (05/01/01), pp. 254, 258 - 59.
[104] *Id*., p. 298.
[105] *Id*., pp. 254, 299.

As for the placement of T-1s in the future, Rhythms proposes SGAT language that would explicitly state that all providers have an obligation to comply with the industry standards and details what that would require. Qwest contends that its SGAT language is sufficient. However, Qwest's language does not reflect any obligation on Qwest's part to not deploy facilities that interfere with advanced services. Rhythms language more clearly describes the requirements that must be met by all carriers in managing spectrum and articulates what is impermissible. In addition, Rhythms language is more consistent with the goals of Section 706 of the Act.

Second, Rhythms claimed that Qwest was placing T-1s on binder groups where Rhythms circuits reside and that the T-1s were causing interference sufficient to put Rhythms customers out of service.[106] While Qwest's witnesses professed confusion as to how this could be occurring, Qwest own employees were telling Rhythm this was the case.[107] The bottom line is that no carrier should be placing known disturbers in binder groups that could cause interference. Rhythms proposed SGAT language would require all carriers to follow spectrum management guidelines.

Similarly, this same proposed SGAT language and the adoption of a spectrum management policy that assumes that DSL is present in binder groups would eliminate the need to provide NC/NCI codes to Qwest.[108] Qwest contends that such information is necessary in order for Qwest to engage in binder group management.[109] The information Qwest's seeks is competitive information and, if all carriers are required to not deploy

[106] *Id*., pp. 233, 235, 265 - 66.
[107] *Id*., pp. 282 - 83, 265 - 66.
[108] *Id*., p. 290.
[109] *Id*., pp. 247, 302.

facilities that will cause interference, there is no need for the disclosure except where required to resolve disputes. In any event, industry standards bodies have now adopted provisions that reject the disclosure of this information.[110] In the *Line Sharing Order*, the FCC set the minimum ground rules at that time to "enable the industry, through its standards-setting bodies, to develop spectrum compatibility standards and spectrum management practices on a continuously ongoing basis, with our assumption of the standards-setting function only in extreme cases where industry standards bodies continue to fail in upholding the general policies that underlie spectrum compatibility standards and spectrum management rules and practices."[111]

The FCC requirement which Qwest cites as binding on this issue is an interim policy that has no binding or precedental effect and is now unnecessary. In its *Line Sharing Order*, the FCC pointedly referred to its views on the use of spectral mask information as "policies," not as rules.[112] In that same order, the FCC expressly stated "these policies and rules permit the industry to work further towards deriving solutions . . . . [W]e believe the spectrum management work currently being performed in T1E1.4 will prove quite useful in ensuring the evolution of advanced services deployment in a manner that safeguards spectrum compatibility."[113] Given that T1E1.4 has adopted a standard--T1.417--that did away with NC/NCI codes for spectrum management purposes,

[110] *Id*., p. 304.
[111] *Line Sharing Order*, ¶ 179.
[112] *Id.*, ¶ 204.
[113] *Id*. ¶ 211.

the FCC interim policy should give way.[114] Indeed, the NRIC group that is drafting

recommendations to the FCC based on T1.417 has proposed eliminating the reporting of spectral mask information as unnecessary and will ask that the FCC clarify that any such policy be rescinded. Given the direction that the standards bodies appear to be heading on the disclosure of NC/NCI codes, the FCC policy should not be enforced at this juncture. CLECs should only be required to disclose NC/NCI codes in response to a spectral dispute that involves their facilities.

Finally, Rhythms proposes that Qwest be required to follow spectrum management guidelines in remote deployment of DSL and not remotely place facilities that will interfere with DSL services. Qwest claims it shouldn't be required to do so because the industry rules are not yet in place.[115] Qwest's position is anticompetitive, is contrary to the Act and FCC orders and is contrary to the goals of Section 706 of the Act. Qwest's position is essentially that it should be permitted to place known disturbers in remote deployments now, even though it knows that such facilities will have to be dealt with later in order for advanced services to be provisioned in those areas. Qwest's argument makes no sense. Qwest should be more proactive. It should be required to comply with spectrum management guidelines now, even for remote deployment. In fact, the FCC encouraged carriers to discontinue deployment of known disturbers and emphasized that carriers should replace known disturbers with new and less interfering

[114] Exhibit 941, Multistate Tr. (5/1/01), p. 304, and (5/2/01), p. 94.
[115] *Id*., p. 89.

technologies.[116] It makes no sense to have one rule for central office facilities and another for remote facilities.

h. Qwest should revise certain of its Loop intervals (Loop – 11).

A number of the standard intervals set forth in Exhibit C for Unbundled Loops should be revised. Specifically, the standard intervals for 1(a) -2/4 Wire Analog Loops, 1(b) 2/4 Wire Non-Loaded Loops, 1(g) DS-1 Loops, and 1(h) Repair Intervals for Basic 2-Wire Analog Loops[117] are too long to provide the CLEC a meaningful opportunity to compete, are discriminatory, anticompetitive, and in some cases are contrary to applicable state law, and place the CLECs in a position where they cannot comply with established service quality standards that have been adopted in Washington.

Qwest has asserted in other loop workshops that if Qwest meets the benchmark, there is a presumption that the CLEC has a meaningful opportunity to compete. That is not the case. In fact, the FCC has been clear that actual commercial usage data is the most probative evidence that Qwest is providing nondiscriminatory access to interconnection and UNEs and the PID results are useful if volumes and demand is low.[118]

The standard interval is the interval in which Qwest is committing to provide a particular UNE to the CLEC. It is the interval that the CLEC will rely upon in providing its retail customer when the CLEC will be able to provision service to that customer.[119] It is the interval which the CLEC uses for calculating its due date for submission of its

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[116] *Id*., p. 89.
[117] AT&T proposed revisions to Interval 1(c) as well. However, Qwest has agreed to reduce these intervals and the new intervals proposed by Qwest are acceptable to AT&T. *See* Exhibit 928.
[118] *Ameritech Michigan Order*, ¶ 138; *BellSouth Kansas/Oklahoma 271 Order*, ¶ 36; *Massachusetts Verizon 271 Order*, ¶¶ 12 - 13.
[119] *Id*.

order to Qwest and in designing and provisioning other components and facilities that make up the service that the CLEC is provisioning to its retail customer. Qwest's proposed intervals are set forth in the Service Interval Guide ("SIG") - Exhibit C to the SGAT.

Before addressing the specific revisions AT&T has proposed to Exhibit C, Qwest has asserted in other loop workshops and here that the loop intervals set forth in its SIG were agreed upon as part of the negotiations surrounding PID OP-4 in the ROC OSS test process and that, therefore, CLECs are foreclosed from requesting revisions to the SIG in this Loop workshop. Qwest's assertion is flawed on many levels.

The SIG cannot be afforded any weight whatsoever, since it was never presented to the ROC for its review and approval. To conclude otherwise would deprive parties of their right in this proceeding to confront evidence presented by Qwest. As discussed below, the record is undisputed that the SIG was never presented to the ROC for its review and approval and therefore cannot be viewed as dispositive here.

In the multistate loop workshop, this issue was fully addressed by the parties, including a representative of MTG, Denise Anderson. As a result of these discussions several facts became clear. First, the SIG was never presented to the ROC TAG for its approval.[120] Nor did the ROC TAG formally approve any of the standard intervals in the SIG.[121] The reason the SIG was not presented to the ROC TAG is because the ROC TAG does not control the approval of standard intervals.[122] As a result, it was the CLECs understanding that the CLECs were free to propose specific changes to Exhibit C in the

[120] Multistate Transcript (06/05/01), pp. 162, 164 (Attachment G).
[121] *Id*., pp. 73, 94 - 95, 99 - 101.
[122] *Id*.

Section 271 workshop process. Indeed, Ms, Anderson from MTG testified that she did not believe that CLECs are foreclosed from raising issues regarding the service intervals in this workshop.[123] In addition, she confirmed that the TAG minutes which reflect the June 2000 agreement regarding the benchmarks for the 3 loop types described above specifically state that "once data is available in Q2, 2001, the intervals will be adjusted. This item will be open on the future discussion topic list."[124]

Certainly, Qwest does not appear to believe that the SIG has been agreed to and cannot be changed, since Qwest has proposed both reductions and increases for certain intervals in the SIG, without submitting those changes to the ROC TAG for their approval. For example, Qwest unilaterally increased the DS-1 intervals and decreased the xDSL/ISDN capable loop and analog (Quick) loop intervals – all without submission of those changes to ROC for their approval. It would be antithetical to allow Qwest the discretion to change the SIG at its whim, but at the same time refuse the CLECs the opportunity to challenge the SIG. In sum, there is no basis to conclude that CLECs should be foreclosed from raising and requesting revisions to intervals that were never confronted and discussed by the ROC TAG.

Based upon the multistate discussion and ROC documents, the only intervals that Qwest brought into the ROC TAG discussions were the intervals for Analog Loops, Non-Loaded Loops and ADSL-Qualified loops, and then the intervals that were considered were for order quantities of 9-16 loops.[125] The sole purpose for Qwest bringing these intervals into the TAG was to use those intervals as the average for establishing the

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[123] *Id*., pp. 183 - 84, 196.
[124] *Id*., p. 181. See also June 2000 Minutes of ROC TAG (Attachment F).
[125] Multistate Transcript (06/05/01), pp. 194 – 95 (Attachment G).

benchmark. There was no discussion as to whether the intervals Qwest raised in discussions were the appropriate standard intervals.[126] Also, there was no discussion of any of the intervals for other quantities of loop types.[127] Moreover, there was clearly no discussion whatsoever regarding the appropriate standard interval for DS-1 loops.[128]

For these reasons, CLECs should not be foreclosed from advocating changes to the SIG in the Section 271 workshops. Clearly, state commissions have the authority to order different standard intervals than those proposed by Qwest in its SIG and that, to the extent that a party seeks to have that new interval incorporated into the PIDs for some future purpose, the party must take that issue to the ROC.[129]

As the Washington Administrative Law Judge stated in the Thirteenth Supplemental Order issued in this proceeding:

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

That is precisely AT&T's point. The fact that certain benchmarks were established by the ROC for testing purposes does not undermine the state's right to enforce its own service quality standards, or to change them at their discretion.

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[126] *Id*., pp. 194, 198.
[127] *Id*.
[128] *Id*., pp. 166 - 67.
[129] *See id*., pp 168 - 169. For example, to the extent that the PIDs have some relevance to the PEPP, parties may want to update the PIDs.

The retail and wholesale service quality standards established by the state commissions are relevant to the assessment of whether the wholesale service intervals proposed by Qwest are appropriate. This is a relevant inquiry for several reasons. First, state commissions may have already established wholesale service intervals in which Qwest must provision the UNEs at issue here. Second, state commissions may have established retail service quality standards that apply to CLECs. To the extent that the standard interval proposed by Qwest impairs the CLEC's ability to meet any retail service quality standards imposed on the CLEC by state commissions, Qwest's standard is improper. Section 253 of the Act specifically enables state commissions impose requirements necessary to " ensure the continued quality of telecommunications services."[130]

Accordingly, AT&T recommends the following revisions to Exhibit C:

(a) Established Service Intervals 2/4 Wire Analog (Voice Grade):

a)	1 - 8 lines	~~5~~ 3 business days
b)	9 - 16 lines	~~6~~ 3 business days
c)	17 - 24 lines	~~7~~ 3 business days
d)	25 or more	ICB

(b) Established Service Intervals for 2/4 Wire Non-Loaded Loops, Basic Rate ISDN Capable Loops, and ADSL Compatible Loops that do not require conditioning, for loops that re-use existing facilities:

[130] 47 U.S.C. § 253 (b).

a)	1 - 8 lines	~~5~~ 3 business days
b)	9 - 16 lines	~~6~~ 3 business days
c)	17 - 24 lines	~~7~~ 3business days
d)	25 or more	ICB

(d) Established Service Intervals for existing DS-1 Capable Loops, DS1 Capable Feeder Loop, 2-Wire Analog Distribution Loop:

a)	1 – 8 lines	~~9~~ 5 business days
b)	9 – 16 lines	~~9~~ 6 business days
c)	17 – 24 lines	~~9~~ 7 business days
~~b~~d)	25 or More	ICB

(h) Established Repair Intervals for Basic 2-wire Analog Loops, Line Sharing and Line Splitting:

24 12 Hours OSS
48 Hours AS

The rationale for these revisions is as follows. For Intervals 1(a) and certain 1(b) loops, conversions for these loops require simple jumpering and migration work. There is no reason why this work should take more than three days.

Qwest has already responded to AT&T's proposal on 1(a) by offering Quick Loop, which is loop conversion without number portability and indicated that it was examining extending Quick Loop to loops with number portability.[131] The availability of Quick Loop for loops with number portability would resolve AT&T's issues with 1(a) and should be required.[132] During the workshop, Qwest indicated it would provide Quick Loop with number portability on 1 to 8 lines as of October 2001. If Qwest meets this commitment, AT&T's concern would be resolved.[133]

On 1(b), AT&T proposed that loops that are a re-use of existing Qwest loops, the Quick Loop intervals should apply.[134] For these loops, the work performed is a simple lift and lay and should not require any more work to be performed than the Quick Loops.[135]

AT&T agrees that the current intervals in 1(b) of the SIG would be appropriate.[136] The installation of new loops would require additional work that could justify additional time.[137]

Qwest claims that qualifying the loops is the reason why the 1(b) intervals need to be as they are in the SIG.[138] However, this assertion is not supported by a comparison of Qwest's initial intervals for 1(a) and 1(b). 1(a) intervals require no qualification, yet

[131] Exhibit 928.
[132] WA Transcript, pp. 4451-52.
[133] *Id*., p. 4452.
[134] *Id*., p. 4456.
[135] *Id*.
[136] *Id*.
[137] *Id*.
[138] *Id*., pp. 4459-60.

Qwest initially proposed the same intervals for both 1(a) and 1(b) loops.[139] If there was a significant time associated with qualifying the 1(b) loops, that time would have been reflected in a significant difference in the initial 1(a) and 1(b) intervals. There was none.

With respect to Interval 1(d), DS-1 loops, in prior versions of Exhibit C filed in Washington, Qwest proposed the very intervals AT&T is requesting.[140] Qwest now claims that it lengthened these intervals because those are the intervals that exist on the retail side (apparently from Qwest's interstate special access tariff) and, therefore, the intervals in Exhibit C are parity.[141] Qwest notified CLECs of these changes to the standard intervals for DS-1s in the ROC process, but did not seek the approval or agreement of the ROC participants for these changes.[142] Nor were these changes discussed by the ROC or TAG participants.

AT&T objects to Qwest's revised intervals. AT&T is the largest purchaser of DS-1s from Qwest on the "retail" side. Qwest arbitrarily and unilaterally changed the intervals offered to retail customers in the last year.[143] For years prior to that, Qwest provided DS-1s pursuant to the intervals AT&T is proposing here, although it did not do so in a timely fashion. As has been the case with local service, Qwest has failed to build facilities to meet customer needs in a timely manner and AT&T filed service quality complaints to attempt to resolve this issue.[144] Qwest's response was not to improve its service, but rather to change its provisioning commitment to its retail customers by

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[139] *Id*., p. 4460.
[140] Exhibit 928.
[141] WA Transcript, p. 4471.
[142] Multistate Transcript (06/05/01), pp. 165 – 67 (Attachment G).
[143] CO Transcript (05/24/01), p. 245 (Attachment H).
[144] WA Transcript, p. 4487.

lengthening the intervals.[145] It now uses those retail intervals that it arbitrarily altered to argue parity. In AT&T's view, the solution to poor service is not to change the intervals. Moreover, poor service on the retail side should not be used to drive parity decisions of the wholesale side. Qwest should be required to establish an appropriate interval and meet that interval. BellSouth UNE Interval Table reflects a 5-day interval for DS-1 loops.[146]

In addition, Qwest should be required to revise its DS-1 intervals because the proposed intervals conflict with the intervals Qwest agreed to provision DS-1s within in the Qwest/U S WEST merger case.[147] As part of the Qwest/U SWEST merger proceeding, Qwest entered into a Settlement Agreement in which it agreed to specific maximum provisioning intervals. By agreement, these intervals are to be in place until December 31, 2002 or until permanent wholesale service standards are adopted in Washington, whichever is earlier.

The intervals established in the Settlement Agreement for DS1s are as follows:

1-8 lines	5 days (high density)[148]
	8 days (low density)
9-16 lines	6 days (high density)
	9 days (low density)
17-24 lines	7 days (high density)
	10 days (low density)
25 or more	ICB

[145] *Id*.
[146] BellSouth UNE Interval Table, Issue 4B – February 2001, (Exhibit 930). Qwest has argued that the BellSouth interval is actually longer than portrayed, but the assumptions it relies upon only applies for LSR submitted manually or that require manual intervention. *See* CO Transcript (05/24/01), pp. 236 – 45 (Attachment H).
[147] *In re Application of U S WEST, Inc. and Qwest Communications International, Inc*., Ninth Supplemental Order Approving and Adopting Settlement Agreements and Granting Applications, Docket No. UT-991358, Appendix B, pp. 4-5 (dated June 19, 2000).
[148] All intervals in the Settlement Agreement are stated as business days.

The intervals proposed by AT&T here are consistent with the high density intervals that Qwest agreed to abide by in the Settlement Agreement.

With respect to 1(g), AT&T supports the arguments made by Covad in its Brief for revising the intervals for provisioning loops with conditioning.

As for 1(h), AT&T contends that an 18-hour interval on repair is more than sufficient given Qwest performance on mean time to restore.[149] For its retail customers Qwest's mean time to restore is 9 hours, based upon March data.[150] The current data reflects a retail mean time to restore in a range of 7 to 14 hours, with and without dispatch.[151] That is the parity figure that should be used as the basis for establishing the wholesale service interval. Thus, the 18-hour interval proposed by AT&T is clearly appropriate and should be reduced even further to be at parity with retail. If Qwest is not required to do better than a 24-hour interval on the wholesale side, CLECs will never be able to come close to matching Qwest's repair time for its retail customers.

In addition, Qwest's mean time to restore on the wholesale side is currently running from 5 to 12 hours, with and without dispatch, so it is clear that AT&T's proposal is realistic.[152]

Qwest argues that the performance measures establish a 24-hour repair interval and the repair interval for retail basic service is 24 hours.[153] That is not the measure of parity. Parity is measured based upon the actual service Qwest provides to its retail

[149] WA Transcript, pp. 4479-80.
[150] WA Transcript, p. 4484.
[151] *See* PID Results for MR – 6 for May 2000-April 2001, dated May 24, 2001.
[152] *See id*.
[153] WA Transcript, p. 4485.

customers, itself or its affiliates, not the standard established by state commissions.[154] That is the only measure that will provide CLECs with a meaningful opportunity to compete, particularly where Qwest is performing better than the standard. As the record and the reported performance results indicate Qwest' repair performance for its retail customers is significantly better that the 24-hour repair interval proposed in Exhibit C.

For all the reasons set forth herein, Qwest should be required to revise its service intervals in the manner proposed by AT&T. Such revisions are necessary to afford CLECs a meaningful opportunity to compete, to afford the CLEC nondiscriminatory access to UNE loops, to comply with state commission requirements, and to afford the CLEC the ability to comply with state commission rules.

i. Qwest should redesignate interoffice facilities where loop facilities are at exhaust (Loop - 12).

This issue concerns whether Qwest must redesignate fiber spans between Qwest offices as loops facilities if Qwest's distribution facilities in that area are at exhaust. Qwest's designates fiber spans between Qwest offices as interoffice facilities. AT&T contends that if the distribution facilities are at exhaust between two Qwest offices and Qwest receives orders for UNE loops that could be filled by redesignating those facilities to distribution facilities, Qwest should be required to do so to meet CLEC demand.[155] Given Qwest refusal to build facilities to meet CLEC demand, this requirement makes

[154] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA services in Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (released August 19, 1997), ¶ 139 ("Ameritech Michigan Order").
[155] WA Transcript, pp. 4405-06.

sense. It also will eliminate any incentive for Qwest to improperly designate facilities as interoffice in order to reserve such facilities for Qwest's own use.

Qwest concedes that there is spare capacity, including dark fiber, that has been designated by Qwest as interoffice facilities, but states that Qwest will not redesignate these facilities as loop or subloop facilities if demand requires and alternative facilities do not exist.[156] Qwest's policy is contrary to law, effectively allowing Qwest to reserve capacity for itself, denying CLECs access to unused capacity while, at the same time, refusing to build to meet CLEC demand. It would allow Qwest to game the Act by designating facilities as IOF, thus eliminating the availability of capacity for UNE loops.

Qwest's defense is that it does not redesignate facilities for itself so it will not do so for CLECs.[157] Qwest presented no evidence to validate this. Nor did it present any policy stating that such facilities never be redesignated. In fact, Mr. Zulevik, Covad's witness and a former employee of U S WEST, testified that fiber that was forecasted for interoffice facilities was made available when needed for distribution facilities.[158] Certainly, Qwest has the discretion to use its facilities however it chooses if the need arises. AT&T understands that this should be an exception not the rule. However, it would be better to look to redesignate IOF facilities than dig up streets, if there is available capacity. Accordingly, AT&T requests such redesignation if facilities are at exhaust in order to meet CLEC demand for UNEs, rather than denying the CLEC the ability to serve its customers. AT&T's proposal is efficient and pro-competitive and should be adopted.

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[156] WA Transcript, pp. 4407-10; *See* CO Transcript (04/20/01), pp. 62 – 68 (Attachment I).
[157] *Id*.
[158] WA Transcript, p. 4411.

j. Qwest must provide access to loops served using IDLC (Loop – 22).

Section 9.2.2.2 describes the analog loops Qwest intends to offer on an unbundled basis. Initially, the last sentence of this section contained a limitation that UNE loops would be provided "to the extent possible." This was included to limit Qwest's obligation to provided loops that are served using Integrated Digital Loop Carrier ("IDLC").

In the *Bell South Second Louisiana Order* and the *SBC Texas Order*, the FCC states that "[t]he BOC must provide competitors with access to unbundled loops regardless of whether the BOC uses [IDLC] technology . . ."[159] Qwest's SGAT, as initially filed, was not consistent with this requirement.

Qwest contends that the FCC has acknowledged the difficulty of provisioning loops that are served off of IDLC. That is true; however, the FCC has never altered the ILEC's obligation to provide IDLC loops.

CLECs have experienced coordination problems when there is a conversion from Qwest's services provisioned in a community served by IDLC to UNE Loop. When a CLEC orders basic installation in a community served by IDLC they have encountered a high percentage of disconnects.[160] It appears that the process problem stems from the fact that the Qwest disconnect order is not getting stopped while the technicians are determining whether the end-user customer's loop is served using IDLC and, if so, how Qwest is going to provision that loop. This results in the customer experiencing a loss of service.[161] Qwest has indicated it has made some process changes that it represents will solve this problem. It is uncertain whether these process changes will, in fact, resolve

[159] *BellSouth Second Louisiana 271 Order*, ¶ 187, *SBC Texas 271 Order*, ¶ 248.
[160] WA Transcript, pp. 4511-13.

this problem. However, AT&T agreed to close this issue in Washington, subject to ROC testing and satisfactory performance by Qwest.

Since the filing of testimony in these workshops, Qwest has made considerable progress in the steps it will take in provisioning IDLC loops. Specifically, during the course of the workshops, Qwest proposed new SGAT language to Section 9.2.2.2.1 and introduced new processes and several exhibits that outline these new processes for provisioning loops that use IDLC technology.[162] In addition, Qwest has altered its position that hairpinning would be limited to 3 loops per central office and agreed to provision more than the three loops per central office on an interim basis.[163] Qwest also stated that a decision will be made to place a Central Office terminal when the number of hairpinned loops exceeds three loops.

With this commitment and Qwest's commitment to revise its technical publications within 45 days of the conclusion of the Colorado workshop on these issues, AT&T issues surrounding IDLC provisioning processes are resolved. However, it should be made clear in the order issued on this checklist item that Qwest remains obligated to provision loops served by IDLC and the ultimate objective of the steps outlined in the workshop and to be addressed in the technical publication is to ensure that CLEC/DLECs have access to unbundled loops served using IDLC.

k. Miscellaneous Issues.

Several disputed issues were closed, subject to review of Qwest's revised technical publications. In these instances, Qwest agreed to provide revised the technical

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[161] *Id*.
[162] *See* Exhibit 885-T, pp. 33-37; Exhibits 893, 894 and 895; WA Transcript, pp. 4513-17.
[163] WA Transcript, 4516-17.

publication within 45 days of the conclusion of the final Colorado workshop and other parties would have 30 days to review these revisions. For example, Loop 5(b) and Loop 7, regarding availability of loops on IDLC, were closed subject to such review.

In addition, several issues were deferred to the cost case. Specifically, the issue of whether Qwest's proposed loop conditioning charge results in double recovery has been deferred to the cost case. It is AT&T's position that Qwest is already recovering the cost for loop conditioning in the current loop price. In addition, as indicated above, the proper overtime rate to be applied for out-of-hours loop installations has been deferred to the cost case.

B. Line Splitting

1. Legal Requirements.

Line splitting is the ability for different carriers to provide voice and data services over a single loop. The FCC has determined that incumbent LECs have a current obligation to provide competing carriers with the ability to engage in line splitting arrangements.[164] The FCC's rules require incumbent LECs to provide requesting carriers with access to unbundled loops in a manner that allows the requesting carrier "to provide any telecommunications service that can be offered by means of that network element."[165] As a result, incumbent LECs have an obligation to permit competing carriers to engage in line splitting over any loop or loop combination.

[164] *Line Sharing Reconsideration Order*, ¶ 18.
[165] 47 C.F.R. § 51.307(c).

In addition, Qwest is required to provide to CLECs all the functionalities and capabilities of the loop, including electronics attached to the loop.[166] The splitter is an example of such electronics that is included within the loop unbundled network element.

2. Disputed Issues on Line Splitting.

As AT&T demonstrates below, Qwest fails to comply with the Act and applicable FCC Orders with regard to line splitting. Therefore, the Commission should find that Qwest has failed to satisfy its Section 271 obligations. In failing to comply with its obligations to provide nondiscriminatory access to line splitting, Qwest has failed to comply with checklist items 2 (unbundled network elements) and 4 (local loop transmission).

a. Qwest should be required to provide access to outboard splitters on a line-at-a-time, or shelf-at-a-time basis. (Line Splitting – 1(a)).

AT&T contends that Qwest should be required to provide access to outboard splitters that it places in its central offices and remote terminals and make them available on a line-at-a-time or shelf-at-a-time basis.[167] Qwest objects to such a requirement. There is no legitimate legal, technical or operational justification for Qwest's refusal. Qwest allows access by its retail customers to its splitters on a line-at-a-time basis. It has presented no technical reason why similar access cannot be provided to CLECs. Qwest should be required to modify its SGAT to state that, to the extent Qwest deploys in its network splitters that are not integrated with the DSLAM and are capable of being provided to DLECs on a line-at-a-time or a shelf-at-a-time basis, that Qwest will provide DLECs with access to such splitters.

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[166] *UNE Remand Order*, ¶ 175.
[167] *See* WA Transcript, p. 4558.

Qwest has not disputed that it is technically feasible for Qwest to provide access to outboard splitters on a line-at-a-time basis.[168] Rather, Qwest contends that they are not required to provide line-at-a time access.

CLECs purchasing UNE Loops or UNE combinations are entitled to "all capabilities of the loop including the low and high-frequency spectrum portions of the loop . . .."[169] In the FCC's Line Sharing Order, the FCC defined the high frequency portion of the loop as a capability of the loop.[170] In order to gain access to the high frequency portion of the loop, line splitting is required. Such line splitting is accomplished by means of passive electronic equipment referred to as splitters, which splits the low and high frequency portions of the loop. The FCC has also determined that ILECs must afford CLECs access to all of the UNE's features, functions, and capabilities, including attached electronics, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element, specifically including DSL services."[171] The FCC reiterated that the loop includes "attached electronics" if such electronics are necessary to fully access the loops feature, functions and capabilities in order to provide service to end users.[172] Under these determinations of the FCC, the splitter is a feature, function or capability of the loop that must be provided to CLECs.

Qwest relies on the SBC Texas 271 Order to support its position. The SBC Texas 271 Order does not support Qwest's position. In that Order, the FCC merely notes that it

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[168] CO Transcript (05/22/01), pp. 141 – 50 (Attachment J).
[169] 47 C.F.R. § 51.319(a)(1).
[170] *Line Sharing Order*, ¶ 17.
[171] 47 C.F.R. §51.307; *UNE Remand Order*, ¶¶166-67.
[172] Id. ¶ 175.

had not yet exercised its rulemaking authority to require ILECs to provide access to splitters, and therefore, it would not require SBC to provide access to splitters as part of that proceeding.[173] The FCC specifically declined to comment on the requirement that an ILEC provide access to an ILEC-owned splitter on the grounds that it was considering this issue in response to AT&T's petition for reconsideration of the *UNE Remand Order*.[174] The FCC decision with regard to SBC's application on this issue was set at a particular point in time. As all participants know, the law is constantly evolving in this area. The SBC decision is therefore not dispositive of what the FCC may decide at the point in time when Qwest is before the FCC with its application for Section 271 relief, nor is it dispositive as to what state commissions may order to promote the development of competition and the broader availability of advanced services.

The FCC's decision to not impose a requirement on ILECs to provide access to ILEC-owned splitters in its review of the SBC Section 271 Application should not deter any state commission from imposing such a requirement on Qwest. It is clear that the state commissions are free to establish additional procompetitive requirements consistent with the national framework established by the Act, and the FCC's implementing rules and orders, under its own authority. For example, Section 251(d)(3) of the Act allows state commissions to enforce regulations, orders or policies that "establish access and interconnection obligations of local exchange carriers."[175]

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[173] *SBC Texas 271 Order*, ¶ 328.
[174] *Id.*
[175] 47 U.S.C. § 251(d)(3).

That is precisely what the Texas Public Utilities Commission concluded in a recent arbitration decision.[176] There, concluding that the FCC's BellSouth Texas 271 Order did not prevent the Texas Commission from doing so, the PUC affirmed an arbitrators' recommended decision, which required Southwestern Bell to provide splitters on a line-at-a-time basis. Specifically, the Arbitrator stated:

> Although, as noted by SWBT, the FCC has to date, not required ILECs to provide the splitter in either a line sharing or line splitting context, the Arbitrators believe this Commission has the authority to do so on this record. The FCC has clearly stated that its requirements are the minimum necessary, and that state commissions are free to establish additional requirements, beyond those established by the FCC, where consistent.[177] Indeed, in the *SWBT Texas 271 Order*, the FCC acknowledged that line splitting, a recent development, would be subject to potential arbitration before the Texas Commission. The Arbitrators, therefore, believe on this record that it is sound public policy to require SWBT to provide AT&T with a UNE loop that is fully capable of supporting any xDSL service.[178]

Then, citing the rulings of the FCC referenced above, the Arbitrators determined that SBC must provide access to its splitters. The decision further found (1) that "excluding the splitter from the definition of the loop would limit its functionality," (2) that "it is technically feasible for SWBT to furnish and install splitters to [enable CLECs to] gain access to the high frequency portion of the loop when purchased in combination with a switch port," and (3) that it is "inaccurate from a technical standpoint to analogize splitters to DSLAMs."[179]

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[176] *Order Approving Revised Arbitration Award, Petition of Southwestern Bell Telephone Company for Arbitration with AT&T Communications of Texas*, Docket No. 22315, pp. 7 - 9 (dated March 14, 2001) (Attachment K).
[177] *UNE Remand Order* ¶¶ 154 - 60; *Line Sharing Order* ¶¶ 223 - 25.
[178] *Revised Arbitration Award, Petition of Southwestern Bell Telephone Company for Arbitration with AT&T Communications of Texas*, Docket No. 22315, p. 16 (released September 27, 2000) ("*Texas Arbitration Award*"). (Attachment L).
[179] *Id*., pp. 17 - 19.

Finally, the Texas decision noted that SWBT's effort to require LECs to collocate in order to gain access to the high-frequency portion of the loop "(1) unnecessarily increases the degree of coordination and manual work and accordingly increases both the likelihood and duration of service interruptions; (2) introduces unnecessary delays for space application, collocation construction and splitter installation; and (3) unnecessarily wastes central office and frame space."[180] Thus, the arbitrators found that SWBT's approach "significantly prohibits UNE-P providers from achieving commercial volumes."[181] Conversely, they found that requiring the ILEC to provide the splitter not only advances competition but also "promotes more rapid deployment of advanced services to a broader cross section of consumers, as required by Section 706" of the Act.[182]

Qwest attempts to distinguish the Texas Commission's decision by claiming that its ruling is somehow based solely upon the notion that SWBT was allowing its affiliate line-at-a-time access to its splitters. However, a straight-forward reading the Texas order indicates that that was not the principle rationale in their ruling.

Qwest also contends that it does not currently use outboard splitters in its central offices. It claims that is splitters are integral, hard wired units.[183] During the Colorado Loop workshop, Qwest finally revealed the type of splitters it deploys in its network and testified that, in Qwest's current configuration, a shelf of splitters are "connecterized" to their DSLAMs.[184] Splitters that are "connecterized" to the DSLAM are not integrated

[180] *Id*., p. 19.
[181] *Id*.
[182] *Id*.
[183] WA Transcript, p. 4559.
[184] CO Transcript (05/22/01), pp. 141-42 (Attachment J); WA Transcript, 4560-61.

into the DSLAM and, therefore, it is technically infeasible to separate the splitter from the DSLAM.[185] For the splitters used by Qwest, it is technically feasible to break out the splitter from the DSLAM.[186] In fact, Covad testified in Colorado that the Qwest DSLAM/splitter configuration is no different that the Covad/Qwest splitter/ DSLAM configuration that Qwest is requiring CLEC to use in lieu of the Qwest splitter and under this configuration the Covad splitters are "connecterized to the Qwest DSLAM.[187] Indeed, Qwest's witness conceded that it was possible to provide access to a shelf of Qwest splitters in this configuration.[188] Thus, Qwest's contention simply does not withstand scrutiny.

Access to Qwest-owned splitters will serve to advance competition for DSL service and bundles of voice and data service, and as such, is very much in the public interest. As AT&T discussed in its comments relating to the Emerging Services workshop, there are several significant benefits to Qwest providing access to outboard splitters. When data CLECs share an ILEC-owned splitter, switching a voice customer's data provider among such providers is much simpler and conserves valuable resources.

Access to Qwest owned splitters also yields benefits when a customer terminates individual services, allowing for the efficient usage of splitters and racks within central offices where space is already scarce, and promotes competition among data CLECs because voice providers and ISPs encounter fewer barriers to switching from one provider to another.

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[185] *Id*., pp. 149 – 50.
[186] *Id*.
[187] *Id*.
[188] *Id*., pp. 143- 45.

Requiring Qwest to provide access to its splitters also promotes the ability of CLECs to offer a bundle of voice and data service in competition with Qwest. One of the procompetitive aspects of UNE-P is that it allows a voice CLEC to enter the market and compete with Qwest without having to obtain collocation space. Access to Qwest-owned splitters on a line-at-a-time basis eliminates the need for UNE-P providers to secure collocation arrangements, and thus provides similar benefits to the expansion of DSL with UNE-P. For example, by having access to splitters, UNE-P providers can effectively partner with any data CLEC that has deployed a DSLAM in the central office, and are not limited to those that have already deployed their own splitters or lack space for additional splitters. By making it less difficult for UNE providers to access the high frequency portion of the loop, this impediment to competition may be avoided.

Accordingly, Qwest should be required to modify its SGAT to state that it will provide access to its splitters on a shelf-at-a-time basis.

b. Qwest Should be Required to Provide Line Splitting on all Types of Loops. (Line Splitting – 3, 4, 5, 6 and 9).

Qwest is required to provide line splitting on all forms of loops and Qwest's differentiation between UNE-P splitting, Loop Splitting and EEL Splitting ignores this obligation.

In its initial filings on line splitting, Qwest proposed to make line splitting available only for loops provided via its UNE-Platform ("UNE-P") POTS offering. AT&T and other CLECs objected to this. In the workshop, Qwest indicated it would offer loops splitting on UNE loops as of August 1.[189] AT&T agrees that Qwest must do

[189] WA Transcript, pp. 4571-72; *See also*, SGAT Section 9.24.

so, however, it is AT&T's position that Qwest's offer is insufficient to constitute compliance with Section 271 for several reasons.

Qwest's attempt to differentiate UNE-P line splitting and Loop Splitting demonstrates the fundamental dispute between Qwest and CLECs/DLECs. Qwest has asserted that its obligation to provide line splitting under the FCC's Orders is limited to UNE-P line splitting, citing to the FCC's *Line Sharing Reconsideration Order,* claiming that the Order is somehow ambiguous as to its applicability beyond UNE-P.[190]

AT&T disagrees. The FCC could not have been clearer in the *Line Sharing Reconsideration Order* that the line sharing and line splitting obligations apply to the entire loop. Specifically, with respect to line splitting, the FCC stated in the *Line Sharing Reconsideration Order*:

> We find that incumbent LECs have a current obligation to provide competing carriers with the ability to engage in line splitting arrangements. The Commission's existing rules require incumbent LECs to provide competing carriers with access to unbundled loops in a manner that allows the competing carrier "to provide any telecommunications service that can be offered by means of that network element." Our rules also state that "[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on ... the use of unbundled network elements that would impair the ability of" a competing carrier "to offer a telecommunications service in the manner" that the competing carrier "intends." We further note that the definition of "network element" in the Act does not restrict the services that may be offered by a competing carrier, and expressly includes "features, functions, and capabilities that are provided by means of such facility or equipment." As a result, independent of the unbundling obligations associated with the high frequency portion of the loop that are described in the Line Sharing Order, *incumbent LECs must allow competing carriers to offer both voice and data service over a single unbundled loop*. This obligation extends to situations where a competing carrier seeks to provide combined voice and data services on the same loop, or where two competing carriers join to provide voice and data services through line splitting.[191]

[190] WA Transcript, pp. 4575-77.
[191] *Line Sharing Reconsideration Order*, ¶ 18 (Emphasis added).

The FCC concluded that requiring RBOCs to provide line splitting:

> will further speed the deployment of competition in the advanced services market by making it possible for competing carriers to provide voice and data service offerings on the same line. As we found in the Line Sharing Order, these offerings are especially attractive to residential and small business customers. At present, end users receiving voice service from competing carriers via the UNE-platform may be unable to get xDSL service from a competing carrier without migrating their voice service back to the incumbent LEC. Line splitting, however, increases consumer choices by making it possible for carriers to compete effectively with the combined voice and data services that are already available from incumbent LECs and through line sharing arrangements. In addition, line splitting provides voice carriers who do not wish to provide xDSL service at this time to develop partnerships with data carriers and thereby offer end users voice and data services on the same line. Furthermore, as the New York Public Service Commission has found, the availability of line splitting may increase the likelihood that competing carriers will make investments in facilities that will help solidify competing carrier market share.[192]

The FCC makes no distinction in the manner in which the loop is delivered to the CLEC in its line splitting requirement. Rather, the FCC confirms that CLECs should have broad access to use all the features and functionalities of the loop and that ILECs may not impose any limitations on the use of the loop by the CLEC.[193] Thus, Qwest's refusal to allow CLECs to use the full functionality of the loop for purposes of line splitting is an improper limitation on the CLECs use of the loop. Qwest should be required to permit line splitting on all loops and loop combinations.

While, AT&T and WCom sought reconsideration of the FCC's initial *Line Sharing Order* to clarify that RBOCs must permit line splitting on UNE-P, the FCC confirmed, in its Reconsideration Order, that the requirement to provide line sharing and

[192] *Id*., ¶ 23.
[193] *Id*., ¶ 27.

line splitting applies to the entire loop, including UNE-P.[194] Thus, Qwest's attempt to use terminology to limit its line splitting obligation by the terminology it uses to define its offerings cannot undermine its obligation to provide line splitting on all loops.

For these same reasons, Qwest must make available line splitting on EELs and other combinations that utilize the loop. Qwest claims that it will allow EEL splitting via the special request process ("SRP").[195] While this process has only just been proposed by Qwest in the General Terms and Conditions workshop, the special request process is similar to the bona fide request process, except technical feasibility has already been established. Qwest claims that this process applies when, from Qwest's perspective, there is insufficient demand to justify Qwest creating a product.[196] By proposing the use of the SRP process, Qwest is conceding there is no issue that it is technically feasible to provide EEL splitting. Rather, Qwest is simply refusing to make EEL splitting generally and readily available as a standard offering.

Qwest's assertions are flawed for several reasons. First, the SRP is a time consuming process, with an undefined time-table. Forcing the CLECs to use SRP to obtain line splitting on EELs would impose unnecessary and inappropriate delays. Second, Qwest's justification for its refusal to create a product is flawed. Qwest claims there has been no demand for EEL splitting. At least one reason for this is that the FCC's line splitting obligation is new and CLECs/DLECs have simply not had sufficient opportunity to request all forms of line splitting, including EEL splitting. In addition,

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[194] *Id*., ¶¶ 10, 18.
[195] CO Transcript (05/22/01), pp. 121 – 22 (Attachment J).
[196] *Id*., pp. 126 - 27.

absent an available product, there is no product for a CLEC/DLEC to request and the use of the SRP process just to determine if the line splitting can be provided will be a disincentive to CLECs/DLECs requesting EEL splitting. Therefore, Qwest's assertion will become a self-fulfilling prophecy. Finally, nor can Qwest rely upon on any claim that there have been very few EELs ordered to justify its refusal to generally offer EELs. Until recently, CLECs had to order EELs as private lines and there have been significant problems encountered in converting those private lines to EELs. Thus, Qwest's rationale does not provide a sound basis for Qwest's refusal to develop a standard offering for EEL splitting, particularly given the FCC's unambiguous requirement that Qwest must permit line splitting on all loops.

As a practical matter, there is no material difference between Qwest permitting line splitting on UNE-P, UNE Loops or EELs. In any of these cases, the underlying loop facilities are being leased by the CLEC and the CLEC should be allowed to use the full features and functions of the loop as they choose. Moreover, splitting of the UNE loop and the EEL loop both involve splitting the line at the central office and should not require any different work by Qwest.

The consequence of this Qwest policy, coupled with Qwest refusal to provide its Megabit service where a CLEC is providing the underlying voice service means that customers that are served by CLECs using EELs will not have access to obtain DSL service. Qwest's policies are anticompetitive, and a barrier to the competition that the FCC was attempting to enhance with its line splitting directives. Specifically, the FCC concluded that this requirements would further speed the deployment of competition in the advanced services market by making it possible for competing carriers to provide

voice and data service offerings on the same line and that line splitting would increase consumer choices by making it possible for carriers to compete effectively with the combined voice and data services that are already available from incumbent LECs and through line sharing arrangements.

Qwest must make line splitting available on all loops, including all loop combinations, as a standard offering, on an unlimited basis. CLECs/DLECs must not be forced to use the time consuming SRP process to implement line splitting. Accordingly Qwest should revise Section 9.21 of its SGAT to clearly set forth it obligation to provide line splitting on all loops and loop combinations. In addition, the SGAT should be revised to clearly state that Qwest will offer EEL splitting as a standard offering and to state the terms and conditions of such an offering. Until Qwest does so, it cannot comply with Checklist Item 4.

c. Qwest's SGAT must be modified to allocate liability appropriately for the customer of record. (Line Splitting – 8(a)).

Qwest should be required to modify Sections 9.21.7.3 and 9.24.7.3 of its SGAT to fairly allocate liability for determination of customer of record.

Qwest, AT&T and other CLECs have agreed on a mechanism to permit an agent for a CLEC to interface with Qwest on line splitting and "loop splitting" matters.[197] Such a mechanism will allow cooperating CLECs to designate one point of contact for ordering unbundled loop facilities for both high frequency and low frequency applications.

A number of mechanisms to designate the appropriate agent would have been acceptable to CLECs, including express notification to Qwest that CLEC has chosen a

specific other carrier as its agent. Qwest opted to utilize a mechanism that creates a presumption that any carrier who had access to a CLEC's security devices (secureIDs, passwords, etc.) would be deemed an "authorized agent" of CLEC. This mechanism, although not perfect, has the advantage of minimizing the amount of unnecessary Qwest process and procedure that could delay or frustrate order, maintenance or repair of shared facilities.

The mechanism agreed to by the parties, however, does create the risk that an unauthorized person could use the CLEC's security devices inappropriately. The parties sought to manage this risk by including SGAT Sections 9.21.7.3 and 9.24.7.3, which are identical. However, the last sentence of these sections should make clear that Qwest shall not be held harmless where it has culpability for the unauthorized use of a CLECs security devices.

Thus, the dispute between AT&T and Qwest is fairly discrete. The last sentence of Sections 9.21.7.3 and 9.24.7.3 as proposed by Qwest, requires a demonstration that the third person "wrongfully" used the security devices and that Qwest acted "willfully" or "negligently."[198] AT&T maintains that only a showing of Qwest's willfulness or negligence is appropriate and that AT&T need not demonstrate that the third party also "wrongfully' used the security devices.[199] Accordingly, AT&T proposes that the word "wrongfully" be stricken from these sections.

To require the CLEC to demonstrate that the third party was also "wrongful" in its use of the security devices adds an additional burden to CLECs attempts to fairly assess

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[197] *See* SGAT Sections 9.21.7 and 9.24.7.
[198] WA Transcript, pp. 5691-94.
[199] *Id*.

liability for harm. It is a fair and ordinary business practice to except the willful and negligent acts of a party from any "hold harmless" provision without any additional limitation. Here it is especially appropriate not to further insulate Qwest from liability because requiring an additional demonstration of a third party's wrongfulness reduces the incentives and pressures on Qwest not to act willfully or negligently.

Qwest may argue that the concept is needed to suggest that the actions must be "bad." AT&T maintains that the only "bad" actions relevant are those of Qwest's and are subsumed in the concept of "willfulness." To require an additional demonstration of "bad" actions—whether Qwest's or a third party's—eviscerates the concept of liability based on Qwest's negligence.

Qwest may also argue that an assessment of the third party's wrongfulness is also appropriate because Qwest should not be liable if the third party's actions had a neutral or even beneficial effect on CLEC. Such an assertion is nonsense because it ignores the fact that if the CLEC suffers no harm (presumably because the third party's actions were not wrongful in that they did not result in any harm or were beneficial), there would be no liability to hold Qwest harmless from anyway.

C. Network Interface Device (NID)

1. Legal Requirements.

Section 271(c)(1)(B)(ii) states that a BOC must provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1). In its recent *UNE Remand Order*, the FCC on remand identified the list of network elements that Qwest must provide pursuant to section 251(c)(3).

The FCC redefined the NID to " include all features, functions, and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring,

regardless of the particular design of the NID mechanism."[200] Specifically, the FCC defined the NID to include "any means of interconnection of end-user customer premises wiring to the incumbent LEC's distribution plant, such as a cross connect device used for that purpose."[201] The FCC also requires that "an incumbent LEC shall permit a requesting telecommunications carrier to connect its own loop facilities to on-premises wiring through the incumbent LEC's network interface device, or at any other technically feasible point."[202]

In addition, the FCC's definition encompasses "smart NIDs" which are devices used on PBX trunks and DS1 loops that give some maintenance monitoring for the loop. Qwest must also make available the full features and functions of the NID, such as termination devices for ISDN loops.

2. Disputed Issues on NIDs.

a. Qwest Must Make the NID Available on a Stand-Alone Basis (NID – 1(a)).

The issue at dispute is the manner in which Qwest is defining the NID. Qwest's NID definition is found at Section 9.5.1 of the SGAT. Qwest asserts that the NID definition reflects merely the FCC's language.[203] However, Qwest clearly intends for its definition of a NID to provide access to a terminal only when such terminal constitutes the demarcation between a customer's inside wire and Qwest's network.[204] If Qwest owns the inside wire then the CLEC obtains access to the NID terminal via the

[200] *UNE Remand Order*, ¶ 233.
[201] 47 C.F.R. § 51.319(b).
[202] *Id.*
[203] Qwest curiously introduces part of the FCC's definition with the phrase "*The NID carries with it* all features, [etc.]" Section 9.5.1 (emphasis added). The modification itself, which does not precisely track the FCC's definition, introduces some interpretive uncertainty as to how Qwest intends on the FCC's definition to be incorporated.
[204] Exhibit 885-T, p. 65..

subloop.[205] Qwest's testimony clearly indicates that it intends for the NID product to be narrower than the FCC's expansive definition. AT&T seeks to ensure that Qwest does not eliminate, through its narrowing of the FCC's broad definition of NIDs, access that is contemplated by the FCC in its unbundling rules.

In the *Local Competition Order*, the FCC defined the network interface device ("NID") as a cross-connect device used to connect loop facilities to inside wiring.[206] Subsequently, in the *UNE Remand Order*, the FCC broadened its definition "to include all the features, functions and capabilities of the facilities used to connect loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism."[207]

Specifically, FCC rules now define the NID as follows:

> The **network interface device network** element is defined as any means of interconnection of end-user customer premises wiring to the incumbent LEC's distribution plant, such as a cross connect **device** used for that purpose. An incumbent LEC shall permit a requesting telecommunications carrier to connect its own loop facilities to on-premises wiring through the incumbent LEC's **network interface device**, or at any other technically feasible point.[208]

Qwest must demonstrate that its definition of the NID is lawful. Failure to demonstrate that such definition is lawful fatally flaws Qwest's 271 application. The FCC has provided specific guidance on this issue. Its guidance makes clear that access to the physical devices that might be described as a NID are less important than access to the functions constituting the NID. The FCC has made clear that the NID "structure" and "function" are distinct, concluding that "[a]lthough the physical structure of the NID is

[205] WA Transcript, pp. 4524-25.
[206] *Local Competition Order*, ¶ 392, n. 852.
[207] *UNE Remand Order*, ¶ 233.

widely available, it is access to the function, rather than the hardware itself, that competitors rely upon."[209]

Qwest argues that the NID definition is irrelevant because Qwest is providing the CLEC every conceivable access it could want through the NID or subloop products. Qwest's assertion is belied by its subloop access protocol for MTEs, which appears to limit CLEC access to only 66 Block and 76 Block terminals.[210] Qwest's own witness observed that Qwest's deployment of NIDs was complex, noting that there are "hundreds of variations of [NID] terminals out there."[211] This is more than just a pricing issue. It is an issue that concerns access to the NID and the terms and conditions under which such access will be afforded. As was clear from the subloop workshop, the terms and conditions associated with accessing subloop are significantly different and more complex and time consuming than the NID access terms. Therefore, CLECs need the assurance of specific rules applicable to all NIDs. CLECs should not be forced to risk Qwest's application of such specific rules to limit the CLEC's "access to the function, rather than the hardware" of a NID. This is precisely why AT&T seeks to ensure that the expansive definition established by the FCC is not undermined by Qwest.

The FCC has made a clear determination that incumbent LECs such as Qwest have used the MTE chokepoint as a means to severely inhibit competition. In the *MTE Order*, the FCC found that "incumbent LECs are using their control over on-premises wiring to

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[208] 47 C.F.R. § 51.319(b),
[209] *UNE Remand Order*, ¶ 232.
[210] *See* Exhibit 1167, Qwest's Standard Multi Tenant Environment (MTE) Terminal Access Protocol, pp. 11-12.
[211] *Id*., p. 77.

frustrate competitive access in multitenant buildings."[212] Further, the FCC found "that incumbent LECs possess market power to the extent their facilities are important to the provision of local telecommunications services in MTEs."[213] Finally, the FCC recognized that "[i]n the absence of effective regulation, they therefore have the ability and incentive to deny reasonable access to these facilities to competing carriers."[214]

Without a clear statement that Qwest is indeed required to provide access to he NID to the full extent of the FCC's order, CLEC's risk problematic interpretive disputes with Qwest. These disputes may require initiation of the Bona Fide Request process, Dispute Resolution or, possibly, arbitration under the Act. Although CLECs specific operational issues may be inevitable, it is unacceptable to have to litigate every form of NID access, when the law is so expansive.

Accordingly, Qwest must be required to revise the definition of the NID in its SGAT to be consistent with the FCC's definition. In addition, the remainder of Section 9.5 should be conformed to be consistent with the FCC's definition. For example, Qwest has maintained that where Qwest owns the on-premises wiring, Qwest will not offer the NID to CLECs. In such instances, Qwest maintains, the NID is only available as a component of Qwest's subloop product.[215] The application of the definition of NID may extend beyond the physical terminal Qwest restrictively identifies as the NID. Indeed the functions and features of the NID may extend to certain "downstream" network

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[212] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, 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, WT Docket No. 99-217, FCC 00-366, ¶ 6 (released October 25, 2000) ("*MTE Order*").
[213] *MTE Order* ¶ 11.
[214] *Id*.
[215] WA Transcript, pp. 4524-25.

components that may include some wiring, adjacent protectors and other equipment. Qwest should be required to make all components of the NID—including all features and functions of the NID— available to CLECs.

This is precisely what applicable law requires. The FCC's definition of the NID "include[s] all the features functions and capabilities of the facilities used to connect loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism."[216] It bears repeating: the FCC made clear that "[a]lthough the physical structure of the NID is widely available, it is access to the function, rather than the hardware itself, that competitors rely upon."[217] Accordingly, all components of the NID must be made available to CLECs, not merely the NID "terminal."

b. Qwest should be required to remove its connections from protectors when CLECs access the protector (NID – 2(b)).

CLECs may encounter situations where they will need to request that Qwest free capacity on the NID so that the CLEC can provide service to the customer.[218] This is an important issue because Section 9.5.2.1 of the SGAT limits the CLEC's access to NID to cases where space is available on the NID. There is no provision that would require Qwest to make space available on the NID. This may be particularly necessary in situations where the customer does not want an additional NID on their premise or in MTE setting where association rules limit additional boxes.[219] Failure to free such capacity may make the NID, or connections within the NID, inaccessible to the CLEC.

Qwest has objected to this request, claiming it had no obligation to make space available on the NID and that AT&T's proposal for removing Qwest loop connection

[216] *UNE Remand Order*, ¶ 233.
[217] *UNE Remand Order*, ¶ 232.

violates the National Electrical Code. Qwest is obligated to provide access to the NID, unless it is technically infeasible for it to do so. Therefore, Qwest is obligated to remove its loop connections from the NID, absent technical infeasibility.

There is no question that it is technically feasible for Qwest to remove its connections from the NID. Qwest does not dispute this. AT&T provided a Bell System Practice that explicitly permits a procedure called "capping off," a procedure which would entail removing the Qwest circuit from the NID and tying it down.[220] Qwest claims that this practice is from 1969, implying it is outdated. Qwest presented no evidence that this practice was ever superceded in the Bell System or U S WEST/Qwest.

Qwest has also asserted that this Bell System practice address a scenario that is different from the removal of the loop by the ILEC for use by the CLEC.[221] This argument is nonsensical. The precise scenario at issue here did not exist at the time. However, as Mr. Wilson, AT&T's witness, testified the procedure depicted in the Bell System practice of removing the protector from the house is analogous to the procedure proposed by AT&T. More to the point, lightning and over-voltage issues have not change since the date of this practice.[222] Mr. Wilson is an engineer with years of experience in the Bell System with local distribution facilities and he stated that this is a proper and acceptable practice.[223]

The only evidence Qwest present to support its refusal to provide access to the NID is its reference to Section 315A of the National Electrical Safety Code and the

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[218] WA Transcript, pp. 4528-30.
[219] WA Transcript, p. 4529.
[220] Exhibit 957; WA Transcript, pp. 4529, 4531-32.
[221] *Id*. pp. 272-73.
[222] *Id*., p. 274.

Section 800-30(a) of the National Electrical Code. Qwest claims that these provisions somehow proscribe it from removing its loop connections in the manner proposed by AT&T.[224] Neither of the provisions cited by Qwest to the National Electrical Safety Code and the National Electrical Code address the proposal made by AT&T. Section 315A of the National Electrical Safety Code addresses the need for protection where a "communications apparatus is handled by other than qualified persons."[225] That is not the case here. We are talking about situations where company technicians that are qualified persons would be capping off loop facilities.

Similarly, Section 800-30(a) of the National Electrical Code is not applicable. This section applies to circuits that run partly or entirely in aerial wire or aerial cable that not confined within a block or circuits, aerial or underground, located within the block containing the building served so as to be exposed to accidental contact with electric light or power conductors operating at over 300 volts to ground. A block is defined in Section 800-2 as square or portion of a city, town, or village enclosed by streets and including the alleys so enclosed, but not any street. "Exposed" has three definitions in the Code. In Article 100 – Definitions, exposed (as applied to live parts) is defined as capable of being inadvertently touched or approached nearer than a safe distance by a person and it is applied to parts that are not suitably guarded, isolated, or insulated. Also in Article 100, exposed (as applied to wiring methods) is defined as on or attached to the surface or behind panels designed to allow access. Finally, in Section 800-2 Definitions, exposed is

[223] *Id*. pp. 259, 274.
[224] WA Transcript, pp. 4529-30.
[225] *Id*.

defined as a circuit that is in such a position that, in case of failure of supports and insulation, contact with another circuit may result.

A capped circuit is not exposed under any of these definitions. Based upon the first definition, when the conductors are capped, the wire cannot be inadvertently touched. For purposes of the second definition, a capped circuit is not attached directly to the structure, it is attached to a standoff that is an insulator. Finally, based upon the third definition, the circuit is doubly insulated and so it cannot come in contact with another circuit even if one insulating sheathe is compromised.

When a communications circuit actually interfaces with inside wire at a building, then it is “exposed" and must have a protector under the National Electrical Code.

In essence, paragraph 800-30(a) requires Qwest to have a protector on a pole in the block for each circuit.[226] This is because not all distribution facilities are actually connected to premises. [227] Spare facilities exist in the loop plant that are not "dropped" to buildings. The reference to electric light or power conductors at over 300 volts is referring to the fact that telephone wires typically coexist on power poles with high voltage lines. Workmen must be protected from accidental contact with communications circuits that have become connected to high voltage power lines or lighting.[228] If Qwest does not have such protectors on all circuits in the block, they are in violation of the National Electrical Code. All cables must have such protection as there is no assurance that any particular circuit actually terminates in a protector at a building. There is no exposure to voltages over 300 volts at buildings (with the exception of industrial facilities

[226] Exhibit 956; WA Transcript, pp. 4532, 4534-35.
[227] WA Transcript, pp. 4534, 4537-38.
[228] WA Transcript, pp. 4534-35.

that are covered by other sections) as the voltage that is available to such buildings is at maximum 220 V. However, the National Electrical Code does not require a protector at the house when the drop does not penetrate the building.[229] Thus, this section of the National Electrical Code is not germane to AT&T's proposal.

Therefore, Qwest has not presented any viable technical or safety concerns and must remove its loop connections in order to provide access to its NID in order to provide CLECs access to its NID where space is not otherwise available. AT&T proposes the following modification to the last sentence of Section 9.5.2.1 to implement this obligation: "At no time should either Party remove the other Party's loop facilities from the other Party's NID without appropriately capping off the other Party's loop facilities."

[229] WA Transcript, p. 4534.

III. CONCLUSION

For all the reasons set forth herein, Qwest has failed to comply with Checklist Items 4.

Respectfully submitted this 6th day of September, 2001.

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. AND AT&T LOCAL SERVICES ON BEHALF OF TCG SEATTLE AND TCG OREGON

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