BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996	)	Docket No. UT-003022
In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996.	)	Docket No. UT-003040

QWEST'S LEGAL BRIEF
REGARDING IMPASSE ISSUES RELATING TO PACKET SWITCHING, LINE SHARING, SUBLOOP UNBUNDLING, DARK FIBER, LINE SPLITTING, AND NETWORK INTERFACE DEVICES

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I. INTRODUCTION

Qwest Corporation ("Qwest") submits this brief to the Washington Utilities and Transportation Commission ("Commission") in support of its compliance with its obligations to provide competitive local exchange carriers (“CLECs”) with access to packet switching, line sharing, subloop elements, dark fiber, line splitting, and network interface devices ("NIDs"). Qwest is filing a separate brief to address the impasse issues related to checklist item 4, unbundled loops.

As it has in other states, Qwest has made significant efforts to resolve disputes with participating CLECs regarding these issues in Washington, and has modified its Statement of Generally Available Terms ("SGAT") to accommodate many of its competitors’ requests. In many instances, Qwest has agreed to modifications that were unnecessary for compliance purposes, but which accommodated CLEC concerns or eliminated disputes. Despite Qwest's concessions, the parties could not reach agreement regarding three issues relating to packet switching, three issues relating to line sharing, four issues relating to subloop unbundling, five issues relating to dark fiber, five issues relating to line splitting, and two issues relating to NIDs. As demonstrated below, each of these issues should be resolved in Qwest's favor as a matter of fact and law.

Although disputes remain, the Commission should note that many of these issues relate to the CLECs' desire to impose new obligations on Qwest rather than to Qwest's compliance with its present obligations under section 271 of the Telecommunications Act of 1996 (the “Act”). Such issues are not appropriate for consideration in this proceeding. Section 271 proceedings are narrowly focused proceedings to assess whether ILECs are complying with the existing state of the law.[1] In its recent *Massachusetts Order*, the FCC reiterated that the section 271 process is not intended to resolve

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[1] The relevant inquiry is whether a BOC complies with the law in effect at the time its section 271 application is filed. Memorandum Opinion and Order, *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,* CC Docket No. 01-9, FCC 01-130 (April 16, 2001) ("***Verizon Massachusetts Order***") ¶ 10; Memorandum Opinion and Order, *Application of SBC Communications, Inc. Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, FCC 01-29 (Jan. 22, 2001) ("*SBC Kansas/Oklahoma Order*") ¶ 18; Memorandum Opinion and Order, *Application of SBC Communications, Inc. Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas,* CC Docket No. 00-65, FCC 00-238 (June 30, 2000) ("*SBC Texas Order*") ¶ 27.

> disputes over an incumbent LEC's precise obligations to its competitors that our rules have not addressed and that do not involve *per se* violations of self-executing requirements of the Act. As the Commission has explained in prior orders, the section 271 process simply could not function as Congress intended if we resolved all such disputes as a precondition to granting a section 271 application.[2]

Thus, a section 271 proceeding is not an appropriate forum in which to consider or impose new obligations on an incumbent local exchange carrier ("ILEC").[3] Because this section 271 proceeding is not the proper forum for the creation of new legal requirements under the Act, the Commission should reject CLEC requests to do so. Further, because, as demonstrated below, Qwest has established that the SGAT satisfies its current obligations, the Commission should approve Qwest's SGAT.

II. PACKET SWITCHING

In its UNE Remand Order, the FCC modified Rule 319 to require unbundling of packet switching only in very limited circumstances.[4] As the FCC has recently confirmed, Rule 319(c)(3)(B) requires an incumbent to unbundle packet switching only if each of the following preconditions is met: (1) the ILEC has deployed a digital loop carrier system ("DLC"), (2) there are no spare copper loops capable of supporting the xDSL services that a CLEC seeks to offer, (3) it has not permitted the requesting CLEC to collocate its DSLAM at the remote terminal, and (4) the ILEC has deployed packet switching capability for its own use.[5] The CLECs insist that Qwest expand its unbundled packet switching offering beyond these limited circumstances.

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2 *Verizon Massachusetts Order* ¶ 10.

3 *SBC Kansas/Oklahoma Order* ¶¶ 18-19 (section 271 proceeding is fast-track, narrowly focused adjudication that is inappropriate for consideration of industry-wide local competition questions of general applicability); *SBC Texas Order* ¶¶ 23-27 (a section 271 proceeding is not an appropriate forum for resolution of new and unresolved interpretive disputes regarding an ILEC's obligations to competitors).

4 Third Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, 15 FCC Rcd 3696 (rel. Nov. 5, 1999) ("*UNE Remand Order*") ¶ 313; 47 C.F.R. § 51.319("Rule 319").

5 Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 & 96-98, FCC 01-26 (Rel. January 19, 2001) ("*Line Sharing Reconsideration Order"*) ¶ 56, citing Rule 319(c)(3)(B).

A. Issue PS-1: Qwest has Fully Implemented the FCC's Rule Regarding the Availability of DSLAM Collocation. [SGAT Section 9.20.2.1.3]

This issue revolves around the language of section 9.20.2.1.3, which states that one of the conditions for unbundling packet switching is as follows:

> Qwest has placed a DSLAM for its own use in a remote Qwest Premises but has not permitted CLEC to collocate its own DSLAM at the same remote Qwest Premises or collocating a CLEC's DSLAM at the same Qwest Premises will not be capable of supporting xDSL services at parity with the services that can be offered through Qwest's Unbundled Packet Switching.

This language tracks the FCC's third condition in Rule 319(c)(3)(B)(iii), and therefore is a necessary prerequisite to unbundling packet switching. Many of the arguments raised in the earlier section apply here as well. AT&T and Covad seek to impose an obligation for Qwest to unbundle packet switching if they believe it is economically infeasible to collocate their DSLAM in the same remote premises as Qwest. The CLEC's request flatly contradicts the FCC rule. The CLECs admit as much, as noted above.

The CLECs base their objections to section 9.20.2.1.3 primarily on their claim that it is "unlikely" that it will ever be economically feasible to remotely collocate a DSLAM.[6] However, again, no CLEC submitted any evidence to support these allegations.

These issues are beyond the scope of this narrowly focused proceeding. As noted above, a Section 271 proceeding is not the proper forum for adding new legal obligations. Instead, such arguments are appropriately made in response to the FCC's further notice of proposed rulemaking seeking comment regarding whether the limited obligation to unbundle packet switching should be expanded.[7]

Moreover, the United States Supreme Court rejected a virtually identical argument posited by the FCC when striking down the FCC's unbundling standard.[8] There, the FCC argued that the impairment prong of the test for unbundling was met if

> the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative

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6 AT&T's Emerging Services Comments at 15-16.

7 *Line Sharing Reconsideration Order* ¶ 63.

8 *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999).

> cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network.

Iowa Utilities Board, 119 S.Ct. 721, 735. This is the exact argument raised by CLECs here. The Supreme Court rejected that standard because it provided a windfall to competitors:

> [T]he Commission's assumption that any increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element "necessary," and causes the failure to provide that element to "impair" the entrant's ability to furnish its desired services is simply not in accord with the ordinary and fair meaning of those terms. An entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been "impaired" in its ability to amass earnings, but has not ipso facto been "impaired . . . in its ability to provide the services it seeks to offer.

Id. The CLEC argument against section 9.20.2.1.3 is as misguided as the FCC's erstwhile impairment test and should be rejected for the same reasons.

To support its request, Covad cites a recent arbitration award issued in a Public Utility Commission of Texas ("Texas Commission") proceeding.[9] As an initial matter, decisions of the Texas Commission do not control over FCC orders with respect to this 271 proceeding. Contrary to Covad's claims, however, the Texas Arbitration Award sets forth a very narrow finding that does not apply to Qwest's network. The arbitrators found as follows:

> Accordingly, the Arbitrators find that *the record in this case* demonstrates that the packet switching functionality incorporated within *the particular architecture that SWBT* is deploying should be unbundled *for the limited purpose* of providing CLECs access to Project Pronto. . . . *The Arbitrators do not find that packet switching functionality should be unbundled generally, as we are cognizant of the FCC's limited exception for packet switching as indicated above.*[10]
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> Thus, the Arbitrators order SWBT to unbundle the packet switching functionality associated with NGDLC technology in order for CLECs to obtain access to the transmission facility from the demarcation point at

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9 Arbitration Award, *Petition of IP Communications Corporation to Establish Expedited Public Utility Commission of Texas Oversight concerning Line Sharing Issues and Petition of Covad Communications Company and Rhythms Links, Inc. against Southwestern Bell Telephone Company for Post-Interconnection Dispute Resolution and Arbitration under the Telecommunications Act of 1996 regarding Rates, Terms, Conditions and Related Arrangements for Line Sharing*, Docket Nos. 22168 & 22469 (July 13, 2001) ("*Texas Arbitration Award*") at 76-79. The Texas Arbitration Award can be found on the Internet at the following URL: http://interchange.puc.state.tx.us/Ichange/DocsLoc1/313365.DOC

10 *Texas Arbitration Award* at 79 (emphasis added).

> the customers' location through the remote terminal and terminating in a port on the OCD in the central office.[11]

The arbitrators thus limited their ruling to the facts before them, the particular architecture of Project Pronto, and the limited purpose of providing CLECs access to that architecture. Finally, the arbitrators emphasized that packet switching should *not* be generally unbundled because the FCC has clearly limited its availability. This carefully limited finding would only apply to Qwest if Qwest had deployed the NGDLC (next generation digital loop carrier) architecture identical to SWBT's Project Pronto. The record in this proceeding clearly reflects that is not the case.

In response to Covad's citation to the *Texas Arbitration Award* at the workshop, Qwest stated that "the architecture Qwest is deploying . . . does not utilize next generation digital loop carrier."[12] Therefore, the *Texas Arbitration Award's* holding, by its own deliberately limited terms, does not apply to Qwest. Instead, Covad ignores the arbitrators' limitations and argues that Qwest should be required to generally unbundled packet switching functionality -- precisely what the arbitrators themselves refused to do. The *Texas Arbitration Award* expressly rejects Covad's position. Qwest urges this Commission to do the same.

What the CLECs truly seek is a finding pursuant to Rule 319 that Qwest must unbundle packet switching irrespective of the FCC's finding that such unbundling is fails to meet the "impair" standard in section 251(d) of the Act. The Commission cannot impose obligations beyond those imposed by the FCC by requiring Qwest to unbundle packet switching unless it affirmatively finds that CLECs prove they would be impaired. The CLECs have not even come close to meeting their burden. The only evidence in the record regarding how CLECs purportedly would be impaired is their bald allegations that failure to so unbundle will cause CLECs hardship. The CLECs presented no evidence of the costs they would actually incur when remote deploying DSLAMs; they presented no evidence of their anticipated take rate of customers in each distribution area; they presented no evidence of alternative technologies [DSLAMs] that may be available to keep rates low; they presented no evidence of the

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11 *Texas Arbitration Award* at 80.

12 July 31, 2001 Workshop Transcript Vol. 36 at 5440:10-19.

number of customers that they must obtain in a distribution area to start before the deployment becomes profitable. They simply state they will be harmed.

The CLECs' argument for an economic feasibility exception to the FCC's four requirements has been rejected by the Multistate Facilitator,[13] the Arizona Commission Staff,[14] and the Colorado Commission Staff.[15] Indeed, the Multistate Facilitator stated: "There is simply no sound basis for deciding that the FCC conditions regarding DSLAM collocation should be supplemented by the addition of an economic feasibility test."[16] The CLECs have provided no basis on which this Commission should create an additional exception to the FCC's conditions; therefore, this claim must be rejected.

B. Issue PS-2: Qwest has Fully Implemented the FCC's Rule Regarding the Availability of Spare Copper Loops. [SGAT Section 9.20.2.1.2]

The parties reached impasse regarding the second of the FCC's four requirements for unbundled packet switching: "there are no spare copper loops capable of supporting the xDSL services that a CLEC seeks to offer." In order to implement this condition, Qwest literally copied it word-for-word into the SGAT at section 9.20.2.1.2. Nonetheless, AT&T and Covad complain that additional language regarding available copper loops must be included in order to ensure that CLECs can offer the xDSL service they desire. Specifically, AT&T requests that the word "no" be replaced with "insufficient" and that the word "adequately" be added before "supporting," so that the requirement

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13 Seven states in Qwest's fourteen state region -- Iowa, Idaho, Montana, North Dakota, New Mexico, Utah, and Wyoming -- have engaged a Facilitator for the purpose of hearing and providing recommendations regarding the issues discussed in the workshops. The proceedings being held by that Facilitator are referred to herein as the "Multistate." The Multistate Facilitator has issued his recommendations regarding emerging services in a report entitled, "Report on Emerging Services," dated June 11, 2001 (hereinafter "Multistate Facilitator's Emerging Services Report"). The body of that report, excluding the cover page, was identical for six of the seven states (except Utah) and is attached hereto as Exhibit 1. The Facilitator rejected AT&T's proposal. Multistate Facilitator's Emerging Services Report at ¶45.

14 The Arizona Corporation Commission Staff rejected AT&T's proposal in its Final Report on Qwest's Compliance with Section 271 Emerging Services, *In the Matter of Qwest Corporation's Section 271 Application*, ACC Docket No. T-00000A-97-0238 (August 1, 2001) ("Arizona Staff's Final Emerging Services Report") ¶ 296. A copy of that report is attached hereto as Exhibit 2.

15 The Colorado Public Utilities Commission Staff rejected AT&T's proposal as "unreasonable" in Commission Staff's Final Report on Issues that Reached Impasse during the Workshop Investigation into Qwest's Compliance with Checklist Item No. 2 regarding Emerging Services: Dark Fiber, Packet Switching, Line Sharing, Subloop, *In the Matter of Qwest Corporation's Compliance with § 271(c) of the Telecommunications Act of 1996*, Docket No. 97I-198T (August 30, 2001) ("Colorado Staff's Final Emerging Services Report") ¶¶ 75-77. A copy of that report is attached hereto as Exhibit 3.

16 *See* Exhibit 1, Multistate Facilitator's Emerging Services Report at 45.

would be revised to read: "there are *insufficient* spare copper loops capable of *adequately* supporting the xDSL services that the requesting carrier seeks to offer."[17]

These arguments fail as a matter of law and fact and have been rejected by the Multistate Facilitator[18] and the and Arizona and Colorado Commission Staff.[19] First, AT&T is admittedly seeking to add to the existing legal obligations under the Rule and FCC orders. AT&T has clearly and consistently conceded as much, particularly in the Multistate workshops. Such issues are beyond the scope of this proceeding.

Further, the SGAT language tracks the rule's requirements exactly, yet the CLECs seek to revise the SGAT to include more onerous requirements than the Rule. The FCC has already rejected this argument. The identical dispute arose in SWBT's Kansas/Oklahoma proceeding. The FCC held that SWBT had satisfactorily established a sufficient legal obligation because the SGATs at issue "incorporate verbatim the criteria adopted in our *UNE Remand Order* to establish when packet switching will be made available."[20] Thus, the CLECs' arguments fail as a matter of law. Moreover, the FCC recently sought comment regarding whether this limited obligation to unbundle packet switching should be expanded.[21] To the extent the CLECs seek to impose additional obligations on Qwest with regarding to unbundled packet switching, those arguments are appropriately made in response to the FCC's further notice of proposed rulemaking, not in this narrowly focused section 271 proceeding.

The CLECs' arguments also fail on the facts. First, inserting "adequately" to modify the requirement that available loops must be "capable of supporting the xDSL services the requesting carrier seeks to offer" adds nothing but vagueness and the potential for conflict. Indeed, the Arizona Commission Staff specifically found that "AT&T's proposed language changes would introduce too

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17 AT&T's Comments on Access to Dark Fiber, Packet Switching, and Line Sharing, dated June 7, 2001 ("AT&T's Emerging Services Comments") at 14-15.

18 *See* Exhibit 1, Multistate Facilitator's Emerging Services Report at ¶¶43-44.

19 *See* Exhibit 2, Arizona Staff's Final Emerging Services Report ¶ 255; Exhibit 3, Colorado Staff's Final Emerging Services Report ¶¶ 65-68.

20 *Kansas/Oklahoma Order* ¶243 (emphasis added).

21 *Line Sharing Reconsideration Order* ¶ 63 ("To the extent our current packet switching rules are not adequate to enable competitors to line share where there is fiber deployed in the loop, we seek comment on how they should be modified").

much uncertainty and opportunity for dispute."[22] Similarly, the Colorado Commission Staff found that AT&T's proposal would "serve to confuse the general framework adopted by the FCC."[23] The CLECs' revision would introduce a layer of uncertainty by requiring a factual inquiry regarding the "adequacy" of loop capabilities. The language in the SGAT (and the Rule) unambiguously states the condition: available loops are either capable of supporting the xDSL service the CLEC chooses to offer or they are not. Thus, the CLECs' proposed insertion of "adequately" should be rejected.

AT&T's contention that "no" should be replaced by "insufficient" is similarly flawed. Under the Rule, packet switching must be unbundled if there are no spare copper loops capable of supporting the xDSL service the CLEC seeks to offer. This analysis applies on a customer-by-customer basis.[24] If there is an available loop capable of providing the particular customer with the service the CLEC desires to offer, then the condition is not met. If there is no such loop available to support the xDSL service a CLEC seeks to offer to its customer, the condition is met. The concept of insufficiency simply does not apply. Again, AT&T's proposal would only introduce an additional layer of uncertainty by requiring a factual inquiry regarding the "sufficiency" of available loops. Thus, AT&T's proposal to replace "no" with "insufficient" should be rejected.

In addition, the CLECs' argument is moot because it assumes circumstances that, as a practical matter, will not exist. The CLECs claim that the preconditions must be modified because, without their proposed revision, their ability to provide service to communities where a few copper loops were available would be impeded because they would have to provide service to those customers with their own packet switch, and then be required to change to providing service with unbundled packet switching.[25] This situation assumes that the available loops are copper, within the distance limitations of xDSL service and that, despite that some of the distribution area is already served by xDSL qualified loops Qwest has nonetheless remotely deployed a DSLAM.

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22 *See* Exhibit 2, Arizona Staff's Final Emerging Services Report ¶ 290.

23 *See* Exhibit 3, Colorado Staff's Final Emerging Services Report ¶ 66.

24 Rebuttal Testimony of Karen A. Stewart on behalf of Qwest Corporation Re: Emerging Services, dated June 21, 2001 ("Stewart Rebuttal Testimony") at 55:1-9.

25 July 13, 2001 Workshop Transcript Vol. 32 at 4656:4-17.

The situation the CLECs portray is, if not an actual impossibility, is a virtual impossibility. In order for packet switching to be unbundled, Qwest must have remotely deployed a DSLAM. Generally, Qwest will only remotely deploy a DSLAM if the existing loops are too long to support xDSL.[26] If Qwest has remotely deployed a DSLAM, there generally are no spare copper loops capable of supporting xDSL service available. If there are no qualified loops available, a CLEC will not be required to begin serving a neighborhood on copper loops, then switch gears to market Qwest's offering through unbundled packet switching. Conversely, as a practical matter, where the fourth condition for unbundling -- Qwest has remotely deployed a DSLAM -- is met, the second condition -- no xDSL capable copper loops -- will also be met. Thus, the CLECs' concern that the availability of copper loops will pose an impediment to their ability to obtain unbundled packet switching is moot as a practical matter.

C. Issue PS-3: Qwest is Not Required to Allow CLECs to Place Line Cards into its Remote DSLAMs Unless the Four Requirements for Unbundling Packet Switching Rule are Satisfied.

Qwest has no obligation to allow CLECs to place line cards in Qwest's remote DSLAMs. In fact, the FCC recently requested comments regarding whether this kind of line card collocation is possible: "We also seek comment on the technical feasibility and practical considerations associated with different methods of providing such access . . . includ[ing] . . . the use of "plug in" line cards in remote terminal equipment that perform a function similar to that of a traditional DSLAM."[27] The fact that the FCC is considering whether to create a new obligation confirms that no such requirement currently exists. Again, this 271 docket is not the appropriate place to decide the issue, especially in light of the pending *Notice of Proposed Rulemaking* before the FCC. Yet that is exactly what the CLECs attempt to do here.

AT&T and Covad argued for the ability to place line cards into Qwest remote DSLAMs, sometimes called "plug and play," regardless of whether the four conditions for unbundling packet switching are met.[28] Again, the CLECs acknowledge that they seek to impose obligations beyond

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26 July 13, 2001 Workshop Transcript Vol. 32 at 4658:1-10.

27 *Line Sharing Reconsideration Order* ¶ 13.

28 *See* Direct Testimony of Michael Zulevic on Loops, Line Splitting, Emerging Services and General Terms and Conditions on behalf of Covad Communications Company, dated June 7, 2001, at 14.

those the FCC currently requires. They also acknowledge that this issue is currently before the FCC for decision. Nonetheless, they jump the gun and demand this now. Their arguments fail as a matter of both law, as set forth above, and fact.

There is no evidence in the record to suggest that "plug and play" is technically feasible without imposing additional obligations on Qwest to unbundle packet switching in situations that are outside of the clearly defined circumstances under which packet switching is required.[29] The FCC has defined packet switching as "the function of routing individual data units, or 'packets,' based on address or other routing information contained in the packets[,] . . . includ[ing] the necessary electronics (*e.g.*, routers and DSLAMs)."[30] Packet switching qualifies as a network element because it includes "all features, functions and capabilities . . . sufficient . . for transmission, routing or other provision of a telecommunications service."[31]

Further, plug and play necessitates unbundled packet switching because individual line cards do not have the full functionality required to operate the DSLAM; rather, a line card is merely a sub-component of the DSLAM, with very little stand-alone functionality.[32] As described at the workshops, ADSL line cards provide DSLAM functionality on a shared resource basis, *i.e.*, ADSL line card performs similarly to a modem pool in that DSLAM functions, including packetizing, are provided to end users on a first come, first served basis.[33] Further, an additional DSLAM card is required to address individual end users of served from the ADSL line card and switch packets from the ADSL line cards to the trunk card carrying data packets back to the ATM switch. This card, generically referred to as the CPU, is shared by all ADSL line cards in a DSLAM, which means that data packets for all users are commingled across the DSLAM platform.[34] Taken together, these cards provide DSLAM functionality combined with addressing and switching. A CLEC's line card must be integrated into the DSLAM and must rely on the functionality of Qwest's DSLAM in order to comprise the features,

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29 As more fully discussed in above, the FCC requires unbundled packet switching only in certain limited circumstances. *UNE Remand Order* ¶ 313.

30 *UNE Remand Order* ¶ 304.

31 *UNE Remand Order* ¶ 304, quoting *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ¶ 262.

32 Stewart Rebuttal Testimony at 57:10-13.

33 Stewart Rebuttal Testimony at 57:13-58:1.

34 Stewart Rebuttal Testimony at 57:1-7.

functions and capabilities necessary to provide DSL service.[35] Thus, plug and play requires Qwest's unbundled packet switching as well thereby eviscerating the need for the product at all. Whether providing an individual customer on an ADSL line card to a CLEC or providing an entire ADSL line card to a CLEC, the result is the same—unbundled packet switching.

However, the FCC has plainly identified the only circumstance under which Qwest is required to unbundled packet switching: all four conditions in Rule 319 must be met. Indeed, the FCC expressly found that these conditions constitute the "one limited exception" to its otherwise complete refusal to order BOCs to unbundle packet switching.[36] The FCC recently affirmed Rule 319 when it reiterated that all four conditions must be met in the *Line Sharing Reconsideration Order*, where the FCC sought comment regarding whether this limited obligation should be expanded.[37] Currently, Qwest has no obligation to unbundle packet switching for any reason unless the four conditions are met. Moreover, the FCC has specifically held that "incorporat[ing] verbatim the criteria adopted in our *UNE Remand Order* to establish when packet switching will be made available," as Qwest has done in its SGAT, satisfactorily establishes a sufficient legal obligation to meet an ILEC's 271 obligations.[38] Thus, as a matter of law, Qwest has fully complied with the FCC's packet switching requirements.

Allowing CLECs to install line cards in Qwest's DSLAM would effectively provide CLECs access to unbundled packet switching without regard to the limited conditions under which packet switching is required. The Multistate Facilitator agreed: "[A]s Qwest also noted, allowing the plug and play option would in effect eviscerate the current FCC standard."[39] The Arizona and Colorado Commission Staff also rejected the CLECs' plug and play demands; indeed, the Colorado Staff noted that adoption of the CLECs' demand would "essentially nullify the FCC requirements."[40] As discussed above, the imposition of additional obligations is not properly within the scope of this section 271 proceeding. Because the CLEC demand for the ability to place line cards into Qwest remote DSLAMs

35 Stewart Rebuttal Testimony at 58:8-19.
36 *UNE Remand Order* ¶ 313.
37 *Line Sharing Reconsideration Order* ¶ 63.
38 *Kansas/Oklahoma Order* ¶243.
39 *See* Exhibit 1, Multistate Facilitator's Emerging Services Report at 47-48.
40 *See* Exhibit 2, Arizona Staff's Final Emerging Services Report at ¶¶ 300, 303; Exhibit 3, Colorado Staff's Final Emerging Services Report at ¶ 81..

would amount to unbundled packet switching in situations where packet switching is not required, this demand must be rejected.

Qwest has implemented a legal obligation in the SGAT to unbundle packet switching in the limited circumstances required by the FCC. It is not required to unbundle packet switching in any situation other than those limited circumstances.

III. LINE SHARING[41]

A. Issue LS-6: Whether Qwest is Obligated to Provide Line Sharing Over Fiber. [SGAT Section 9.4.1.1]

Qwest was the first ILEC in the country to offer line sharing to CLECs. "Line sharing" requires two carrier to provide services to one customer over a single loop facility; Qwest provides voice service over the lower frequency portion of the loop and the CLEC provides DSL over the high frequently portion of the loop. At this point, the only technically feasible way to "line-share" is when the loop is made of clean copper. When a loop is Digital Loop Carrier ("DLC") or fiber, sharing the loop would garble the signals. There does not appear to be any dispute on this point. Nonetheless, the CLECs seek to require Qwest to "line share" over fiber. This is simply not technically feasible at this time.

In the *Line Sharing Reconsideration Order*, the FCC clarified that ILECs such as Qwest must allow CLECs to "line share" the distribution portion of the loop where the signal is then split, and then allow the CLEC's data to be carried over fiber to some different location. Specifically:

> where a competitive LEC has collocated a DSLAM at the remote terminal, an incumbent LEC must enable the competitive LEC to transmit its data traffic from the remote terminal to the central office. The incumbent LEC can do this, at a minimum, by leasing access to the dark fiber element or by leasing access to the subloop element."

Line Sharing Reconsideration Order ¶ 12. The CLECs do not dispute that Qwest complies with this obligation. Qwest provides CLECs with the network elements that can transport data from Qwest remote terminals; these include dark fiber,[42] DS-1/DS-3 Capable Loops,[43] and OCN Loops.[44]

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41 There are two additional line sharing issues that are subsumed in a single line splitting issue. Issues LS-1 (Whether Qwest is required to provide access to Qwest's POTS splitters) and LS-2 (If Qwest is required to provide access to its splitters, whether that access must be on a port-at-a-time basis) are addressed below in Section VI, Line Splitting, with Issue LSPLIT-1.

42 *See* SGAT section 9.7.

43 *See* SGAT section 9.2.

44 *See* SGAT section 9.2.2.3.1. Qwest has also added the following sentence at the end of section 9.2.2.3.1: "Qwest shall allow CLEC to access these high capacity Loops at accessible terminals including DSXs, FDPs or equivalent in

Qwest also provides CLECs with the ability to commingle their data with Qwest's data over the same facility when certain conditions are satisfied.[45]

The FCC then acknowledged that there may be additional ways to implement line sharing where there is fiber in the loop, which would turn on the inherent capabilities of the equipment ILECs have deployed.[46] Accordingly, the FCC initiated two further notices of proposed rulemaking seeking comments on the technical feasibility of "line sharing" over fiber fed loops.[47] Clearly, the FCC has not imposed any additional obligations. It has merely begun the process for considering whether to impose any such additional obligations. Indeed, in its recent *Massachusetts Order*, the FCC specifically noted that "the issue of line sharing over fiber-fed loops is the subject of a *Further Notice of Proposed Rulemaking* at the Commission."[48] Nonetheless, the CLECs demand that the Commission impose additional line sharing obligations of the very kind the FCC intends to study through the comments it has requested.

Specifically, the CLECs have demanded that Qwest delete a reference to copper loops in SGAT section 9.4.1, which describes Qwest's line sharing offering, and broaden the reference to include other loops. These revisions would expand Qwest's line sharing obligations and would create a false impression that CLECs can "line share" over any type of facility. Moreover, the line sharing methodology described in Section 9.4 requires use of a Central Office Splitter. This technically will not facilitate line sharing over fiber. Thus, removing references to copper simply does not work. As fully discussed above, this section 271 proceeding is not an appropriate forum for imposing new obligations. Moreover, as Qwest's witness explained, the CLEC proposal would render the SGAT's description misleading because it is not technically feasible for Qwest to offer line sharing over anything other than a copper loop.[49]

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the central office, customer premises, or at Qwest owned outside plant structures (e.g., CEVs, RTs or huts) as defined in section 9.3.1.1."

45 *See* SGAT section 9.20 (unbundled packet switching).

46 *Line Sharing Reconsideration Order* ¶ 12.

47 *Line Sharing Reconsideration Order* ¶ 12 ("For these reasons, we are initiating a Third Further Notice of Proposed Rulemaking today in the Advanced Services docket and a Sixth Further Notice of Proposed Rulemaking in the Local Competition docket that requests comment on the feasibility of different methods of providing line sharing where an incumbent LEC has deployed fiber in the loop.").

48 *Verizon Massachusetts Order* at n.512, citing the *Line Sharing Reconsideration Order* ¶ 12

49 Stewart Rebuttal Testimony at 11:3-5.

Nonetheless, Qwest has added the following language as a new section 9.4.1.1. to the SGAT:

> To the extent additional line sharing technologies and transport mechanisms are identified, and Qwest has deployed such technology for its own use, and Qwest is obligated by law to provide access to such technology, Qwest will allow CLECs to line share in that same manner, provided, however, that the rates, terms and conditions for line sharing may need to be amended in order to provide such access.

AT&T refused to accept this offer, claiming that Qwest must do more.

In other jurisdictions, CLECs have suggested that the Commission consider the Illinois Commission's position on this issue, referring to a recent decision of the Illinois Commerce Commission ("Illinois Commission"), which the CLECs have relied upon to claim that the Illinois Commission had ordered line sharing over fiber. However, the decision does not extend as far as the CLECs have suggested. The Illinois Commission did not order Ameritech to provide line sharing over fiber. Instead, it merely ordered Ameritech to provide access to fiber subloops and line sharing over copper loops. The Illinois Commission specifically set out the UNEs it directed Ameritech to provide, including "Lit Fiber Subloops" and the "High Frequency Portion of copper subloops."[50] This decision provides no support for the CLECs' attempt to impose an obligation to require Qwest to provide line sharing over fiber. To the contrary, it describes exactly what Qwest offers to CLECs today.

Moreover, the Illinois Commission decision was based on the specific architecture deployed by Ameritech in its Project Pronto DLCs. There is no evidence in the record to support application of this fact-specific decision to Qwest's DSLAM architecture. Finally, the *Illinois Arbitration Decision* did not arise from a section 271 proceeding, but instead arose from the rehearing of decisions reached in interconnection agreement arbitrations.[51]

Qwest is and has been proactively offering line sharing to CLECs throughout its region for over a year. To date, throughout Qwest's region, CLECs are offering service to customers over a

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50 Arbitration Decision on Rehearing, *Covad Communications Company Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues; Rhythms Links, Inc. Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues*, Docket Nos. 00-312/00-313 (consol.), 2001 Ill. PUC LEXIS 205 (February 15, 2001) ("*Illinois Arbitration Decision*"), at *94-*95.

51 *Illinois Arbitration Decision* at *1.

substantial number of shared loops. Qwest has been proactively meeting with CLECs in industry forums to create best practices and methods for line sharing deployment. On this issue, however, Qwest simply does not have a technical solution that will allow "line sharing" over fiber. The FCC's recent NPRM supports this view as it seeks comments on whether line sharing over fiber is technically feasible. It is illogical to assume that the FCC ordered ILECs to offer line sharing over fiber when the FCC is not even sure it can be done. Qwest is meeting its obligations. The Commission should reject this demand, just as the Multistate Facilitator[52] did.

B. Issue LS-3: The 10,000 Line Limit in Section 9.4.2.3.1 is Lawful and Appropriate. [SGAT Section 9.4.2.3.1]

The CLECs that take issue with part (c) of the following sentence in section 9.4.2.3.1:

> If CLEC elects to have POTS splitters installed in Qwest Wire Centers via Common Area Splitter Collocation, the POTS splitters will be installed in those Wire centers in one of the following locations: (a) in a relay rack as close to CLEC's DS0 termination points as possible; (b) on an ICDF to the extent such a frame is available; or (c) where options (a) and (b) are not available, or in Wire Centers with network access line counts of less than 10,000, on the COSMIC™/MDF or in some other appropriate location such as an existing Qwest relay rack or bay.

In particular, Covad and Rhythms seek to be able to collocate a splitter on the COSMIC™/MDF in every circumstance.

Covad, the most vocal CLEC on this point, appears to base its argument solely on a belief that Qwest discriminated by allowing a CLEC to avoid the 10,000 line limit in a central office in Colorado.[53] Qwest demonstrated that no such discrimination was occurring because the frame Covad referred to was not a main distribution frame (MDF"), but was actually really a retired MDF that was reassigned to become an ICDF, which does not face the 10,000 line restriction.[54] Thus, this isolated incident does not support Covad's claim.

This issue should be resolved in Qwest's favor. First, Qwest has no obligation to allow COSMIC™/MDF splitter collocation in all circumstances. Second, Covad's proposal would preclude

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52 *See* Exhibit 1, Multistate Facilitator's Emerging Services Report at 19.
53 July 12, 2001 Workshop Transcript Vol. 31 at 4603:5-15.
54 July 12, 2001 Workshop Transcript Vol. 31 at 4603:16-4604:6.

Qwest from recovering its legitimate costs that it incurred based on the Interim Line Sharing Agreement. The CLECs agreed to the 10,000 limitation in that agreement and in the subsequent permanent agreement.[55] Based on the Interim Line Sharing Agreement, Qwest invested heavily in relay racks and bays for CLEC splitters collocated in a common area.[56] Covad now wants Qwest to eat that cost. Qwest is entitled to recover its just and reasonable costs of providing CLECs access to its facilities and equipment.[57] Finally, Qwest's position is eminently reasonable because Qwest has offered to remove the restriction for situations in which the current line splitter bays and racks have been fully utilized.[58]

Thus, the 10,000 line limit is not only lawful and reasonable, but it is also necessary to ensure Qwest recovers its legitimate costs related to line sharing. Accordingly, Covad's demand must be rejected. Indeed, the Arizona Commission Staff found that Qwest's position on this issue is "reasonable and is adopted by Staff."[59] The Colorado Commission Staff also found it Qwest's favor.[60] Qwest requests that this Commission do the same.

C. Issue LS-4: Whether Qwest's Five Day Provisioning Interval for Line Sharing is Appropriate. [SGAT Exhibit C]

The FCC ordered ILECs such as Qwest to offer line sharing as an unbundled network element because it was convinced by the CLEC community that ILECs offered the functional equivalent of line sharing to their own retail customers.[61] The FCC rationalized that it would be inappropriate to place CLECs at a competitive disadvantage.[62] Thus, the FCC required line sharing and required ILECs to provision line sharing in similar intervals to that which provides DSL service to the ILEC retail customers. In other words, the FCC ordered retail parity.

Qwest currently offers CLECs a five day line sharing provisioning interval, which is significantly less than what Qwest offers on the retail side to its Qwest DSL customers. Covad contends that this is

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55 July 12, 2001 Workshop Transcript Vol. 31 at 4599:14-4600:22.
56 July 12, 2001 Workshop Transcript Vol. 31 at 4599:21-4600:12.
57 *Iowa Utilities Board v. FCC*, 219 F.3d 744, 750 (8th Cir. 2000), *cert. granted* January 22, 2001.
58 *See* July 12, 2001 Workshop Transcript Vol. 31 at 4600:12-15.
59 *See* Exhibit 2, Arizona Staff's Final Report at ¶ 183.
60 *See* Exhibit 3, Colorado Staff's Final Report at ¶ 96.
61 Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 & 96-98, FCC 99-355 (Rel. December 9, 1999) ("*Line Sharing Order*") ¶33.
62 *Id*.

not enough, arguing that the work involved in provisioning line sharing does not take that much effort and claiming that Qwest should provision the service in one day.[63] This is patently ridiculous. The CLECs should not be permitted to whipsaw Qwest by obtaining line sharing by arguing retail parity and then obtaining ridiculously short provisioning intervals by arguing there is no retail parity. The CLECs should be collaterally and judicially estopped from making such an argument. Moreover, Covad's suggestion would amount to severe discrimination against Qwest.

Covad's reasoning is key: as its witness, Mr. Zulevic testified, Covad desires a "competitive edge" over Qwest in the provisioning of retail services using DSL technology:

> We have proposed going from the five-day down to a one-day interval over a period of time. I don't think that's totally unreasonable. But the parity issue, no, I don't think that is appropriate. Just because their business plan and their customers are satisfied with the 10-day interval, it doesn't mean that all of the customers in the state of Colorado are satisfied with waiting 10 days for that service to be put in.
>
> One of the things that we would like to offer to our customers is a better quality of service as being maybe one of the *competitive edges* that we can provide in entering in market. And in order to do that, we have to be able to differentiate ourselves. [64]

Covad misses the mark. The Act does not require intervals that provide CLECs with a competitive advantage. Rather, the FCC has determined as follows:

> [F]or those functions the BOC provides to competing carriers that are analogous to the functions a BOC provides to itself in connection with its own retail service offerings, the BOC must provide access to competing carriers in "substantially the same time and manner" as it provides to itself. Thus, where a retail analogue exists, a BOC must provide access that is equal to (*i.e.*, substantially the same as) the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness.[65]

Thus, the standard is parity with Qwest's retail offering.

In the *Line Sharing Order*, the FCC expressly and unequivocally determined that line sharing and an ILEC's provision of DSL service are comparatives of each other:

> As a general matter, the nondiscrimination obligation requires incumbent LECs to provide to requesting carriers access to the high frequency

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63 July 13, 2001 Workshop Transcript Vol. 32 at 4613:7-4614:11.

64 Stewart Rebuttal Testimony at 5:18-6:10 (quoting from Colorado Workshop Transcript, 11/02/00, at 37:23-38:11 (emphasis added)).

65 *SBC Texas Order* ¶ 44.

> portion of the loop that is equal to that access the incumbent provides to itself for *retail* DSL service its customers or its affiliates, in terms of quality, accuracy and timeliness. Thus, we encourage states to require, in arbitration proceedings, incumbent LECs to fulfill requests for line sharing within the *same interval the incumbent provision xDSL to its own retail or wholesale customers*, regardless of whether the incumbent uses an automated or manual process.[66]

Thus, the FCC has established that the nondiscrimination standard for line sharing is retail parity and the interval for line sharing should be the same as the xDSL loop interval. Qwest must, therefore, provision line sharing in "substantially the same time and manner" for CLECs as it provides Qwest DSL service to its own retail customers. Qwest followed, indeed exceeded, the FCC's directive when it set the line sharing interval at five days.[67]

Qwest's retail DSL provisioning interval is ten days, yet its line sharing interval was reduced from five days to three days for 1 to 24 lines as of July 1, 2001.[68] Thus, Qwest is already providing CLECs with a faster interval than required to comply with the parity standard. This three day interval plainly provides DLECs better than retail parity. Moreover, Covad's responses to discovery requests in another jurisdiction indicate that Covad allots only one hour to perform the tasks it must perform after it receives a shared loop from Qwest. Thus, even if Covad takes an entire day to complete its work, the CLECs would be able to turn up their DSL service several days before Qwest can.

More importantly, Qwest's performance results establish that Qwest is actually providing CLECs with superior provisioning intervals for line sharing. Qwest's installation intervals are reported in Performance Indicator Definition (PID) OP-4 -- Installation Interval. Qwest's May 2001 results showed that Qwest's retail DSL service (formerly called "Megabit") is provisioned in more than ten days.[69] Thus, even with the previous five day period, Qwest's provisioning interval handily positions Covad to deliver finished service in just over five days -- giving Covad a five day competitive edge over Qwest. The Multistate Facilitator agreed: "The evidence in the record does lead to the conclusion that

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66 *Line Sharing Order* ¶ 173 (emphasis added).

67 The recent FCC order approving Verizon's 271 application in Massachusetts confirms that Qwest's 5-day interval is satisfactory. Verizon's stated interval was 5 days, and its average interval was around 6 to 7 days. *Massachusetts 271 Order* ¶170 n. 540 (this order is available on the Internet: http://www.fcc.gov/Bureaus/Common_Carrier/Orders/2001/fcc01130.txt).

68 July 13, 2001 Workshop Transcript Vol. 32 at 4615:14-4616:15.

69 July 13, 2001 Workshop Transcript Vol. 32 at 4615:22-4616:2.

Qwest's five-day interval will allow ample opportunity overall for CLECs to complete remaining work in time to provide end users with xDSL services within time frames that are competitive with what Qwest is now applying.'[70] The Colorado Commission Staff also found in Qwest's favor on this issue.[71]

As noted above, Qwest has implemented an even shorter three day interval for certain CLEC orders. Thus, as a matter of law and fact, Qwest has met -- and exceeded -- its obligation to provide line sharing intervals to CLECs at parity with the intervals it provides itself. Accordingly, Qwest requests that the Commission enter a finding that Qwest's line sharing intervals comply with its section 271 obligations on this issue.

IV. SUBLOOP UNBUNDLING

The FCC's UNE Remand Order requires ILECs to allow subloop access at any "accessible terminal" in Qwest's outside plant. This requires Qwest to unbundle distribution subloops, feeder subloops in Feeder Distribution interfaces – the primary point at which feeder and distribution are connected to create the complete loop. Qwest is also required to unbundle subloops in accessible terminals in Multiple Tenant Environments (MTEs).

There is no virtually dispute about how Qwest must unbundle subloops outside of MTEs. In these circumstances, the CLEC provides Qwest with a request for "cross connect collocation;" Qwest has 90 days to provision such collocation; the cross-connect collocation includes a facility inventory and a cross-connect field dedicated to the CLEC; once the collocation is complete, the CLEC submits an LSR for each individual subloop order; and Qwest has five (5) days to run the jumper to provision the individual subloop.

The unanimity in the non-MTE environment is contrasted with substantial disagreement as to how Qwest must provision subloops in an MTE environment. Qwest has made substantial concessions regarding subloop access in MTEs. For example, in the collocation workshops, AT&T demanded and Qwest conceded that it must be willing to provide collocation in any Qwest premises, no matter how small (space permitting). In the subloop context, however, AT&T claimed it had the unfettered right to

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70 *See* Exhibit 1, Multistate Facilitator's Emerging Services Report at 21-22.

71 *See* Exhibit 3, Colorado Staff's Final Report at ¶¶ 91-93.

access MTE terminals without collocation. Similarly, Qwest originally demanded that a cross-connect field dedicated to the CLEC be created to ensure there was no confusion about ownership of facilities when a technician accessed the terminal. As described above, both of these demands were uncontested outside of the MTE context. Not true with MTEs. Qwest conceded both of these substantial points. Qwest has also agreed to allow CLECs the option of having Qwest run the jumpers necessary to access subloops in MTE Terminals, thus closing impasse Issue SB-5. These concessions moved the parties substantially closer together. Further, in response to AT&T's request for direct access in MTE terminals, Qwest created a standard protocol for such access.[72]

Qwest and AT&T have worked together to narrow their differences relating to the SGAT provisions and the protocol. Indeed, the parties further refined their disputes in this workshop by agreeing to work from a single document -- Qwest's SGAT -- rather than submitting competing language. AT&T and Qwest worked through Qwest's SGAT language regarding MTE access on a line-by-line basis. Qwest made substantial concessions and, with the exception of the few impasse issues discussed below, reached agreement. Other than those impasse issues, Qwest's SGAT language now represents the parties' consensus. As set forth below, each of the remaining impasse issues should be decided in Qwest's favor as a matter of fact and law.

A. <u>Issue SB-3:</u> Whether the SGAT's provisions for access to subloop elements at MTE terminals is consistent with the FCC's definition of, and rules regarding access to, unbundled NID. [SGAT Sections 9.3.3.5, 9.3.5.4.1, 9.3.5.4.4, 9.3.5.4.5, 9.3.3.7]

Qwest and AT&T have reached impasse regarding whether the SGAT section on subloop access is consistent with the FCC's definition of the unbundled network interface device ("NID"). This issue is no longer relevant. The SGAT allows CLECs to access NIDs (demarcation points) and MTE Terminals (when subloop is sought) in exactly the same way. Despite this, AT&T contends that any accessible terminal containing a protector in an MTE is a NID and subject to the FCC's rules on access to the unbundled NID. As a matter of law, AT&T is incorrect.

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72 Qwest's Standard Multi Tenant Environment (MTE) Terminal Access Protocol (the "MTE Access Protocol"), was first offered by Qwest as workshop Exhibit 1164. July 31, 2001 Workshop Transcript Vol. 36 at 5467:22-5468:23. Qwest then revised Exhibit 1164 to incorporate language that addressed AT&T's concerns and offered a redlined version of the document as Exhibit 1167.

As a practical matter, this is simply a terminology issue, nothing more. There is no difference in what CLECs will obtain. The only issue is the nomenclature for these terminals when they are demarcation points and when they are not. Qwest asserts that the terminals should have different names to leave absolutely no confusion about whether a subloop is involved. When an MTE Terminal is involved, subloop is necessarily there. When a NID is ordered, it is necessarily the demarcation point. At the end of the day, engineers and technicians will be implementing the terms of the contract language -- not lawyers. There is no legitimate reason to impose a level of confusion on implementation of the contract.

Rule 319 (a)(2)(D) provides that "[a]ccess to the subloop is subject to the Commission's collocation rules." In order to avoid the application of the collocation rules, AT&T claims that the accessible terminals it seeks to access in conjunction with subloop elements constitute unbundled NIDs, and therefore are not subject to the collocation rules. This contention has no merit as a matter of law.

In the UNE Remand Order, the FCC required unbundling of subloops[73] and of the NID.[74] The FCC defined the NID unbundled network element in the *UNE Remand Order*. Specifically, the FCC defined "the NID to include any means of interconnection of *customer premises wiring to the incumbent LEC's distribution plant*, such as a cross-connect devise used for that purpose."[75] The FCC acknowledged that it was establishing a particular definition for the NID unbundled network element: "[T]he NID definition, *for purposes of our unbundling analysis*, should be flexible and technology-neutral."[76] The FCC then reiterated that this discrete UNE NID definition includes any variation in "the hardware interfaces *between carrier and customer premises facilities*," i.e., the demarcation point. *UNE Remand Order* ¶ 234 (emphasis added). Thus, the FCC plainly defined the unbundled NID, regardless of the technology the NID employs, as the demarcation point at which the customer premises facilities begin.

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73 *UNE Remand Order* ¶ 202-229.
74 *UNE Remand Order* ¶ 230-240.
75 *UNE Remand Order* ¶ 233 (emphasis added).
76 *UNE Remand Order* ¶ 234 (emphasis added).

In defining the UNE NID, the FCC expressly "declined to adopt parties' proposals to include the NID in the definition of the loop."[77] Instead, FCC carefully distinguished the unbundled NID demarcation point from the *functionality* of the NID. Because competitors "acquire the *functionality* of the NID for the subloop portion they purchase," the FCC determined that there is "no need to . . . include the NID as part of any other subloop element."[78] Thus, the FCC created a distinction between the unbundled NID, which is defined as the demarcation point, and the functionality of the NID, which is included in the subloop elements CLECs purchase.

Moreover, the FCC specifically stated that its collocation rules apply to all accessible terminals on the loop: "[W]e intend to make collocation available at all accessible terminals."[79] The reason for making collocation available is to establish the "methods and standards of obtaining interconnection."[80]

In describing the accessible terminals at which subloop elements can be accessed, the FCC explicitly contemplated that collocation would apply: "Accessible terminals contain cables and their respective wire pairs that terminate on screw posts. This allows technicians to affix cross connects between binding posts of terminals *collocated* at the same point."[81]

The crux of the disagreement between AT&T and Qwest turns on the FCC's description of these two UNEs – subloop and NID. Essentially, AT&T claims that any accessible terminal that includes the cross-connect and electrical overvoltage protections that a NID performs constitutes a NID to which Qwest must provide unbundled access pursuant to Rule 319(b). This contention ignores the FCC's plain distinction between the functionality of the NID, which the FCC expressly held is included as part of a subloop, and the unbundled network element NID, which the FCC clearly defined as the demarcation point between "end-user customer premises wiring [and] the incumbent LEC's distribution plant."[82]

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77 *UNE Remand Order* ¶ 235.
78 *UNE Remand Order* ¶ 235.
79 *UNE Remand Order* ¶ 221.
80 *UNE Remand Order* ¶ 221.
81 *UNE Remand Order* ¶ 206 n.395 (emphasis added).
82 *See* Exhibit 3, Colorado Staff's Final Report at ¶ 120.

Ignoring the FCC's carefully drawn distinction, AT&T claims that the NID is any accessible terminal that contains an overvoltage protector and cross-connects. This claim clearly focuses on the functionality of the NID. As set forth above, the FCC specifically determined that the functionality of the NID is part of the subloop element, but that functionality does not satisfy the definition of the unbundled NID.

Thus, pursuant to the *UNE Remand Order*, the terminals to which AT&T repeatedly refers as "NIDs" are simply accessible terminals through which CLECs access subloop elements. Pursuant to Rule 319(a)(2)(D), these terminals constitute "[a]ccess to the subloop [and] is subject to the Commission's collocation rules." As a matter of law, CLECs must be required to comply with the collocation rules when they access subloop elements at accessible terminals. The Colorado Commission Staff concluded that "AT&T's argument for an expansive NID definition . . . is unavailing."[83] Qwest requests this Commission to do the same.

Despite the existence of the overarching issue regarding the definition of NIDs, Qwest and AT&T have made substantial progress in narrowing their specific disputes regarding access to subloop elements at MTE Terminals. The parties' differences were further refined at the workshop to four much more granular issues: (1) whether CLECs must pay a charge for Qwest's creation of an inventory; (2) whether the provisions of SGAT section 9.3.3.7 relating to a terminal where there is no spare space are appropriate; (3) whether Qwest should create a web site identifying MTE locations where Qwest has already determined intrabuilding cable ownership; and (4) specific wording changes to Qwest's MTE Access Protocol. The inventory charge and web site issues are addressed separately below and the remaining two issues are addressed here.

Section 9.3.3.7. The second issue is whether the provisions of SGAT section 9.3.3.7 relating to a terminal where there is no spare space are appropriate. Section 9.3.3.7 provides as follows:

> If there is no space for CLEC to place its building terminal or no accessible terminal from which CLEC can access such Subloop elements, and Qwest and CLEC are unable to negotiate a reconfigured Single Point of Interconnection (SPOI) to serve the MDU, Qwest will either rearrange facilities to make room for CLEC or construct a single point of access that is fully accessible to and suitable for CLEC. In

83 *See* Exhibit 2, Arizona Staff's Final Report at ¶ 183.

> such instances, CLEC shall pay Qwest a nonrecurring charge, which shall be ICB, based on the scope of the work required.

Thus, if Qwest and the CLEC cannot reach agreement regarding a single point of interconnection to serve the MDU, Qwest will either rearrange facilities or construct a fully accessible single point of access. The crux of this issue is that AT&T believes that the CLEC should be able to control whether Qwest should rearrange facilities or build a single point of access.[84]

The FCC already decided this issue in the *UNE Remand Order*:[85]

> If parties are unable to negotiate a reconfigured single point of interconnection at multi-unit premises, we require the incumbent to construct a single point of interconnection that will be fully accessible and suitable for use by multiple carriers. Any disputes regarding the implementation of this requirement, including the provision of compensation to the incumbent LEC under forward-looking pricing principles, shall be subject to the usual dispute resolution process under section 252.

Thus, the FCC clearly stated that, in situations where the parties cannot reach agreement regarding a single point of interconnection at an MDU, Qwest must construct a fully accessible single point of interconnection. Section 9.3.3.7 tracks very closely with the FCC's holding. Because the SGAT provisions implement the FCC's requirements, this issue should be decided in Qwest's favor.

Qwest's MTE Access Protocol. At the workshop, Qwest explained that it created the MTE Access Protocol to respond to AT&T's request for direct access to subloop terminals, and to MTE Terminals in particular.[86] The document is intended to provide guidance to CLEC technicians.[87] The MTE Access Protocol is a working document that has assisted AT&T and Qwest in defining and resolving their specific areas of dispute.[88]

At the workshop, AT&T listed its concerns about the MTE Access Protocol in substantial detail.[89] Qwest immediately responded to those concerns point by point at the workshop.[90] Qwest

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84 July 13, 2001 Workshop Transcript Vol. 37 at 4682:18-4683:9.
85 *UNE Remand Order* ¶ 226.
86 July 31, 2001 Workshop Transcript Vol. 36 at 5485:5-14.
87 July 31, 2001 Workshop Transcript Vol. 36 at 5468:1-12.
88 July 31, 2001 Workshop Transcript Vol. 36 at 5468:12-15.
89 *See, generally*, July 31, 2001 Workshop Transcript Vol. 36 at 5468-5483.
90 *See, generally*, July 31, 2001 Workshop Transcript Vol. 36 at 5485-5494.

then agreed to work with AT&T in the evening to attempt to reach agreement regarding how to address AT&T's concerns and to produce a new, revised version of the MTE Access Protocol for discussion the next day in the workshop. Qwest produced a redlined version of the document incorporating language addressing AT&T's concerns.[91] AT&T acknowledged that the revised version reflected the parties' substantial progress toward agreement.[92]

With the exception of certain issues that are already at impasse between the parties relating to SGAT provisions and are addressed in this brief (*e.g.*, the need for CLECs to submit LSRs to order subloops), the parties have agreed on language to be incorporated in the MTE Access Protocol to resolve the concerns AT&T has expressed.

B. Issue SB-13: Whether Qwest must create a web site to identify MTE locations where it has made an ownership determination.

AT&T requested that Qwest create a web site to identify every MTE location where it has made an ownership determination, in the same way that Qwest tracks collocation space.[93] Contrary to AT&T's suggestion, there is a crucial distinction between the collocation web site and AT&T's proposed intrabuilding cable ownership web site: unlike collocation space, there are literally tens of thousands of MTE locations in Qwest's fourteen state region. As Qwest's witness at the workshop noted, maintaining ownership determination regarding each location on a web site would entail a "staggering number of entries."[94] The creation and maintenance of such a web site would impose an extreme burden on Qwest.

In addition to being overly burdensome, such a web site would have little practical utility. Theoretically, a CLEC could use the site to locate a prior determination of ownership relating to an MTE location instead of waiting for Qwest to provide that information. The SGAT provides that Qwest has only two business days to notify CLECs regarding its determination of ownership of intrabuilding cable in those MTE locations where there has already been a determination of ownership.[95] Having this

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91 August 1, 2001 Workshop Transcript Vol. 37 at 5518:6-5519:23.
92 August 1, 2001 Workshop Transcript Vol. 37 at 5519:25-5520:16.
93 August 1, 2001 Workshop Transcript Vol. 37 at 5546:1-19.
94 August 1, 2001 Workshop Transcript Vol. 37 at 5546:21-5547:3.
95 SGAT section 9.3.5.4.1.

knowledge two days earlier would not be of much practical value to a CLEC because the CLEC would require far more than two days to bring its facilities in. CLECs know which locations it may seek to serve weeks, even months, before they are prepared to deliver the service. Qwest's two day interval will not delay any CLEC using a reasonable business planning process.

Given Qwest's eminently reasonable two day interval for notifying CLECs of prior ownership determinations, the Commission should reject AT&T's request to provide and maintain that same information on a web site.

C. Issue SB-4: Whether CLECs must submit LSRs to order subloops. [SGAT Sections 9.3.5.1.1, 9.3.5.2.1, 9.3.5.4.4]

Submission of a local service request ("LSR") is the industry standard for wholesale orders.[96] The Ordering and Billing Forum ("OBF") is the national industry forum that creates and maintains LSR ordering guidelines, which are the de facto standard for ordering. The OBF has considered how subloop unbundling should be ordered and has developed LSR guidelines for ordering subloops. The process the OBF has defined for ordering subloops is based on submission of an LSR for all subloop elements, including feeder, distribution, and specifically including intrabuilding cable. Whenever a CLEC is interconnecting with Qwest's network, the LSR provides the process by which the CLEC informs Qwest that it is gaining access at an MTE. This allows Qwest to update its inventory records to reflect that the identified piece of network is being used[97] and provides information required for Qwest to begin billing the CLEC and to register the circuit in Qwest's maintenance systems.[98] Qwest's LSR form for subloop orders requires substantially the same information that CLECs currently provide on LSRs to order unbundled loops.

AT&T claims that it should not be required to order intrabuilding cable in an MTE environment submitting a LSR to Qwest. This contention is wholly unreasonable and without merit.

The industry standard requires submission of an LSR for ordering for good reason. The LSR contains information regarding the interconnection point between the CLEC network and the Qwest

96 July 13, 2001 Workshop Transcript Vol. 32 at 4705:6-12.
97 July 13, 2001 Workshop Transcript Vol. 32 at 4704:18-21.
98 July 13, 2001 Workshop Transcript Vol. 32 at 4705:2-5.

network. It also allows the CLEC customer care representative who creates the LSR to validate that interconnection point information against Qwest's systems to ensure that it is valid and will be accepted. The LSR contains information Qwest requires for billing, tracking inventory, and identifying the circuit for maintenance and repair purposes. Timely submission of the LSR is required so that Qwest can satisfy its obligations to manage and maintain its network[99] and to bill and recover the payment to which it is entitled for the element. More importantly, both CLEC and Qwest customers will be adversely affected by the lack of a timely LSR due to the resultant inaccuracies in Qwest's systems, which will impede Qwest's repair efforts.

Instead of the industry standard LSR process, AT&T offers very little process. AT&T proposed to provide Qwest with only a monthly summary indicating the terminal block and pair and cable used by property address.[100] The Multistate Facilitator found in his recommendations that "AT&T's solution is simply not rigorous enough to offer Qwest what it is entitled to have."[101] The Arizona Staff stated that AT&T's proposal "is not satisfactory and would most likely lead to considerable delay and dispute over access and ownership issues resulting in an entirely unworkable process."[102] Moreover, AT&T refuses to submit any information in the industry standard LSR format, based on the cost it claims is associated with submitting an LSR.[103]

AT&T's refusal is wholly unreasonable in several respects. First, the absence of an LSR would dramatically increase Qwest's costs. Without LSR information, Qwest would have to build manual processes into its billing flow in order to ensure accurate billing out of the usual monthly flow. In addition, AT&T's position would probably require that Qwest manually create and track the AT&T payment notices in a spreadsheet, rather that through Qwest's existing automated billing systems. There is no legitimate reason for reinventing a process that has already been developed and established as the

99 July 13, 2001 Workshop Transcript Vol. 32 at 4704:1-4.
100 July 13, 2001 Workshop Transcript Vol. 32 at 4700:19-23.
101 *See* Exhibit 1, Multistate Facilitator's Emerging Services Report at 31.
102 *See* Exhibit 2, Arizona Staff's Final Emerging Services Report at ¶ 211.
103 July 13, 2001 Workshop Transcript Vol. 32 at 4706:4-11.

industry standard. Moreover, without the information provided on an LSR, Qwest would be unable to resolve any maintenance problems for CLEC customers.[104]

Further, the absence of an LSR will impede Qwest's ability to service its own retail customers. If a customer subscribes to AT&T's service, then decides to return to Qwest, Qwest will have difficulty providing service because it will not know that AT&T has taken the subloop. When that customer called Qwest to order service, Qwest may have committed to a shorter installation interval and be unable to meet it because it was not aware that a portion of the subloop had been taken by AT&T. Without knowledge regarding the activity that has taken place at the terminal, a Qwest technician is faced with either pulling AT&T's jumper off, believing that it should be serving a Qwest customer, or not turning up the Qwest service. Neither option is acceptable because both result in the unnecessary disruption of a customer's service. If AT&T had notified Qwest of these activities by submitting an LSR, Qwest would be able to contact AT&T to resolve the situation much more quickly and efficiently.

Moreover, AT&T has admitted that it will have to complete an LSR for 70-80% of MTE orders because those orders will include local number portability, which must be ordered by LSR.[105] That same LSR can be used to order inside wire subloops.[106] Thus, this dispute will touch only a minority of AT&T's orders. The substantial majority will require an LSR regardless of the outcome of this issue. If AT&T is not prejudiced by issuing LSRs in these instances, surely it will not be prejudiced by submitting an LSR in the circumstances without number portability.

While the parties have come closer to agreeing on the specific information to be provided, AT&T has offered no practical alternative to submitting LSRs to order subloops. If AT&T provides all of the necessary information in a format other than an LSR, Qwest will have to convert it to LSR format anyway in order to enter it into its systems. The Multistate Facilitator and the Arizona and Colorado Commission Staff have all found that the CLECs should be required to comply with the industry standard.[107] Qwest urges this Commission to do the same.

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104 July 13, 2001 Workshop Transcript Vol. 32 at 4712:20-4713:23.

105 July 13, 2001 Workshop Transcript Vol. 32 at 4706:13-20.

106 July 13, 2001 Workshop Transcript Vol. 32 at 4708:10-4709:21; 4710:15-20.

107 *See* Exhibit 1, Multistate Facilitator's Emerging Services Report at 31; *see also* Exhibit 2, Arizona Staff's Final Emerging Services Report at ¶ 207, 210; see also Exhibit 3, Colorado Staff's Final Emerging Services Report at ¶¶ 131-132.

D. Issue SB-5: Whether CLECs should pay the nonrecurring charges proposed by Qwest for creation of an inventory. [SGAT Sections 9.3.3.5, 9.3.5.4.4]

AT&T and Qwest have made substantial progress regarding the inventory requirement. During the Washington workshops, Qwest agreed that completion of the inventory is not required before a CLEC can gain access to a subloop element.[108] The inventory itself has also been refined. The inventory required is an inventory of the CLEC's facilities, not Qwest facilities.[109] The CLEC provides information to Qwest regarding the CLEC's intent to bring a specified number of facilities into a building, and Qwest creates an inventory in its systems by inputting that information.[110] This inventory information allows Qwest to build continuity on a circuit in its systems so that problems can be isolated quickly when they arise.[111] AT&T refuses to pay Qwest's proposed charge for inputting the inventory information.[112]

AT&T's refusal to pay Qwest's inventory charge is unreasonable. The parties have reached agreements that narrow Qwest's involvement to the bare essentials -- inputting the necessary information into Qwest's systems to create the inventory. Qwest is entitled to recover its just and reasonable costs of providing CLECs access to its facilities and equipment.[113] As discussed above, the inventory information is vital to Qwest's ability to maintain its network information and to respond to maintenance issues. The Commission should find in Qwest's favor on this issue.

V. DARK FIBER[114]

A. Issue DF-5(1) & (2): Whether the unbundling requirement extends beyond the RBOC, Qwest Corporation. [SGAT Section 9.7.1]

The unbundling obligations of section 251(c)(3) apply only to ILECs.[115] Qwest Corporation is the only ILEC in the Qwest family of corporations. As part of the Qwest/U S WEST merger,

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108 July 13, 2001 Workshop Transcript Vol. 32 at 4785:14-4746:25.

109 July 13, 2001 Workshop Transcript Vol. 32 at 4730:1-7.

110 August 1, 2001 Workshop Transcript Vol. 37 at 5522:21-5523:5, 5523:11-13.

111 July 13, 2001 Workshop Transcript Vol. 32 at 4722:16-4723:10.

112 August 1, 2001 Workshop Transcript Vol. 37 at 5521:19-5522:4.

113 *Iowa Utilities Board v. FCC*, 219 F.3d 744, 750 (8th Cir. 2000), *cert. granted* January 22, 2001.

114 There was an additional dark fiber issue, DF-1, relating to leased fiber from non-affiliates. Qwest has agreed to provide access to dark fiber Qwest has obtained through capitalized Indefeasible Right to Use ("IRU") or capitalized leases, so long as Qwest is not prohibited from providing access to another person or entity, regardless of whether the IRU or lease is with an affiliate or non-affiliate. SGAT section 9.7.1. Therefore, there is no impasse relating to this issue.

115 Section 251(c)(3) is a subsection of section 251(c) which begins with the following preamble:

U S WEST Communications, Inc. became Qwest Corporation. Prior to the merger, Qwest had no ILEC operations, and U S WEST Communications, Inc. was the only ILEC within the U S WEST family of entities.[116] Thus, Qwest Corporation is the only ILEC within the Qwest family.[117] Consequently, the unbundling requirements of section 251(c)(3) apply only to Qwest Corporation.

AT&T nevertheless contends that Qwest should be required "to add language to its SGAT that clarifies that QCI and its affiliates are obligated to unbundled [sic] their in-region facilities, including dark fiber."[118] AT&T claims that the unbundling requirements of section 251(c)(3) pertain to entities beyond Qwest Corporation. AT&T has offered no rationale, legal or factual, for its position in this or any other workshops. Indeed, there is no justifiable rationale for AT&T's position.[119]

1. Background

Qwest Communications International ("QCI") is a holding company that owns a variety of subsidiaries.[120] These subsidiaries are separate corporations with defined assets and operations. Two of these corporations own and control significant telecommunications networks that provide telecommunications services pursuant to state or federal authority.[121] Qwest Corporation ("QC"), the successor to the old U S WEST Communications, Inc. ("USWC"), is the only Qwest entity that provides (or has ever provided) local exchange services in Washington. Qwest Communications Corporation ("QCC"), the successor to the pre-merger Qwest's businesses, holds Qwest's nationwide long distance network and provides only non-local-exchange services in these states. Neither QCC nor any other QC affiliates have ever provided any kind of local exchange service in this state,[122] nor have

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> ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS. – In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

47 U.S.C. §251(c) (emphasis added).

116 Rebuttal Testimony of Mary Ferguson LaFave on behalf of Qwest Corporation, dated June 21, 2001 ("LaFave Testimony") at 3:1-2.

117 Section 251(h)(1) defines ILEC, and there is no evidence that any Qwest entity other than Qwest Corporation satisfies this definition, nor could there be.

118 AT&T's Emerging Services Comments at 6-7.

119 To the extent that AT&T argues for a new obligation, the FCC has made it crystal clear that this section 271 proceeding is not the appropriate venue. *Kansas/Oklahoma Order* ¶19.

120 LaFave Testimony at 2:17-19.

121 LaFave Testimony at 2:19-22.

122 LaFave Testimony at 3:8-12.

they ever acquired any local exchange facilities or network elements from QC or USWC,[123] nor have they been certificated as a LEC.

As set forth below, there is no basis for AT&T's theory in the 1996 Act, the FCC's orders, or any court case.

2. None of QC's Affiliates is a Successor or Assign of U S WEST Communications, Inc.

AT&T posits that the Qwest/U S WEST merger made all Qwest entities into ILECs because all Qwest entities became successors and assigns of U S WEST Communications, Inc., which was an ILEC. QC's affiliates do not meet the "successor or assign" requirements of section 251(h). The FCC has ruled that one company is a "successor" of another for purposes of section 251(h) if there is "substantial continuity" between them, "such that one entity steps into the shoes of, or replaces, another entity."[124] "Substantial continuity" exists where a company has "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations."[125] No affiliate of QC has "step[ped] into the shoes of, or replace[d]" the pre-merger ILEC, nor has any such affiliate "acquired substantial assets" of USWC or "continued" USWC's ILEC business "without interruption or substantial change."[126] The only Qwest entity that has done these things (and, hence, the only one that is an ILEC "successor" for purposes of section 251(h)) is QC.[127]

Other provisions of the Act confirm that the regulatory status of a multi-part company such as Qwest must be determined separately for each of the company's corporate entities. For example, section 272 prescribes certain requirements for any Bell Operating Company affiliate "which is a local exchange carrier that is subject to the requirements of section 251(c)" — clearly indicating that there can be BOC affiliates that are *not* local exchange carriers and *not* subject to 251(c). 47 U.S.C. § 272(a)(1). Similarly, 47 U.S.C. § 153(4) defines a "Bell Operating Company" as one of twenty

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123 LaFave Testimony at 3:14-4:2.

124 *Applications of Ameritech Corp. and SBC Comm. for Consent To Transfer Control*, 14 FCC Rcd 14712, 14897-98 ¶ 454 (1999), *vacated in part sub nom. Association of Communications Enters. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

125 *Id.* (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987)). *See also* 47 C.F.R. §53.207 (BOC affiliate is a "successor or assign" of an ILEC only if the ILEC transfers assets to the affiliate that are subject to section 251(c)(3), and then only "with respect to such transferred network elements").

126 LaFave Testimony at 4:4-12.

127 LaFave Testimony at 4:12-13.

listed companies (the original BOCs) together with *some* (but not all) successors and assigns and *some* (but not all) corporate affiliates, depending on whether they provide wireline telephone service.[128] Contrary to AT&T's suggestion, Congress did not intend the various regulatory categories in the Act to sweep in entire corporate families without any regard to the particular services each entity in that family is actually providing.

QC has not sought to avoid section 251(c) obligations by moving local network facilities or elements from QC to its affiliates and having the affiliates lease them back to QC or provide the services themselves.[129] There is no evidence in the record — and certainly nothing provided by AT&T — suggesting that any of QC's affiliates have pursued the same lines of business as QC in an effort to siphon off its customers.

3. None of QC's Affiliates are LECs, Let Alone ILECs, in Washington.

By the terms of the Act, the only entities that are subject to section 251(c) are "incumbent local exchange carriers."[130] Congress defined "incumbent local exchange carriers" as a subcategory of "local exchange carriers:" the ILEC in a given area is "the local exchange carrier that — (A) on [February 8, 1996], provided telephone exchange service in such area; and (B)(i) on such date . . . was deemed to be a member of [NECA] . . . ; or (ii) is a person or entity that, on or after such date . . . , became a successor or assign of a member [of NECA]."[131] A "local exchange carrier," in turn, is defined in terms of its specific activities: a LEC is any carrier "that *is engaged in* the provision of telephone exchange service or exchange access."[132]

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128 The term "(B) includes any successor or assign of any such [listed] company that provides wireline telephone exchange service; but (C) does not include an affiliate of any such company, other than an affiliate described in subparagraph . . . (B)." 47 U.S.C. § 153(4).

129 LaFave Testimony at 4:15-22.

130 47 U.S.C. § 251(c).

131 47 U.S.C. § 251(h)(1) (emphasis added).

132 47 U.S.C. § 153(26) (emphasis added). The Act defines "telephone exchange service" as "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service . . . by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(47). "Exchange access" is defined as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16).

None of QC's affiliates is "engaged in the provision of" *any* local exchange service in Washington.[133] None therefore is a "local exchange carrier" within the meaning of the Act. QC's affiliates thus cannot be "incumbent local exchange carriers" as defined in section 251(h): they are not "*the local exchange carrier* that . . . provided telephone exchange service" in Washington on February 8, 1996, nor are any a "*local exchange carrier* that . . . is a person or entity that, on or after such date . . . , became a successor or assign" of such a LEC.[134] Put simply, since QC's affiliates are not "local exchange carriers" *at all*, they cannot be "incumbent local exchange carriers" for purposes of section 251(c).

Even if a QC affiliate were to provide local exchange services in the future in Washington, it still would not be an *incumbent* LEC within the meaning of section 251(h) unless it became USWC's successor or assign by acquiring "key local exchange and exchange access services and facilities" from USWC – specifically, "network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)."[135] None of QC's affiliates have ever acquired such network elements from USWC or QC.[136] As the FCC has held, "a BOC affiliate should not be deemed an incumbent LEC subject to the requirements of section 251(c) solely because it offers local exchange service; rather, section 251(c) applies only to entities that meet the definition of an incumbent LEC under section 251(h)," in particular, that section's "successor or assign" test.[137]

4. Section 251(c) does not Extend to an Incumbent LEC's Long Distance Operations or Network.

The FCC has specifically considered how the unbundling obligations of section 251(c)(3) apply to carriers (such as Sprint and the former GTE) that provide both incumbent local exchange and long distance services, and it rejected the argument AT&T makes here. In the *Advanced Services Remand*

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133 LaFave Testimony at 3:8-12.

134 47 U.S.C. §§ 251(h)(1)(A), (B) (emphasis added).

135 *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, 11 FCC Rcd 21905, 22054 ¶ 309 (1996). *See also* 47 C.F.R. §53.207 (FCC definition of a BOC "successor or assign").

136 LaFave Testimony at 3:14-4:2.

137 *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, 11 FCC Rcd 21905, at 22055 ¶ 310.

Order,[138] the FCC found "no merit" to the suggestion that "section 251 would inevitably require GTE and Sprint, acting in their capacity as incumbent LECs, to unbundle all their facilities, including their long distance facilities."[139] These ILECs' long distance facilities would not meet the "limitations Congress has established in section 251(d)(2)" on unbundling; access to them is not "necessary" to provide competitive local service, nor would the failure to unbundle such facilities "impair" a CLEC's ability to compete.[140] These limitations ensure "that the unbundling obligations under section 251(c) are consistent with section 251's underlying goal of opening the *local* market to competition."[141]

In a later appeal, the FCC explained its ruling on the basis that the unbundling of ILECs' affiliated long distance networks would not serve the "'underlying goal' of sections 251 and 252: to bring competition to those telecommunications markets that are subject to the continuing *market power* of incumbent LECs." Brief for Respondents at 30, *WorldCom, Inc. v. FCC*, No. 00-1002 (D.C. Cir. filed Dec. 22, 2000) (emphasis in original). As the FCC told the D.C. Circuit, ILECs have no market power and control no bottleneck facilities in long distance:

> As a general matter, incumbent LECs have traditionally held market power not with respect to "long distance" networks as such, but with respect to the local bottleneck facilities (such as the loop) needed for "access" to those networks (and thus to the telecommunications and information services carried over those networks).

Id. The rationale for unbundling is absent in this context, as the FCC acknowledged. m The DC Circuit upheld the FCC's definition of the scope of an ILEC's unbundling obligations on the condition that those obligations would not extend to non-ILEC services, such as long distance, wireless, and cable services.[142]

Indeed, AT&T itself filed a brief *supporting* the FCC in that appeal. AT&T agreed with the FCC that the obligations of sections 251 and 252 are specifically directed to incumbents' *local* service networks:

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138 Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385 (1999), *vacated in part and remanded on other grounds, WorldCom, Inc. v. FCC*, 246 F.3d 690, 694-696 (D.C. Cir. 2001).

139 15 FCC Rcd at 390 ¶ 13.

140 *Id*. at 390-91 ¶¶ 13-14.

141 *Id*. at 391 ¶ 14 (emphasis added).

142 *WorldCom, Inc. v. FCC*, 246 F.3d 690, 694-695 (D.C. Cir. 2001)

> Congress recognized that by virtue of having been the providers of local exchange services in an area prior to the adoption of the 1996 Act, ILECs possess monopoly control over local network facilities. Because new entrants cannot in the foreseeable future possibly replicate the ILECs' infrastructure, particularly their loops, Congress realized that the ILECs' status as incumbent providers of exchange service gave them insurmountable advantages over new entrants in the provision of all telecommunications services that utilize those networks . . . .

Joint Brief of Intervenors in Support of Respondents in Opposition to the Qwest Petitioners at 6, *WorldCom, Inc. v. FCC*, No. 00-1002 (D.C. Cir. filed Dec. 22, 2000). AT&T's current suggestion that 251(c) applies without regard to whether the ILEC's *local* network is even at issue is an about-face from its earlier position.

As a result of the foregoing, it would make no difference even if QC affiliates *were* deemed to be ILECs because none provide local exchange service. The only telecommunications services they provide are operator services and long distance. Thus, any dark fiber held by them would be part of a long distance facility, and therefore be exempt from unbundling.

B. Issue DF-5(3): Whether Qwest must unbundle dark fiber it does not own in meet point arrangements with third parties. [SGAT Section 9.7.1]

In a "joint build" or meet point arrangement, two entities combine to make a fiber route between two points. As part of the arrangement, the route may be divided into two parts that come together at the meet point, and each entity owns one of the parts. Usually, each entity has some rights to send traffic over the fiber owned by the other party.[143]

Qwest has unequivocally committed to unbundling dark fiber that it owns and controls as part of a meet point arrangement.[144] For this purpose, Qwest added the following language to the SGAT:

> 9.7.2.20 Qwest shall allow CLEC to access Dark Fiber that is part of a meet point arrangement between Qwest and another Local Exchange Carrier if CLEC has an interconnection agreement containing access to Dark Fiber with the connecting Local Exchange Carrier. Qwest rates, terms and conditions shall apply to the percentage of the route owned by Qwest.

AT&T, however, wants Qwest to go further and unbundle dark fiber it does not own in such meet point arrangements.[145] Qwest cannot and will not unbundle such dark fiber that it does not own

143 Stewart Rebuttal Testimony at 40:16-22.
144 Stewart Rebuttal Testimony at 41:13-24.
145 AT&T's Emerging Services Comments at 7-8.

or control. Contrary to AT&T's claim that it is entitled to unbundling of any rights Qwest have to send traffic over the fiber owned by the other party, any such rights do not constitute Qwest dark fiber and, therefore, are not subject to dark fiber unbundling obligations.[146] Further, Qwest's failure to unbundle those rights is not discriminatory. To the contrary, requiring CLECs to deal with a third party that has no legal obligation to deal with it is exactly what Qwest had to do.[147] Thus, it is not discriminatory to require CLECs to do the same. Finally, providing CLECs with Qwest's rights at TELRIC rates (which is necessarily implied by unbundling) when the CLEC is not required to assume Qwest's duties under its arrangement with the third party may actually unlawfully discriminate against Qwest -- and possibly the third party, who may have legal rights against such a transfer to CLECs of Qwest's rights under the two-party arrangement.[148]

Again, AT&T failed to provide any legal justification for how Qwest could unbundle such an asset of a third party or how it could be required to do so.[149]

C. <u>Issue DF-2:</u> Whether Qwest may impose a requirement of a significant amount of local exchange traffic on dark fiber combinations. [SGAT Section 9.7.2.9]

AT&T has challenged the following provision in the SGAT as unlawful:

> 9.7.2.9 CLEC shall not use UDF as a substitute for special or switched access services, except to the extent CLEC provides "a significant amount of local exchange traffic" to its end users over the UDF as set forth by the FCC (See 9.23.3.7.2).

AT&T claims that the FCC authorized such a restriction only for enhanced extended links (EELs) and not dark fiber pursuant to the *UNE Remand Order*.[150] AT&T's argument does not withstand scrutiny.

EELs are combinations of loop and transport.[151] Dark fiber is not a UNE unto itself, but rather a flavor of transport and loop.[152] The local exchange traffic restriction pertains to combinations of loop

146 Stewart Rebuttal Testimony at 42:3-7.
147 Stewart Rebuttal Testimony at 42:7-12.
148 Stewart Rebuttal Testimony at 42:13-18.
149 As noted above, such arguments for novel duties are misplaced in a 271 docket. *Kansas/Oklahoma Order* ¶19.
150 AT&T's Emerging Services Comments at 9.
151 *UNE Remand Order* ¶¶477, 480.
152 *UNE Remand Order* ¶¶174, 325.

and transport.[153] Thus, the local exchange traffic restriction does properly pertain to combinations of dark fiber loop and transport.[154]

Moreover, the FCC's rationale for the local exchange restriction pertains to dark fiber combinations of loop and transport just as it does to EELs. The FCC imposed the restriction so as to prevent unbundling requirements from interfering with access charge and universal service reform.[155] In other words, an unfettered unbundling obligation would have erased substantial amounts of access charge revenues. In addition, access revenues have historically provided implicit subsidies that are necessary to maintain the goals of universal service. Without the local service restriction, dark fiber loop and transport unbundling could present a similar threat to access revenues and universal service.

The Multistate Facilitator and the Arizona Commission Staff found for Qwest on this issue as well[156]. The Multistate Facilitator stated: "The logic behind the FCC's concern about access charges is in no way diminished because the facilities providing the combination were unlit before a CLEC gained access to them."[157] Qwest urges the Commission to find that section 9.7.2.9 is just and proper under the FCC's *Supplemental Order Clarification*.

D. <u>Issue DF-9:</u> Whether Qwest may impose process requirements and rate elements for unbundled dark fiber orders. [SGAT Section 9.7.3.1.1, 9.7.5.1]

The SGAT provides that a CLEC must submit an inquiry specifying the two locations between which the CLEC seeks dark fiber and the number of fibers requested.[158] This inquiry is called an Initial

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153 *Supplemental Order Clarification*, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 00-183 (rel. June 2, 2000) ¶8.

154 Similarly, the restriction applies to EUDF. In paragraph 489 of *UNE Remand Order*, the FCC made clear that they were not ordering ILECs to provide EUDIT (otherwise known as entrance facilities), unless the CLEC is providing local service:

> We conclude that the record in this phase of the proceeding is insufficient for us to determine whether or how our rules should apply in the discrete situation involving the use of dedicated transport links between the incumbent LEC's serving wire center and an interexchange carrier's switch or point of presence (or "entrance facilities"). . . We believe that we should fully explore the policy ramifications of applying our rules in a way that potentially could cause a significant reduction of the incumbent LEC's special access revenues prior to full implementation of access charge and universal service reform. Therefore, we set certain discrete issues for further comment below.

The FCC then asked for comment regarding whether EUDIT and unbundled transport in general could be used as a substitute for special or switched access services. The same analysis applies to EUDF because it too is essentially an entrance facility.

155 *UNE Remand Order* ¶ 489.

156 *See* Exhibit 2, Arizona Staff's Final Emerging Services Report at ¶¶ 274-278.

157 *See* Exhibit 1, Multistate Facilitator's Emerging Services Report at 51.

158 SGAT section 9.7.3.1.1.

Records Inquiry ("IRI").[159] If the IRI seeks information regarding dark fiber that does not run between Qwest wire centers or between a Qwest wire center and customer premises, then a Field Verification and Quote Preparation ("FVQP") must be performed.[160] WorldCom has challenged Qwest's IRI and FVQP processes and rate elements, claiming that the dark fiber ordering process should the same as the ordering process for unbundled dedicated interoffice transport ("UDIT").[161] WorldCom's position simply ignores the differences between these two products.

Qwest's dark fiber and UDIT are not -- and cannot be -- inventoried in the same way.[162] The UDIT product is transport facilities that have already been lit with electronics and integrated into Qwest's provisioning systems.[163] When Qwest receives a UDIT order, Qwest's systems can identify the next available segment of transport that meets the required parameters from the automatically inventoried facilities that are already in Qwest's provisioning systems.[164] Dark fiber, on the other hand, is by definition fiber that has not been lit by electronics.[165] Unlit fiber is not integrated into Qwest's provisioning systems. Instead, when Qwest receives an order for dark fiber or has a need to identify dark fiber for its own use, it employs a manual process to identify and incorporate that fiber as an assignable fiber segment in Qwest's provisioning systems.[166] When the fiber does not terminate at a Qwest wire center or customer premises, a technician must be dispatched to determine how the fiber is appropriately accessed.[167] Thus, Qwest's dark fiber is simply not automatically assignable like UDIT; extensive OSS development work and modifications would be required for Qwest to inventory dark fiber in the same way it inventories lit fiber.[168]

Qwest's IRI and FVQP phases are consistent with other RBOCs' dark fiber offerings.[169] Qwest's processes for its dark fiber offering are reasonable and Qwest is entitled to recover its just and

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159 SGAT section 9.7.5.1(a).
160 SGAT section 9.7.5.1(b).
161 July 13, 2001 Workshop Transcript Vol. 32 at 4643:6-19.
162 July 13, 2001 Workshop Transcript Vol. 32 at 4643:21-25.
163 July 13, 2001 Workshop Transcript Vol. 32 at 4644:1-5.
164 July 13, 2001 Workshop Transcript Vol. 32 at 4644:5-11.
165 SGAT section 9.7.1.
166 July 13, 2001 Workshop Transcript Vol. 32 at 4644:12-25.
167 July 13, 2001 Workshop Transcript Vol. 32 at 4646:3-7.
168 July 13, 2001 Workshop Transcript Vol. 32 at 4649:11-14.
169 July 13, 2001 Workshop Transcript Vol. 32 at 4647:18-23.

reasonable costs of providing CLECs access to its facilities and equipment.[170] Therefore, WorldCom's request must be denied.

E. Issue DF-13: Whether Qwest must break open sealed splice cases to provide access to dark fiber. [SGAT Section 9.7.2.2]

At the workshop, Yipes requested that Qwest be required to provide access to dark fiber at splice cases that are not located at the end of a fiber optic strand, but that are located on a continuous strand.[171] This request must be rejected as a matter of law.

The *UNE Remand Order* provides that dark fiber is not really a UNE unto itself, but a subspecies of two other UNEs – loop and transport.[172] That Order also specifies the points at which access to transport and loops is required. For loops, access is required at "accessible terminals."[173] The FCC's definition is exceedingly clear: "An accessible terminal is a point on the loop where technicians can access the wire or fiber within the cable *without removing a splice case to reach the wire or fiber within*."[174] The FCC further clarified as follows:

> Accessible terminals contain cables and their respective wire pairs that terminate on screw posts. This allows technicians to affix cross connects between binding posts of terminals collocated at the same point. *Terminals differ from splice cases, which are inaccessible because the case must be breached to reach the wires within*.[175]

Thus, there can be no question but that the FCC's definition of the accessible terminals at which Qwest must provide access to dark fiber do not include splice cases. Indeed, Yipes conceded at the workshop that it's request exceeds the FCC's requirements: "It's not accessible terminations under the FCC's description."[176]

Despite the clear absence of any obligation to do so, Qwest has nonetheless agreed to provide access to dark fiber at splice cases under certain circumstances.[177] However, Qwest has specifically excluded certain splice cases, stating that it "will not open or break an existing splices on continuous

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170 *Iowa Utilities Board v. FCC*, 219 F.3d 744, 750 (8th Cir. 2000), *cert. granted* January 22, 2001.
171 July 31, 2001 Workshop Transcript Vol. 36 at 5447:12-22.
172 *UNE Remand Order* ¶¶174, 325.
173 *UNE Remand Order* ¶206.
174 *UNE Remand Order* ¶ 206 (emphasis added).
175 *UNE Remand Order* at n.395 (emphasis added).
176 July 31, 2001 Workshop Transcript Vol. 36 at 5447:22-23.
177 SGAT § 9.7.2.2.2.

fiber optic cable routes."[178] Qwest generally seals splice cases at strategic points in its network where it anticipates little, if any, access at that point.[179]

Qwest has already exceeded its obligations by providing access to dark fiber at splice cases under certain circumstances. Qwest has no obligation to provide the access Yipes seeks. Therefore, Yipes' request must be denied.

VI. LINE SPLITTING

As mentioned above, Qwest was the first ILEC in the country to offer line sharing to CLECs. As the FCC noted in its *Line Sharing Reconsideration Order*, line sharing is limited to those instances in which the incumbent LEC provides voice service on the particular loop to which the CLEC seeks access.[180] In other words, a competing carrier seeking to provide xDSL service using the unbundled high frequency portion of the loop can do so only if the same loop is used by the incumbent LEC to provide voice service to an end user.[181] Line splitting, on the other hand, occurs where both the voice and data service are provided by competing carriers over a UNE-P platform.[182] While Qwest is unaware of any other ILECs that currently provide a similar offering, Qwest will offer "loop splitting," where a CLEC purchases an unbundled loop from Qwest and, by itself or in partnership with a data LEC ("DLEC"), provides both voice and data service on the same loop.[183]

The parties reached impasse on five issues. As demonstrated below, each of these issues should be decided in Qwest's favor as a matter of law.

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178 SGAT § 9.7.2.2.2.9.
179 July 31, 2001 Workshop Transcript Vol. 36 at 5448:20-24.
180 *Line Sharing Reconsideration Order* ¶ 17.
181 *Line Sharing Reconsideration Order* ¶ 17; July 20, 2001 Workshop Vol. II Transcript at 276:3-6.
182 *Line Sharing Reconsideration Order* ¶ 17; July 20, 2001 Workshop Vol. II Transcript at 276:7-10.
183 July 12, 2001 Workshop Transcript Vol. 31 at 4575:14-19; SGAT section 9.24.

A. Issue LSPLIT-1(a) & (b) and LS-2: Whether Qwest is required to provide access to Qwest's POTS splitters on a line-at-a-time basis and, if so, whether the splitters must be located as close to the MDF as possible. [SGAT Section 9.21.2.1][184]

The CLECs claim that Qwest should be required to purchase, own, and provide access to Qwest's POTS splitters on a line-by-line basis in order to provide CLECs with the full functionality of loops.[185] The FCC has specifically rejected this contention on more than one occasion. This demand must be rejected as a matter of law and fact.

AT&T made the identical argument against Southwestern Bell Telephone Company ("SWBT") in its section 271 proceeding. Specifically, AT&T argued

> that it has a right to line splitting capability over the UNE-P with SWBT furnishing the line splitter. AT&T alleges that this is "the only way to allow the addition of xDSL service onto UNE-P loops in a manner that is efficient, timely, and minimally disruptive." Furthermore, AT&T contends that competing carriers have an obligation to provide access to all the functionalities and capabilities of the loop, including electronics attached to the loop. AT&T contends that the splitter is an example of such electronics and that it is included within the loop element.[186]

The FCC expressly rejected AT&T's argument:[187]

> 327. We reject AT&T's argument that SWBT has a present obligation to furnish the splitter when AT&T engages in line splitting over the UNE-P. The Commission has never exercised its legislative rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the splitter, and incumbent LECs therefore have no current obligation to make the splitter available. As we stated in the UNE Remand Order, "with the exception of Digital Subscriber Line Access Multiplexers (DSLAMs), the loop includes attached electronics, including multiplexing equipment used to derive the loop transmission capacity." We separately determined that the DSLAM is a component of the packet switching unbundled network element. We observed that "DSLAM equipment sometimes includes a splitter" and that, "[i]f not, a separate splitter device separates voice and data traffic." We did not identify any circumstances in which the splitter would be treated as part of the loop, as distinguished from being part of the packet switching element. That distinction is critical, because we declined to exercise our rulemaking authority under section 251(d)(2) to require incumbent

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184 WorldCom claims that, if Qwest is required to provide access to its splitters, then Qwest should be required to place its splitters as close to the MDF as possible. July 12, 2001 Workshop Transcript Vol. 31 at 4571:11-16. As discussed below, the CLECs' demand for access to Qwest's splitters must be rejected as a matter of fact and law, therefore WorldCom's demand regarding placement of the splitter is moot. Qwest is not required to provide access to the splitters, therefore issues regarding splitter placement are moot.

185 *See, e.g.*, AT&T's Comments on Loops, Line Splitting and NIDs for Workshop IV, dated June 28, 2001 ("AT&T's Loop Comments") at 23-26.

186 *SBC Texas Order* ¶ 326 (footnotes omitted).

187 *SBC Texas Order* ¶¶ 327-328 (footnotes omitted; emphasis added).

> LECs to provide access to the packet switching element, and our decision on that point is not disputed in this proceeding.
>
> 328. The UNE Remand Order cannot fairly be read to impose on incumbent LECs an obligation to provide access to their splitters.

This position is further supported by the *Line Sharing Order*, which is the basis for the line splitting requirement. In that order, the FCC held that ILECs have the option of providing line splitters themselves or, in the alternative, allowing CLECs to place their splitters in the ILEC's central offices.[188] Thus, the FCC has specifically held, not once but twice, that ILECs are not required to own and install splitters for CLECs on a line-at-a-time basis.

AT&T concedes that the FCC has not yet required ILECs to provide access to splitters and that such access is therefore not a condition of obtaining 271 approval.[189] AT&T nevertheless argues that the Texas Commission has decided this issue in its favor.[190] As noted above, decisions of the Texas Commission do not control over FCC orders with respect to this 271 proceeding. In addition, the Texas Commission decision does not stand for the broad proposition the CLECs assert. The Texas Commission considered a situation where SWBT utilized non-integrated outboard splitters as part of a managed data service it offered. Because splitters were already in use and available, the Texas Commission required SWBT to provide the outboard splitters to CLECs. However, the Texas Commission expressly limited this finding to the facts before it: "The Commission clarifies that this finding applies only to 'stand-alone' splitters, as requested by AT&T in this docket. *This does not apply to a splitter that has been incorporated into a DSLAM.*"[191]

AT&T appears to acknowledge this limitation, arguing only that Qwest should provide access to its *outboard* splitters, to the degree it has any.[192] Unlike SWBT, Qwest does not currently provide

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188 Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, FCC 99-355 (rel. Dec. 9, 1999) *("Line Sharing Order")* ¶ 146.

189 AT&T's Loop Comments at 45-46.

190 July 12, 2001 Workshop Transcript Vol. 31 at 4558:1-6; AT&T's Loop Comments at 47-49.

191 Order Approving Revised Arbitration Award, *Petition of Southwestern Bell Telephone Company for Arbitration with AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications, Inc. Pursuant to Section 252(b)(1) of the Federal Telecommunications Act of 1996*, PUCT Docket No. 22315 (March 1, 2001) at 9 (emphasis added).

192 AT&T's Loop Comments at 45.

non-integrated (*i.e.*, outboard) POTS splitters.[193] The only splitters used in Qwest's central offices are those that are integrated by hardwiring into the DSLAM unit.[194] Within the DSLAM platforms used by Qwest, there is a separate shelf for the splitters. However, the DSLAM shelves are hardwired directly to the back of the data ports of the splitters with amphenol connectors.[195] Because of the critical need to maintain voice service if a DSLAM card fails or is removed for maintenance purposes, Qwest's current architecture for DSLAM and splitter deployment does not call for circuit board integration. However, the integration of DSLAMs and splitters is not defined solely by circuit board integration.

From a design and provisioning perspective, the DSLAM modems and POTS splitters are a single unit.[196] This translates into a single point of demarcation between the shared loop and the splitter/DSLAM port combinations. The interface to the ATM switch also constitutes a single demarcation point.[197] Moreover, the equipment bays that house the splitter and DSLAM units are ordered from the manufacturer as a single unit, with a one-to-one relationship between splitters and ports.[198] Thus, if Qwest were required to deconstruct the DSLAM/splitter unit to provide access to a splitter, the DSLAM availability would be stranded. Finally, Qwest's technicians do not have access to the cable between the splitter and the DSLAM for testing. Testing is performed at the MDF.[199] Therefore, it is impossible to for Qwest to provide access for another provider to the Qwest-owned splitter.[200] Thus, Qwest does not use outboard splitters.

Thus, neither the facts nor the law supports the CLECs' demand for access to Qwest's POTS splitters. The Multistate Facilitator agreed with Qwest, refusing to require Qwest to purchase and own POTS splitters on behalf of CLECs: "It is very clear that existing FCC requirements provide no basis for obliging Qwest to provide splitters and to make them available to CLECs on a line-at-a-time basis."[201] The Washington Commission should do likewise.

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193 Rebuttal Testimony of Jean M. Liston on behalf of Qwest Corporation, dated July 13, 2001 ("Liston Rebuttal Testimony") at 73:14-15.
194 July 12, 2001 Workshop Transcript Vol. 31 at 4559:5-4560:1; Liston Rebuttal Testimony at 73:15-16.
195 Liston Rebuttal Testimony at 73:16-17.
196 Liston Rebuttal Testimony at 73:18-19.
197 Liston Rebuttal Testimony at 73:20-22.
198 Liston Rebuttal Testimony at 73:22-74:2.
199 Liston Rebuttal Testimony at 74:2-3.
200 Liston Direct Testimony at 103:3-10; Liston Rebuttal Testimony at 74:3-5.
201 Exhibit 1, Multistate Facilitator's Emerging Services Report at 4, 15.

B. Issue LSPLIT-2 and LS-1: Whether Qwest must offer its retail DSL service on a stand-alone basis when a CLEC provides the voice service over UNE-P.

Qwest offers a retail DSL product (formerly called "MegaBit") along with its voice services. In accordance with unambiguous holdings in two FCC orders, Qwest initially offered its DSL service to retail customers only if Qwest also provided voice service. Qwest has now modified its policy and agreed to continue to provide its DSL service to a customer that has decided to obtain UNE-P voice service from another provider.[202] Therefore, this issue should be closed. However, AT&T asked that the issue remain open pending its review of the product offering.[203] Accordingly, while Qwest has agreed to continue to provide its DSL service to a customer that obtains UNE-P voice service from another provider, Qwest sets forth the legal basis for its continued belief that there is no legal requirement for it to do so.

As a matter of law, Qwest has no obligation to continue to provide DSL service when its retail customer decides to obtain UNE-P voice service from another provider. The FCC expressly rejected AT&T's argument to the contrary in its *SBC Texas Order:*

> We reject AT&T's argument that we should deny this application on the basis of SWBT's decision to deny its xDSL service to customers who choose to obtain their voice service from a competitor that is using the UNE-P. *Under our rules, the incumbent LEC has no obligation to provide xDSL service over this UNE-P carrier loop. . . .* In sum, we do not find this conduct discriminatory.[204]

Indeed, in the context of denying AT&T's motion for reconsideration on this very issue, the FCC recently confirmed that Qwest has no obligation to provide xDSL service when it is no longer the voice provider.[205] The FCC left no room for doubt on this issue:

> We deny, however, AT&T's request that the Commission clarify that incumbent LECs must continue to provide xDSL services in the event customers choose to obtain voice service from a competing carrier on the same line because we find that the *Line Sharing Order* contained no such requirement.[206]

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202 July 12, 2001 Workshop Transcript Vol. 31 at 4564:23-4565:6.
203 July 12, 2001 Workshop Transcript Vol. 31 at 4569:17-4570:2.
204 *SBC Texas Order* ¶ 330 (emphasis added, citations omitted).
205 *Line Sharing Reconsideration Order* ¶ 26 (ILEC is not required to provide xDSL service when it is no longer the voice provider).
206 *Line Sharing Reconsideration Order* ¶ 16.

AT&T has claimed in other jurisdictions that, even though the FCC plainly rejected its motion for reconsideration on this issue, some of the FCC's language in the *Line Sharing Reconsideration Order* could be construed to mean that the FCC did not actually consider this issue in the underlying *Line Sharing Order*. In the *Line Sharing Reconsideration Order*, the FCC stated:

> Although the *Line Sharing Order* obligates incumbent LECs to make the high frequency portion of the loop separately available to competing carriers on loops where incumbent LECs provide voice service, *it does not require that they provide xDSL service when they are not* [sic] *longer the voice provider*. We do not, however, consider in this Order whether, as AT&T alleges, this situation is a violation of sections 201 and/or 202 of the Act. To the extent that AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with the Commission's line sharing rules and/or the Act itself, we encourage AT&T to pursue enforcement action.[207]

Reduced to its essence, this passage says: "We do not require it. We will not consider your argument here. Take it to another forum." AT&T has suggested in other jurisdictions that this passage indicates that the FCC actually did not consider an incumbent's obligation to provide xDSL service when it is no longer the voice provider. It is difficult to imagine how AT&T teased such a construction out of the FCC's plain statement that the *Line Sharing Order* "does not require that [ILECs] provide xDSL service when they are not [sic] longer the voice provider." The first sentence quoted above cannot reasonably be read to support AT&T's claim.

However, the FCC did clearly state in the *Line Sharing Order* that it did not consider AT&T's allegation that an incumbent's decision not to offer xDSL service violates sections 201 and/or 202 of the Act because those issues should be raised in a separate enforcement proceeding. Thus, section 201/202 issues were not appropriately raised in that proceeding, in which the Commission considered section 251 line sharing obligations. Because the line splitting obligations at issue here arose from that line sharing proceeding, the FCC's determination that AT&T's section 201/202 arguments were not within the appropriate scope of that proceeding applies equally to this proceeding. Moreover, given the FCC's repeated refusal to consider extraneous issues in section 271 proceedings, AT&T's section 201/202 arguments are even less appropriately raised in this section 271 proceeding. Having refused to

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[207] *Line Sharing Reconsideration Order* ¶ 26 (emphasis added).

consider AT&T's section 201/202 concern because it was not appropriately within the scope of the proceeding, the FCC encouraged AT&T instead to pursue a different type of action -- a section 201/202 enforcement action -- if AT&T believes that specific ILEC behavior constrains competition. Thus, AT&T's tortured construction of the FCC's statement is wholly without merit.

AT&T's claim that it could be disadvantaged if Qwest does not continue to provide DSL service is equally baseless. AT&T has presented no evidence regarding competitive harm or barrier to market entry. Even AT&T had presented competent evidence regarding its claim, the claim must be rejected as a matter of law because the FCC has already expressly determined that Qwest's conduct is not discriminatory:

> [T]he UNE-P carrier has the right to engage in line splitting on its loop. As a result, a UNE-P carrier can compete with SWBT's combined voice and data offering on the same loop by providing a customer with line splitting voice and data service over the UNE-P in the same manner. *In sum, we do not find this conduct discriminatory.*[208]

A CLEC may provide DSL service to its voice customer or choose to resell Qwest's voice and DSL service to its voice customer, or the customer can obtain DSL service from another provider. Thus, DSL service poses no barrier to CLEC as a matter of law.

Finally, it bears noting that Qwest retail DSL is merely a competing product in the broadband market dominated by cable modem service. This lack of market power in the broadband market further requires the conclusion that Qwest's policy and the FCC's rule are pro-competitive.

Thus, there is no legal basis for requiring Qwest to continue to provide DSL service to its retail customer who switches to UNE-P voice service from another provider. Nonetheless, in order to address concerns raised by the Multistate Facilitator and the Arizona Commission Staff, Qwest has agreed to continue to provide DSL services under those circumstances. Therefore, this issue is moot. Accordingly, this issue should be decided in Qwest's favor.

C. Issue LSPLIT-3: Whether Qwest must acknowledge loop splitting as a legal requirement.

There is no issue regarding whether Qwest will provide loop splitting because Qwest has already included a loop splitting offering in its SGAT. To Qwest's knowledge, no other ILEC in the

208 *SBC Texas Order* ¶ 330 (emphasis added).

country offers loop splitting.[209] Moreover, unlike line splitting over UNE-P, there are no industry standards relating to loop splitting. Nevertheless, Qwest has agreed to develop a standard offering for loop splitting and has offered SGAT language, Section 9.24, to implement the offering. Qwest has committed to developing its loop splitting offering collaboratively with CLECs through industry meetings.[210] Through that process, Qwest will define the product offering and develop an implementation schedule. There is thus no dispute regarding whether Qwest will offer loop splitting.

Nonetheless, AT&T insists that Qwest must affirmatively acknowledge that it has a legal obligation -- separate and distinct from the concrete legal obligations imposed by the SGAT itself -- to offer line splitting. Given Qwest's existing commitment to provide loop splitting, this demand serves no purpose -- except, perhaps, to massage AT&T's ego.

Qwest is already contractually obligated to provide loop splitting. It is not germane for the consideration of the 271 application about how Qwest feels about it on an intellectual level.[211] The Multistate Facilitator supported this position, stating as follows:

> Provided that Qwest can demonstrate at the time of its filing to the FCC that it has made substantial progress in defining the specific terms and conditions applicable to loop splitting, it is reasonable to conclude that it has met its obligations under Section 271.[212]

Qwest implemented its Loop Splitting offering on August 1, 2001. AT&T's stubborn request should be rejected.

D. Issue LSPLIT-4, 5, 6 & 9: Whether Qwest must provide line splitting over EELs, resold lines, or other UNE combinations involving a loop.

The FCC defined Qwest's obligation to provide line splitting in the *Line Sharing Reconsideration Order*. In that proceeding, the FCC considered AT&T's and WorldCom's request for clarification "that an incumbent LEC must permit competing carriers *providing voice service using*

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209 Liston Rebuttal Testimony at 58:3-5.

210 *See* Liston Rebuttal Testimony at 57:9-21.

211 *See* Exhibit 5, Oregon July 20, 2001 Workshop Vol. II Transcript at 286:24-287:1.

212 The Multistate Facilitator has issued his recommendations regarding line splitting and NIDs, among other things, in a report entitled, "Facilitator's Report on Checklist Item 2 (Unbundled Network Elements), Checklist Item 4 (Access to Unbundled Loops), Checklist Item 5 (Access To Unbundled Local Transport) and Checklist Item 6 (Access To Unbundled Local Switching) dated August 20, 2001 ("Multistate Facilitator's UNE Report") at 69. The body of the Multistate Facilitator's UNE Report, excluding the cover page, was identical for six of the seven states (except Utah) and is attached to the Loops brief (identified therein as "Multi-State UNE Report").

the UNE-platform to either self-provision necessary equipment or partner with a [DLEC] to provide xDSL service on the same line."[213] Thus, the issue before the FCC, as framed by AT&T and WorldCom, was expressly limited to an ILEC's obligation to provide line splitting over UNE-P. The FCC's determination on that issue was similarly limited: "Thus, as AT&T and WorldCom contend, incumbent LECs have an obligation to permit competing carriers to engage in line splitting *using the UNE-platform* where the competing carrier purchase the entire loop and provides its own splitter."[214] The FCC reiterated this obligation in the *SBC Texas Order*, finding SWBT in compliance with its section 271 obligations where "SWBT allows competing carriers to provide both voice and data services over the UNE-P."[215]

The CLECs raised these issues because they believe that Qwest has a broader obligation to provide line splitting that subsumes these specific issues. However, they were unable to identify any specific situation where they believe Qwest has an obligation to provide line splitting other than those specifically identified. The CLECs apparently hope to expand Qwest's line splitting obligations by claiming that Qwest has yet-to-be-discovered obligations to provide line splitting. Contrary to the CLECs' vague aspirations, Qwest's line splitting obligations are not so amorphous.

Qwest's obligation is to permit competing carriers to engage in line splitting over UNE-P where the competing carrier purchases the entire loop and provides its own splitter. SGAT section 9.21 fully implements this obligation. Although the FCC did not impose a clear obligation on ILECs to provide line splitting over unbundled loops, and Qwest is unaware of any other ILECs that currently provide loop splitting, Qwest nevertheless has agreed to develop a standard offering for loop splitting. Further, as discussed below, Qwest will work with CLECs who request "EEL splitting" on a special request basis. However, Qwest will not offer line splitting over resold lines. Other than these specific situations, no CLEC could identify any additional combination of UNEs that include a loop over which to even claim that Qwest should provide line splitting. Accordingly, the Commission should reject the CLECs' ethereal claim that Qwest has unspecified line splitting obligations.

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213 *Line Sharing Reconsideration Order* ¶ 16 (emphasis added).
214 *Line Sharing Reconsideration Order* ¶ 19 (emphasis added).
215 *SBC Texas Order* ¶ 325.

1. "EEL splitting."

As an initial matter, the concept of "EEL splitting" is counterintuitive because, as AT&T itself noted at the workshop, EEL is a combination of loop and transport[216] that was originally designed to eliminate the need for collocation in the serving wire center. Thus, it is not truly possible to split an EEL because splitting would break the EEL loop and transport combination with the insertion of collocation.[217] Both the voice and data streams would then be directed to the DLEC's collocation area. The voice service would be routed to the IDF to connect to the transport UNE. Thus, the voice portion is not an EEL combination of loop and transport; instead, it is loop and transport separated by collocated equipment. Similarly, the data would be routed on a loop to the CLEC splitter and DSLAM, which may require a separate (unshared) transport UNE from Qwest for delivery to the ISP. Thus, a split EEL would no longer be an EEL.[218]

Qwest has no obligation to provide EEL splitting. Nonetheless, Qwest has agreed to provide EEL splitting on a special request basis.[219] Qwest will not, however, create a standard product offering for EEL splitting. Qwest is only required to offer products where there is a current or "reasonably foreseeable" demand for such products.[220] There is currently no demand for EEL splitting.[221] Further, the absence of any demand for EEL splitting is demonstrated by the CLECs' failure to offer any evidence indicating any such demand. Given the lack of demand, the significant investment of time and effort required to develop a standard product is not warranted. Developing a standardized product would require Qwest to define methods, and procedures, build OSS functions for ordering, define LSR information that can flow through Qwest's databases and onto billing statements.[222]

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216 July 12, 2001 Workshop Transcript Vol. 31 at 4579:9-11.

217 Liston Rebuttal Testimony at 68:14-69:5.

218 Liston Rebuttal Testimony at 68:8-11.

219 Liston Rebuttal Testimony at 68:3-5.

220 *See* Memorandum Opinion and Order, *Application of BellSouth Corp., et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, to provide In-Region, Inter-LATA Services in South Carolina,* CC Docket No. 97-208, FCC 97-418 (rel. Dec. 24, 1997) ¶ 181; Memorandum Opinion and Order, *Application of Bell South Corp. Bell South Telecommunications, Inc. and Bell South Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, FCC 98-271 (rel. Oct. 13, 1998) ¶¶ 108, 116, 139; *SBC Texas Order* ¶ 98.

221 Liston Rebuttal Testimony at 70:2-18. The absence of any demand for EEL splitting is also demonstrated by the CLECs' failure to produce a single document evidencing any such demand in response to Qwest's document requests in other jurisdictions. Liston Rebuttal Testimony at 67:18-23.

222 Liston Rebuttal Testimony at 67:23-68:3.

AT&T raised concerns in other jurisdictions that the lack of appreciable demand may not be attributable to the absence of CLEC interest in such a product. This concern should be allayed by Qwest's agreement to revisit its decision not to create a standard offering if demand for EEL splitting increases sufficiently.

AT&T has also claimed in other state commission workshops that Qwest's lack of a standard product may cause it competitive harm because it intends to become a facilities-based DLEC. In order for AT&T to provide both voice and DSL to the customer, AT&T would be required to collocate in the serving wire center. Thus, becoming a facilities-based DLEC would eliminate AT&T's need for the intended benefit of EEL, which is to eliminate collocation in the serving wire center.

The Multistate Facilitator found in favor of Qwest's position that providing EEL splitting on a special request basis is appropriate in light of the "remarkably small current demand," and that "Qwest should be deemed to have satisfied its obligations to provide line splitting in this context[223]

2. Splitting Resold Lines.

Qwest will not agree to offer line splitting over resold lines. First, Qwest has no obligation to provide combinations of unbundled network elements with resale products. Further, as described above, the FCC requires ILECs to provide access to checklist items to only meet "reasonably foreseeable demand." There is no evidence of any demand for splitting resold lines. The absence of any such demand is confirmed by the CLECs' failure to produce any evidence in this proceeding or any documents evidencing any demand for splitting resold lines in response to Qwest's document requests in other jurisdictions.[224] Finally, any need for such a product could be satisfied with Qwest's existing offerings by simply converting the resale voice grade line to UNE-P voice, at which point UNE-P line splitting is available.[225]

The Multistate Facilitator found in Qwest's favor on this issue, stating as follows:

> [S]plitting resold lines is an anomalous concept. CLECs can acquire the underlying facilities as UNEs or they can resell a service. They cannot buy a service for resale, yet claim that they have secured any rights to

223 *See* Multistate Facilitator's UNE Report at 69
224 Liston Rebuttal Testimony at 67:18-23.
225 Liston Rebuttal Testimony at 69:7-21.

> the underlying facilities. Loops are split; services are not. …. [T]here is at least one solution to line splitting under a resale situation, which is first to substitute UNE-P for resold services, then to pursue the splitting options made available by that substitution.[226]

Because Qwest has no obligation to offer line splitting on resold lines and, in any event, Qwest already provides an equivalent offering using UNE-P, the CLECs' request that the Commission impose a new obligation to provide line splitting on resold lines must be denied.

3. Splitting Over All UNE Combinations that Include a Loop.

Qwest has attempted to determine whether there is a need for line splitting on all loop-based products.[227] Qwest issued discovery requests in other jurisdictions to CLECs, including AT&T and Covad, asking for information regarding the CLECs' plans for offering line splitting for products in addition to Qwest's line splitting and loop splitting products. No CLEC produced a single document evidencing any demand for any other product.[228] Indeed, no CLEC has identified any combination -- other than those already identified above -- over which to even argue that Qwest should be required to provide line splitting. This issue, therefore, relates only to alleged line splitting obligations for which the CLECs could not even begin to define parameters. This is precisely the kind of novel, interpretive question that the FCC has held is not appropriately raised in a section 271 proceeding.[229] Accordingly, Qwest requests that the Commission resolve this issue in Qwest's favor, as did the Multistate Facilitator.[230]

E. Issue LSPLIT-8(a): Whether the Hold-Harmless Provision Relating to CLECs' Use of Authorized Agents for Ordering and Repair must be Revised to Provide that Qwest may be Held Liable in Circumstances where Qwest is not at Fault. [SGAT Section 9.21.7]

The SGAT provides CLECs with the flexibility to designate either the CLEC or the DLEC as the customer of record in the line or loop splitting context. The customer of record is Qwest's single point of contact for initiating orders and repair calls relating to that line.

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226 *See*, Multistate Facilitator's UNE Report at 69.
227 Liston Rebuttal Testimony at 67:6-68:6.
228 Liston Rebuttal Testimony at 67:18-21.
229 *See, e.g., SBC Texas Order* ¶¶ 23-27 (a section 271 proceeding is not an appropriate forum for resolution of new and unresolved interpretive disputes regarding an ILEC's obligations to competitors).
230 *See*, Multistate Facilitator's UNE Report at 69.

When a DLEC has partnered with a CLEC in a line or loop splitting arrangement, only Qwest's customer of record for those lines could submit electronic orders and trouble reports to Qwest for those lines. When the CLEC, not the DLEC, is Qwest's customer of record for those lines, AT&T asked Qwest to incorporate SGAT provisions that would provide a DLEC with limited ability to communicate directly with Qwest regarding only those lines on which it provides services in partnership with the CLEC. Qwest proposed new SGAT language to accommodate AT&T's request to incorporate the concept of an authorized agent that CLECs can designate to perform ordering and repair functions in the line splitting context.

Qwest proposed new language regarding line splitting in section 9.21.7[231] to allow the CLEC to designate an authorized agent to perform ordering and/or maintenance and repair functions. The CLEC must provide its authorized agent with the necessary access and security devices, such as user identifications, digital certificates and SecurID cards, to allow the authorized agent to access the records of the customer of record. The parties agreed on most of the language, but have reached impasse on one issue relating to section 9.21.7.3, which reads as follows.

> 9.21.7.3 The customer of record shall hold Qwest harmless with regard to any harm to customer of record as a direct and proximate result of the acts or omissions of the authorized agent of the customer of record or any other person who has obtained from the customer of record the necessary access and security devices through the customer of record, including but not limited to user identifications, digital certificates and SecurID cards, that allow such person to access the records of the customer of record unless such access and security devices were wrongfully obtained by such person through the willful or negligent behavior of Qwest.

The impasse issue relates to the last phrase in section 9.21.7.3. The phrase at issue carves out the limited exception to the hold-harmless provision. The exception provides that Qwest will not be held harmless if "such access and security devices were wrongfully obtained by such person through the willful or negligent behavior of Qwest." Thus, Qwest is not protected by the hold-harmless provision where someone wrongfully obtains access because of Qwest's willful or negligent conduct. There are

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231 Qwest proposed a virtually identical provision in the loop splitting section, which differs only in the first section, where the reference to "Line Splitting" and the cross-reference to the line splitting ordering and maintenance and repair sections were changed to reference "Loop Splitting" and the appropriate loop splitting ordering and maintenance and repair sections. *See* SGAT section 9.24.7.

two key concepts in this exception. First, the person who obtains access is someone who was not authorized to obtain access or, who "wrongfully" obtains access. If the access is not wrongful, it is authorized and Qwest should be held harmless. Second, it would only be fair to hold Qwest liable if Qwest deliberately allowed the wrong person access or, even if Qwest did not actually intend to give the wrong person access, that person obtained access because Qwest was negligent. Both "willful" and "negligent" are necessary in order to describe intentional conduct and conduct that, while not intentional, was substandard enough that Qwest should not be held harmless.

AT&T demands that this exception be expanded. AT&T insists that one of the key concepts described above -- AT&T does not care which one -- be eliminated from the exception provision so that Qwest can be held liable for the acts of the CLEC's authorized agent under circumstances where Qwest is not at fault. AT&T argues that only one of the following two changes shown in redlined text below should be made:

> 9.21.7.3 The customer of record shall hold Qwest harmless with regard to any harm to customer of record as a direct and proximate result of the acts or omissions of the authorized agent of the customer of record or any other person who has obtained from the customer of record the necessary access and security devices through the customer of record, including but not limited to user identifications, digital certificates and SecurID cards, that allow such person to access the records of the customer of record unless such access and security devices were ~~wrongfully~~ obtained by such person or were obtained through the willful or negligent behavior of Qwest.

Neither change is appropriate because both changes would render the hold-harmless provision meaningless. If "wrongfully" is deleted, Qwest could be held liable where someone obtains access "through the willful or negligent behavior of Qwest." Setting aside Qwest's negligent behavior, Qwest then could be liable where it "willfully" provided a person access. Every time Qwest processes a CLEC's request for access for an authorized agent, Qwest is "willfully" or intentionally providing access. Because "wrongfully" has been deleted under AT&T's proposal, Qwest would be unprotected every time it *rightfully* provided access to a CLEC's authorized agent. AT&T has claimed in other jurisdictions that this would not be the proper construction of the modified provision because "willfully" is technically defined to include an element of evil intent or bad motive. However, the plain meaning of

"willful" is simply "deliberate."[232] Thus, AT&T's revision should be rejected because it injects ambiguity that exposes Qwest to potential liability. Moreover, setting aside "willful," AT&T's revision would result in potential liability for Qwest where Qwest may have been careless, but nonetheless provided access to a person the CLEC has authorized. Thus, Qwest could be held liable if, while its conduct may technically have been negligent, Qwest did exactly what the CLEC asked it to do -- provided access to an authorized agent. Thus, AT&T's proposal to delete "wrongfully" must be rejected because it would nullify the hold-harmless provision.

Alternatively, AT&T proposes to expand Qwest's potential liability by inserting "or were obtained" in the exception clause so that Qwest would not be held harmless where "access and security devices were wrongfully obtained by such person or were obtained through the willful or negligent behavior of Qwest." This revision would have the same effect as deleting "wrongfully" because inserting "or" creates two separate exceptions to the hold-harmless provision: Qwest may be liable if access were "wrongfully obtained" or "obtained through the willful or negligent behavior of Qwest." In other words, inserting "or" splits "the willful or negligent behavior of Qwest" off into an independent exception. The result is similar to that above. Setting aside Qwest's negligent conduct, Qwest is not held harmless if someone rightfully obtains access through Qwest's intentional conduct. Setting aside Qwest's willful conduct, Qwest could be held liable if a person obtained access through that person's own criminal acts, for which Qwest has no responsibility. Again, this revision would nullify the hold-harmless provision. Moreover, the Multistate Facilitator found in Qwest's favor on this issue:

> There is no apparent reason why Qwest should bear any responsibility, even if some negligence theory could be supported, for harm to a CLEC from the CLEC's agent's or representative's use of such information that the CLEC intentionally and "rightfully" gave to the person in question. Only where the CLEC or agent has "wrongfully" obtained the information, and only where it obtained it through negligent or willful conduct, is it proper to hold Qwest responsible for claims resulting from a concession that Qwest has made to its normal customer of record procedures for the administrative convenience of CLEC customers.[233]

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232 *Webster's II New College Dictionary* (1995) at 1263.

233 *See*, Multistate Facilitator's UNE Report at 70.

AT&T's alternative proposals to revise sections 9.21.7.3 and 9.24.7.3 would expand the exception to the hold-harmless provision to the point of rendering it meaningless. Therefore, those proposals must be rejected.

VII. THE UNBUNDLED NID

The FCC's *UNE Remand Order* requires ILECs to unbundle subloop elements and NIDs.[234] Because the parties' disputes regarding the SGAT provisions relating to NIDs are firmly rooted in AT&T's objections to the SGAT provisions relating to subloop unbundling, some context regarding subloop unbundling is required.

The FCC requires Qwest to provide the CLECs access at any "accessible terminal" in Qwest's outside plant to unbundled distribution subloops, feeder subloops, and subloops in accessible terminals in Multiple Tenant Environments ("MTEs"). The parties have no dispute regarding Qwest's provisions for unbundling subloops that are not located in MTEs. However, the parties are in substantial disagreement as to how Qwest must provision subloops in an MTE environment.

At the heart of the NID impasse issues is AT&T's desire to obtain immediate, unfettered access to any accessible terminal in an MTE, regardless of its function in Qwest's network or the impact such access may have on Qwest's obligations and Qwest's customers. Because of their operational functions in Qwest's network, Demarcation Point[235] terminals and other accessible terminals are subject to different procedures for CLEC access. Demarcation Point terminals mark the end of Qwest's network; accordingly, the SGAT provides the CLECs with easy access to these terminals. Accessible terminals, on the other hand, sit within Qwest's network and, because CLEC activity in these terminals affect Qwest's network, the SGAT contains processes for access to these terminals that also provides Qwest with essential information it needs to adequately maintain the network. Given the legitimate difference in procedures, Qwest initially proposed to designate the terminals in such a way as to eliminate any confusion: a NID was a demarcation point; an MTE Terminal was not and, therefore, involved subloop elements. Through the course of 271 workshops, Qwest agreed to revise its definition of NIDs to

234 *See UNE Remand Order* ¶¶ 202-229 (subloop) & 230-240 (NID).
235 "Demarcation Point" is defined in Section 9.2 of the SGAT.

include terminals that are not demarcation points.[236] However, Qwest has maintained that differences in access to these operationally distinct terminals cannot be entirely ignored. CLEC access to an MTE NID requires Qwest to first determine if the NID is the Demarcation Point or an accessible terminal for sub-loop access. Without taking this essential step, the CLEC would not know if they were accessing customer wire or a Qwest subloop.

AT&T, however, seeks to expand the NID definition in a manner that would permit it to avoid the FCC rule that provides that access to subloops is subject to the FCC's collocation rules[237] and the SGAT's subloop access provisions, which include processes designed to provide Qwest with information it needs to manage its network. In short, AT&T seeks to access all terminals through the NID section of the SGAT, regardless of whether they constitute Demarcation Points.

Thus, the parties remain at impasse on the following issues: (1) whether CLECs are entitled to stand-alone access to the NID when Qwest owns the inside wire, including stand-alone pricing; and (2) whether CLECs may remove Qwest's wires from the protector field of the NID. As set forth below, both of these NID impasse issues should be decided in Qwest's favor as a matter of fact and law.

A. Issue NID-1(a): Whether CLECs are entitled to stand-alone access to the NID when Qwest owns the inside wire. [(SGAT Sections 9.5.1 and 9.5.2.1.1]

Qwest provides access to stand-alone NIDs (*i.e.*, a NID that constitutes the demarcation point) pursuant to SGAT section 9.5. Qwest also provides access to NIDs that do not constitute demarcation points (i.e., where Qwest's network extends beyond the NID to the inside wire) pursuant to SGAT section 9.3. As discussed below, these offerings fully comply with the FCC's rulings regarding access to these two distinct types of terminals. AT&T contends that it should be able to purchase the NID and the inside wire separately, as two separate elements, where Qwest owns the inside wire.[238] Contrary to AT&T's suggestion, this is not a dispute about access to NIDs. AT&T can access NIDs that are attached to inside wire owned by Qwest through SGAT section 9.3, which governs subloop unbundling.

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236 SGAT section 9.5.1.

237 *See* 47 C.F.R. 51.319(a)(2)(D) ("Access to the subloop is subject to the Commission's collocation rules").

238 July 12, 2001 Workshop Transcript Vol. 31 at 4523:22-25.

AT&T is pressing the issue of stand-alone access to NIDs in the context of SGAT section 9.5 in the hopes of avoiding the application of the subloop access rules. AT&T includes in this issue a request for Qwest to establish separate pricing for access to a stand-alone NID where Qwest owns the inside wire.[239] Because this request for access fails as a matter of law, the subordinate issue of pricing is moot.

AT&T's contention has no merit as a matter of law. When a CLEC orders access to inside wire owned by Qwest, it is requesting access to subloops. The subloop it obtains includes the features and functionalities of that subloop which, in the case of inside wire, includes the features and functionalities of the NID. It would be redundant to order inside wire subloop and a NID. Moreover, stand-alone access to the NID where Qwest owns the inside wire would ignore Qwest's ownership of facilities beyond the NID, and Qwest's legitimate need to maintain records and procedures with respect to those facilities.

In the *UNE Remand Order*, the FCC described the NID as follows:

> In the Local Competition First Report and Order, the Commission defined the NID *as a cross-connect device used to connect loop facilities to inside wiring*. We modify that definition of 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*. Specifically, we define the NID to include *any means of interconnection of customer premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device used for that purpose*.[240]

The FCC indicated that it was establishing a particular definition for the NID unbundled network element: "[T]he NID definition, *for purposes of our unbundling analysis*, should be flexible and technology-neutral."[241] The FCC then reiterated that this discrete unbundled NID definition includes any variation in "the hardware interfaces *between carrier and customer premises facilities*,"[242] i.e., the demarcation point. Thus, the FCC plainly defined the unbundled NID as the

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239 July 12, 2001 Workshop Transcript Vol. 31 at 4523:19-4524:3; 4526:25-4527:3.
240 *UNE Remand Order* ¶ 233 (emphasis added).
241 *UNE Remand Order* ¶ 234 (emphasis added).
242 *UNE Remand Order* ¶ 234 (emphasis added).

demarcation point at which the customer premises facilities begin, regardless of the technology the NID employs or the design of a particular NID.

In defining the unbundled NID, the FCC expressly "decline[d] to adopt parties' proposals to include the NID in the definition of the loop."[243] Instead, the FCC carefully distinguished the unbundled NID Demarcation Point from the *functionality* of the NID. Because competitors "acquire the *functionality* of the NID for the subloop portion they purchase," the FCC determined that there is "no need to . . . include the NID as part of any other subloop element."[244] Thus, the FCC created a distinction between the unbundled NID, which is defined as the Demarcation Point, and the functionality of the NID, which is included in the subloop elements CLECs purchase. Accordingly, "*[c]ompetitors purchasing a subloop at the NID . . . will acquire the functionality of the NID for the subloop portion they purchase*."[245]

Qwest's NID provisions are in full compliance with the FCC's rulings on this issue. Indeed, Qwest's SGAT definition of NID incorporates much of the FCC's language verbatim:

> The Qwest NID is defined as any means of interconnection of on-premises wiring and Qwest's distribution plant, such as a cross connect device used for that purpose. Specifically, the NID is a single-line termination device or that portion of a multiple-line termination device required to terminate a single line or circuit at a premises. . . . The NID carries with it all features, functions and capabilities of the facilities used to connect the Loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism.[246]

This definition includes terminals that are not Demarcation Points.

AT&T has consistently couched this issue as its desire for the ability to access any terminal as an unbundled element for the purpose of accessing the inside wire, regardless of whether Qwest owns the inside wire. But access to inside wire through the SGAT's NID provisions rather than subloop provisions would permit AT&T to avoid the FCC rule that provides that access to subloops is subject

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243 *UNE Remand Order* ¶ 235 (emphasis added).
244 *UNE Remand Order* ¶ 235.
245 *UNE Remand Order* ¶ 235 (emphasis added).
246 SGAT section 9.5.1.

to the FCC's collocation rules[247] and the SGAT's subloop access provisions, which include processes designed to provide Qwest with information it needs to manage its network.

AT&T has clarified in other jurisdictions that its request is really that Qwest revise the SGAT to completely separate the NID from subloop, so that AT&T would order a NID in addition to the attached subloop. AT&T's position directly contradicts the FCC's mandate that the functionality of the NID is included as part of a subloop.[248] Pursuant to the *UNE Remand Order*, a CLEC seeking access to a subloop and attached NID would order only the subloop, because the functionality of the NID is included.

If a CLEC seeks to access a subloop element connected to a NID in addition to the NID itself (or instead of the NID), rather than simply a stand-alone NID, the CLEC must comply with the SGAT's provisions for accessing subloop elements. Thus, section 9.5.1 provides as follows:

> If CLEC seeks to access a NID as well as a Subloop connected to that NID, it may do so only pursuant to Section 9.3. If CLEC seeks to access only a NID (i.e., CLEC does not wish to access a Subloop connected to that NID), it may only do so pursuant to this Section 9.5.

This provides access to MTE Terminals under the provisions of section 9.5 when the MTE Terminal is also the Demarcation Point and the NID. However, as mandated by the FCC, the SGAT provides that section 9.3 applies when the MTE Terminal is not the Demarcation Point, but rather access to a subloop element.

The SGAT's provisions regarding the definition of and access to the NID preserve the distinction the FCC so deliberately drew between the unbundled NID and the functionality of the NID that accompanies a subloop element connected to the NID. Therefore, AT&T's attempt to obtain stand-alone access to NIDs connected to Qwest's inside wire must be rejected as a matter of law.

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247 47 C.F.R. 51.319(a)(2)(D) ("Access to the subloop is subject to the Commission's collocation rules").
248 *UNE Remand Order* ¶ 235.

B. Issue NID-2(b): Whether CLECs may remove Qwest's wires from the protector field of the NID. [SGAT Sections 9.5.2.1 and 9.5.2.5]

AT&T has requested that CLECs be permitted to remove Qwest's wires from the protector field of the NID.[249] However, that would leave Qwest's distribution facility unprotected, in violation of the National Electric Safety Code ("NESC") and the National Electric Code ("NEC").

The NID provides protection against foreign voltage surges, such as those caused by lightning and inadvertent contact between commercial power cable and telephone cable. Removing Qwest's distribution facilities from the protector field of the NID would violate electrical safety codes, which require surge protectors or over voltage protectors on communications conductors.[250] It would also create risks to the network and to employees working on the terminal.[251] The removal of the ground protection creates a potential fire hazard that could impact the network, the building, and individuals in the building.[252] CLECs should not be permitted to remove Qwest's wires from the NID.

AT&T's position is that the CLECs should be permitted to disconnect the Qwest distribution facilities from the protector field of the NID and "cap off" the facility, and leave it disconnected and dangling.[253] AT&T has relied on a 1969 Bell System practice, documentation of which was allegedly stored in an AT&T witness's attic, to support this position. Qwest is hard-pressed to understand how AT&T can ask the Commission to rely on a Bell System practice written by AT&T more than three decades ago, rather than the current National Electric Safety Code to resolve this issue. AT&T summarily claims that the protector is not necessary if the distribution facility does not enter the building.[254] This incorrectly assumes that the risks to the network, the building, employees working on the terminal, and individuals in the vicinity of the terminal are eliminated if the facility does not enter the building. That is not the case. All of the risks of potential danger from a voltage surge and possible resulting fire would remain for the network, the exterior of the building on which the terminal is located, employees working on the terminal, and individuals in the vicinity of the terminal. AT&T is essentially

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249 July 12, 2001 Workshop Transcript Vol. 31 at 4529:1-23.
250 *See* July 12, 2001 Workshop Transcript Vol. 31 at 4530:20-23; Liston Rebuttal Testimony at 63:23-25; 64:10-11.
251 July 12, 2001 Workshop Transcript Vol. 31 at 4529:1-6.
252 Liston Rebuttal Testimony at 64:10-13.
253 July 12, 2001 Workshop Transcript Vol. 31 at 4529:1-6.
254 July 12, 2001 Workshop Transcript Vol. 31 at 4535:5-6.

asking the Commission to order a situation that would place Qwest's network in violation of safety codes, and potentially cause serious harm to individuals and property in Washington.

Qwest strongly urges the Commission to join with the Multistate Facilitator[255] and reject AT&T's request, and instead abide by the national electric safety codes that require voltage protectors on all telecommunications facilities.

VIII. CONCLUSION

For the reasons stated above, Qwest should prevail on all impasse issues regarding packet switching, line sharing, dark fiber, subloop unbundling, line splitting, and NIDs. Accordingly, Qwest requests that the Commission verify Qwest's compliance with its obligation to provide access to packet switching, line sharing, dark fiber, subloop unbundling, line splitting, and NIDs pursuant to section 271(c)(2)(B)(ii) of the Act.

255 *See*, Multistate Facilitator's UNE Report at 74.

RESPECTFULLY SUBMITTED this 7th day of September, 2001.

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