Decision No. R01-846

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 97I-198T

IN THE MATTER OF THE INVESTIGATION INTO U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996.

VOLUME 4A IMPASSE ISSUES ORDER

Mailed Date: August 16, 2001

TABLE OF CONTENTS

I. INTRODUCTION

A. This order resolves impasse issues brought before the hearing commissioner in Volume IVA of Commission Staff's Report on the Fourth Workshop. By Decision R01-806-I, I determined

that no further investigation, hearing, briefing or arguments were necessary to resolve the Volume IVA impasse issues. Volume IVA reflects terms in Qwest's Statement of Generally Available Terms and Conditions (SGAT) that could not be agreed to by consensus in the fourth workshop of the § 271 collaborative process.

B. I have reviewed Staff's Report, Staff's recommendation, the participants' briefs and the workshop record. Because Volume IVA comprehensively recounts the participants' respective positions on the impasse issues, this order will not recapitulate those positions. Instead, this order will identify the issue in summary fashion, give a summary of the party positions, announce the resolution of the impasse issue, and then discuss the reasoning behind the conclusion.[1]

[1] The Commission Staff has combined issues CL2-15 and UNE-C-19 into one issue and they will be similarly addressed in this order. Issues EEL-8 and UNE-C-4(b) have also been combined. The parties have resolved issue numbers UNE-C-4(a), UNE-C-21, SW-12 and TR-11. Those issues are not considered here. Moreover, there are two issues that have been raised by the parties in this Workshop that have been addressed in previous orders. I incorporate my findings from Impasse Issue 1-88 (Channel Regeneration Charges) from the Volume IIA Impasse Issues Order with regard to Issue CL2-11/TR-6, which has been similarly raised in this workshop. In order to comply with § 271, Qwest must eliminate the regeneration compensation language from the SGAT or incorporate the ANSI standards for regeneration compensation. I also incorporate my findings from Impasse Issue 14-9 (Marketing to Misdirected End-user Calls) from the Volume IIA Impasse Issues Order, as it is wholly applicable to Issue SW-2 in this workshop. Qwest is not responsible for informing misdirected callers of their mistake before conducting its marketing activities. Finally, some of the issues contained in this order have been broken up into two sub-issues. Although these distinctions were not explicitly made in Volume IVA of Staff's Report on the Fourth Workshop, the issues warrant such a split.

Recommendation of § 271 Compliance:

Upon Qwest's making the necessary changes to the SGAT described below, I will recommend to the Commission that it certify Qwest's compliance with § 271 checklist items 5 and 6.[2]

II. ACCESS TO UNBUNDLED NETWORK ELEMENTS

A. CL2-5c: Retail Service Quality Standards (SGAT § 9.1.2)

ISSUE:

Whether Qwest must comply with state retail service quality requirements in providing UNEs.

Party Positions:

Qwest:

There is no basis for comparison of Qwest's performance in providing UNEs to CLECs and in providing retail services to Qwest's retail end users. CLECs have the option of reselling Qwest's retail services. There is no retail analog for most UNEs, which is reflected in the ROC OSS Third Party Test.

AT&T (Covad concurring):

Qwest should be required to comply with all state wholesale and retail requirements, particularly in the case of UNE-P. A difference in the quality of service that Qwest provides raises a question of discrimination under § 251(c)(3).

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[2] As AT&T and WorldCom have pointed out in their comments to the Staff Report, access to other UNEs such as NIDs and loops are being addressed in other workshops, and compliance with checklist item 2 is also conditioned on satisfactory completion of the review of Qwest's OSS. Therefore, a recommendation of full compliance cannot be made unless and until these other requirements are met. Of course, ROC OSS compliance is also a prerequisite for compliance.

Staff:

Qwest (in providing UNEs equal in quality to what it provides itself) complies with the FCC's wholesale service requirements. In addition, CLECs may petition this Commission to take further action in a separate docket. Finally, the Performance Assurance Plan ("PAP") contains provisions that monitor and regulate Qwest's wholesale service quality.

Conclusions:

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

Discussion:

(1) The FCC has made it clear that "the access and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides to itself."[3] Furthermore, the FCC concluded that 47 U.S.C. § 251(c)(3) requires "incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete."[4] As a threshold matter, the proposed SGAT contains provisions that unequivocally meet these guidelines. Sections 9.1.2 and 9.23.3.1, which pertain to UNEs and UNE-Cs, respectively, both recite the FCC's mandate in this regard.

(2) AT&T's argument that state retail service quality

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[3] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd. 15499(1996)(hereinafter *Local Competition Order),* at ¶ 312.

[4] *Id.*

requirements should apply across the board to UNEs appears to be aimed at services such as UNE-P or other combinations that may be comparable to retail services. AT&T seeks access to UNE-P in order to reap the benefits of TELRIC pricing, while extending the state retail quality service rules to elements that are wholesale in nature. AT&T can't have it both ways. If a CLEC desires the protection afforded by the retail quality service rules, then it has the option of reselling Qwest's services, albeit at lower profit margins.

(3) Moreover, granting an extension of the retail quality service rules would contradict the PAP. The PAP focuses on achieving the proper penalties and service credits to achieve compensation of the CLECs, as well as the proper performance incentives for the ILEC.

(4) As it stands now, a CLEC that opts into the PAP will surrender any rights to monetary relief provided by Colorado's wholesale quality rules or provisions of an interconnection agreement designed to provide such relief. State law regulatory enforcement actions that are redundant with the PAP are prohibited. Such preempted rights could conceivably include an action by this Commission that results in the payment of money to a CLEC if the retail service quality standards were applied to UNE-P and other wholesale services.

(5) Qwest's current SGAT language is acceptable for § 271 purposes.

B. CL2-15, UNE-C-19: Construction of Facilities for UNEs (SGAT §§ 9.1.2.1, 9.19)

ISSUES:

i. Whether Qwest is required to construct facilities for UNEs for CLECs.

ii. Whether Qwest must light unused dark fiber upon a CLEC's request.

Party Positions:

Qwest:

i. UNEs were created with the purpose of giving CLECs access to the incumbent LEC's existing network, but ILECs do not have the obligation to build a network for CLECs.

ii. Dark fiber should be unbundled and lit if the electronics are already in place, but requiring Qwest to add electronics to dark fiber constitutes a requirement to construct or build.

AT&T:

i. Qwest must build network elements for CLECs (except interoffice facilities) under the same terms and conditions that the ILEC would build facilities for itself.

ii. Requiring Qwest to light unused dark fiber and make it available as dedicated transport is a reasonable modification under the FCC's requirements.

WorldCom:

i. If Qwest determines that it will not construct a facility based upon an individual financial assessment, the SGAT should provide the CLEC with the opportunity to challenge this decision.

ii. WorldCom does not address the second issue.

Staff:

i. Qwest does not have an affirmative duty to build in all instances, although it is obligated to assess whether to build a UNE for a requesting CLEC as it would when assessing whether to build for itself.

ii. Qwest must light unused dark fiber when the dark fiber already has existing electronics attached to it. Requiring Qwest to add electronics to dark fiber, however, results in an impermissible "build" situation.

Conclusions:

i. Qwest should be required to assess whether it should build UNEs in the same manner that it normally builds them for itself.

ii. Qwest is not required to attach electronics to dark fiber. This does not constitute a modification of Qwest's facilities.

Discussion:

a. Construction of UNEs

(1) The Commission has previously addressed this issue.[5] The parties have submitted competing interpretations of the *Local Competition Order* and the *UNE Remand* Order, as well as the Eighth Circuit's opinion in *Iowa Utilities Board v. FCC*.[6] AT&T and WorldCom correctly point out that *Iowa Utilities Board* decision invalidated FCC rules that would have required ILECs to

[5] *In the Matter of the Petition of ICG Telecom Group, Inc., for Arbitration of an Interconnection Agreement with U S West Communications, Inc., Pursuant to § 252(B) of the Telecommunications Act of 1996*, Docket No. 00B-103T, Initial Commission Decision (Mailed Aug. 1, 2000) at pgs. 37-38.

[6] 120 F.3d 753 (8th Cir. 1997).

provide superior network elements when requested. However, the Eighth Circuit's rationale was based upon the premise that section 251(c)(3) requires unbundled access *only* to an incumbent LEC's *existing* network.[7] AT&T has also argued that because ILECs have an obligation to maintain, repair, or replace unbundled network elements under the *Local Competition Order*, they should also have the obligation to build UNEs because this would be "essentially the same thing."[8] There is a fundamental difference between repairing or replacing that which you are legally obligated to provide in the first place and building that which you are not legally obligated to provide at all.

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

(3) AT&T's argument that the *UNE Remand Order*

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[7] *Id.* at 813.

[8] AT&T Brief at 9.

requires ILECs to construct facilities by negative implication is disingenuous.[9] The FCC has never expressly imposed construction requirements in all circumstances on ILECs. One would surmise that the Commission would have directly imposed this potentially burdensome responsibility on ILECs in unequivocal terms.

(4) 47 C.F.R. § 313(b) requires Qwest to provision network elements to CLECs on terms and conditions under which the ILEC provides such elements to itself. I adopt the spirit of Staff's recommendation and order that Qwest revise SGAT section 9.19 to include the sentence: "Qwest will assess whether to build for CLEC in the same manner that it assesses whether to build for itself." This language will sufficiently address situations where Qwest rejects a request to build and then constructs the same facilities for its own customers.[10]

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[9] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, CC Docket No. 96-98, FCC 99-238 (Rel. Nov. 5, 1999)(hereinafter *UNE Remand Order)* at ¶ 324. "In the *Local Competition First Report and Order*, the Commission limited an incumbent LEC's transport unbundling obligation to existing facilities, and did not require incumbent LECs to construct facilities to meet a requesting carrier's where the incumbent LEC has not deployed transport facilities for its own use." *Id.*

[10] Of course, even this requirement likely inhibits Qwest from building facilities for itself, in the marginal case, particularly because of the opportunity cost of building out facilities for TELRIC recompense, as opposed to other alternatives. The FCC no doubt was aware of this marginal disincentive, and believed other unnamed policy objectives should predominate.

b. Lighting Unused Dark Fiber

(1) The FCC has included dark fiber in the definition of dedicated transport.[11] Dark fiber does not have electronics on either end of the dark fiber segment to energize it to transmit a telecommunications service.[12] The FCC has also found that dark fiber is "easily called into service" by the incumbent carrier,[13] but has also indirectly indicated that a carrier leasing the fiber is expected to put its own electronics and signals on the fiber.[14] The FCC has also stated that ILECs must make reasonable modifications to provide access to UNEs.[15]

(2) As an initial matter, the FCC's discussion of network modifications took place within the larger discussion of the definition of technical feasibility for interconnection and access to unbundled network elements. The FCC concluded "that the obligation imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements."[16]

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[11] *UNE Remand Order* at ¶ 324.

[12] *Id.*

[13] *Id.*

[14] *Id.* at n.292 (quoting definition of dark fiber in Newton's Telecom Dictionary, 14th ed.).

[15] *Local Competition Order* at ¶ 198.

[16] *Id.*

(3) Here, the unbundled network element is dark fiber, *not* lit fiber. It is a subtle, yet critical distinction. I agree with Qwest that the addition of electronics to dark fiber means that dark fiber is no longer being offered.[17] This goes beyond a mere modification to provide access to an unbundled element. In essence, the addition of electronics to unlit fiber constitutes the construction of a new, "functional" dedicated transport facility, which is plainly prohibited by the *UNE Remand Order*. Additionally, Staff has found that adding electronics at the termination locations of dark fiber can be a time consuming and expensive process.[18] Therefore, AT&T's argument falls outside the scope of the FCC's requirement for modifications to LEC facilities. Just as there is no obligation upon Qwest to build dark fiber in the first instance, there is no obligation to add electronics to the segment once it is built.

(4) Qwest has agreed that it will make dark fiber available to CLECs. CLECs can attach the electronics at a comparable cost. CLECs may also ask Qwest to attach electronics under SGAT section 9.19, but Qwest is not required to do so.

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[17] Qwest Comments on Staff Report 4A at 5.

[18] Staff Report at ¶ 30.

C. EEL-1: Connection of Enhanced Extended Links to Tariffed Services (SGAT § 9.23.3.7.2.7)

ISSUE:

Whether Qwest must provision an EEL combination (a combination of loop and transport elements) or convert Private Line/Special Access to an EEL if Qwest records indicate that service "will be connected directly to a tariffed service."

Party Positions:

Qwest:

The FCC has clearly prohibited the connection of EELs with any tariffed services.

WorldCom

Qwest should commingle UNE combinations with tariffed services if the CLEC pays retail rates for special access circuits. This merely presents Qwest with an administrative issue that mirrors the requirements that Qwest must satisfy in sorting traffic for other types of circuits.

Staff

The FCC's prohibition on commingled traffic does not extend to tariffed services in general. The SGAT should be modified to specify that EELs will be provisioned when they will be directly or indirectly connected to local exchange tariffed services.

Conclusion:

Qwest may prohibit the commingling of EELs and Private Line-Special Access with tariffed special access services.

Discussion:

(1) In the FCC's *Supplemental Order Clarification*, the Commission listed three local use categories and included the caveat that "[t]his option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services."[19] The Commission subsequently qualified what it meant by "tariffed services" in the Supplemental Order Clarification:

> We further reject the suggestion that we eliminate the prohibition on "commingling" (i.e. combining loops or loop-transport combinations with **tariffed special access services**) in the local usage options described above . . . We are not persuaded that removing this prohibition would not lead to the use of unbundled network elements by IXCs solely or primarily **to bypass special access services**.[20] (emphasis added).

(2) The FCC's temporary prohibition and policy basis is straightforward. Qwest's SGAT section 9.23.3.7.2.7 must reflect that EELs or Private Line/Special Access will not be provisioned if these services will be "connected directly to a *tariffed special access service*." (emphasis added). This is the only clarification that Qwest must make in order to comply with the FCC mandate. If a CLEC is willing to pay retail rates for

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[19] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order and Clarification, FCC 00-183 (Rel. June 2, 2000)(hereinafter *Supplemental Order Clarification*), at ¶ 22.

[20] *Id.* at ¶ 28. *See also Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Services*, CC Docket No. 96-98, Public Notice (Rel. Jan. 24, 2001)(hereinafter *Public Notice)*.

special access services, they may independently negotiate with Qwest or await the FCC's impending decision on this issue.

D. EEL-5: Termination of Liability Assessments ("TLAs")(SGAT § 9.23.3.12)

ISSUE:

Whether TLAs in pre-existing pricing agreements should be waived.

Party Positions:

Qwest:

TLAs were incorporated into discounted pricing plan agreements for special access circuits or private lines, and CLECs should not be allowed to avoid their contractual obligations. This is not an appropriate issue for the § 271 proceedings.

AT&T:

The Commission should waive TLAs for private line/special access circuits that qualify as EELs. Qwest did not provide these combinations to CLECs until the Supreme Court's holding in *Iowa Utilities Board*.

Staff:

Qwest can require CLECs to pay TLAs. It was reasonable for Qwest to believe that it had no obligation to provide EELs until the Supreme Court decision in *Iowa Utilities Board*. There is no evidence on the record that CLECs were unable to negotiate the terms of the agreements containing TLAs.

Conclusion:

The Colorado § 271 proceeding is not the appropriate forum for resolution of this issue.

Discussion:

(1) In the *SWBT Texas Order*, the FCC emphasized that a 271 application is not "an appropriate forum to consider instituting a 'fresh look' policy (to provide an opportunity for retail and wholesale customers to exit without penalty long term contracts that the carriers have voluntarily entered into with SWBT)."[21]

(2) The issue raised by AT&T with regard to TLAs collides with this directive. I decline to scrutinize the record in an attempt to determine whether Qwest did or did not provide loop and loop/transport combinations until "long after the FCC had identified its obligation to do so" in the *Local Competition Order*.[22] If this is indeed the case, AT&T and other CLECs have had an ample amount of time to challenge these practices. Instead, the parties voluntarily contracted for private line or special access rates in œonsideration for a reduced price from Qwest.

(3) The language that Qwest agreed to in SGAT § 9.23.3.12 will receive a favorable § 271 recommendation.[23]

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[21] *In the Matter of the Application of SBC Communications, et al., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, June 30, 2000, FCC 00-238, at ¶ 433.

[22] AT&T Brief at 51.

[23] Qwest Brief at 13.

E. EEL-6: Waiver of Use Restrictions for Unconverted Circuits

ISSUE:

Whether CLECs may connect special access/private lines that would qualify as EELs to UNEs.

Party Positions:

Qwest:

This issue addresses TLAs again. TLAs are not an appropriate issue for § 271 cases. The issue of TLAs on special access conversions is currently before the FCC.

AT&T:

Qwest cannot prohibit a CLEC from connecting UNEs to special access/private line circuits where the CLEC was unable to order the special access/private line circuits as UNEs.

Staff:

Qwest must allow CLECs to connect UNEs to special access/private line circuits that qualify as EELs in situations where the CLECs were unable to purchase such circuits as UNEs, until the initial term of the line agreement expires.

Conclusion:

The Colorado § 271 proceeding is not the appropriate forum for resolution of this issue.

Discussion:

(1) Requesting carriers can convert special access/private line circuits to EELs if they meet the FCC's local use restrictions. In Issue EEL-5, *supra*, I declined to

address whether Qwest belatedly permitted CLECs to order UNE-Cs and waive the TLA provisions. Such an issue is beyond the scope of the § 271 application process. This is another attempt by AT&T to circumvent its contractual obligations. This issue is similarly not germane to this proceeding.

F. EEL-7: Waiver of Local Use Restrictions When Qwest Refuses to Build

ISSUE:

When Qwest refuses to build a UNE, and a CLEC then orders a tariffed service at retail rates, do the commingling restrictions apply?

Party Positions:

Qwest:

If Qwest agrees to build facilities under SGAT section 9.19, then the facility is a UNE or a combination of UNEs. Facilities purchased out of special access tariffs cannot be combined with UNEs.

AT&T (WorldCom concurring):

If CLECs must pay retail rates for tariffed services and wishes to, for example, use the same multiplexer for the tariffed services as it does for UNE loops, CLECs will be forced to pay for additional multiplexing and transport costs if the commingling restrictions are applied.

Staff:

Qwest is not required to construct UNEs, although CLECs may make a request under SGAT section 9.19. A tariffed service purchased at retail cannot be combined with an EEL.

Conclusion:

Where Qwest agrees to construct UNEs the commingling restrictions will not apply.

Discussion:

(1) The scenario presented by AT&T arises, in part, from the law of unintended consequences. As an initial matter, I suspect that the FCC will dispense with this and the other issues surrounding the commingling prohibition in the near future. In the meantime, and as addressed in Issue CL2-15, *supra,* Qwest must assess whether to build a UNE for a CLEC in the same manner that it would assess building for itself. Although Qwest is not required to build in all instances, this resolution should mitigate the CLEC's concerns.[24] Otherwise, the commingling restrictions would apply if a CLEC opted to purchase tariffed special access services.[25]

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[24] "[I]f the Commission concludes that Qwest has no obligation to build UNEs, it is imperative that the SGAT contain language that makes clear that the same assessment to build will be used for both Qwest's end user customers and CLECs under section 9.19." AT&T and WorldCom's Joint Comments on Commission Staff's Report on Volume IVA Impasse Issues at 7.

[25] Of course, the scenario presented by AT&T in its brief of this issue ignores the possibility that CLECs can avoid the commingling restrictions by building DS1 loops or other facilities that might otherwise constitute tariffed special access services.

G. UNE-C-4(b): Finished Services (SGAT §§ 9.1.5, 9.6.2.1, 9.23.1.2.2)

ISSUES:

i. Whether the FCC has prohibited commingling between tariffed special access services and all UNEs, or whether the prohibition is limited to loop and loop-transport combinations.

ii. Is the SGAT prohibition against directly connecting UNE combinations to finished services proper?

Party Positions:

Qwest:

i. The FCC is currently addressing whether UNEs may be combined with tariffed services. In the meantime, the commingling prohibition covers all UNEs.

ii. Requiring collocation maintains the distinction between UNEs and end-to-end finished services.

AT&T (WorldCom concurring):

i. The commingling prohibition is limited to loop and loop-transport combinations connected to special access services.

ii. The SGAT should be amended to remove any prohibition on connecting UNEs to finished services, except where expressly prohibited by the FCC.

Staff:

i. The FCC has only prohibited the connection between a loop-transport combination and an ILEC's tariffed services.

ii. Qwest's collocation requirement for UNEs connected to finished services unnecessarily impedes the ability of CLECs to compete. The SGAT should be modified to state that UNEs can be directly connected to finished services unless the FCC has expressly prohibited it.

Conclusions:

i. The commingling prohibition applies to loop and loop-transport combinations.

ii. The SGAT should be amended in order to account for future modifications of existing rules.

Discussion:

(1) The most reasonable interpretation of commingling in the *Supplemental Order Clarification* and the Commission's subsequent *Public Notice* is that commingling is forbidden between loop and loop-transport combinations and tariffed special access services. Although the FCC has employed a varying use of the term "commingling," in paragraph 28 of the *Supplemental Order Clarification,* the FCC specifically states that loops and EELs (loop-transport combinations) are included in the prohibition against commingling. The FCC emphasized that the purpose of this temporary prohibition was to avoid the "use of unbundled network elements by IXCs solely or primarily to bypass special access services."

(2) The *Public Notice* also specifically seeks comment on whether circuits may remain connected to existing access service circuits "if a requesting carrier converts special access circuits to combinations of unbundled network elements."[26] The Commission then explicitly asks whether "incumbent LECs

[26] *Public Notice* at 3.

[should] be required to commingle unbundled loops and loop-transport combinations for competitive carriers if they do so in their own networks."[27] Because a narrow construction of the temporary prohibition is required since "it is not clear that the 1996 Act permits any restrictions to be placed on the use of unbundled network elements,"[28] I cannot subscribe to Qwest's assertion that the commingling prohibition extends to all UNEs.

(3) Although existing rules currently prohibit the connection of UNEs to the finished services that Qwest currently lists in section 4.23 of the SGAT,[29] the SGAT should reflect that UNEs can be directly connected to finished services, unless it is expressly prohibited by existing rules. This additional language will encompass any possible changes that are made to the "existing rules" by the FCC in the immediate future or what constitutes a "finished service" by Qwest.

(4) Upon the modification of the SGAT in accordance with the foregoing discussion, SGAT sections 9.6.2.1 and 9.23.1.2.2 will receive a favorable § 271 recommendation. SGAT section 9.1.5 is acceptable as it relates to this issue.

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[27] *Id.*

[28] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC-Docket No. 96-98, Supplemental Order (Rel. Nov. 24, 1999), at 3.

[29] This includes voice messaging, DSL, access services, private lines, retail services, and resold services. As such, Qwest's imposition of collocation requirements for these services is acceptable.

H. UNE-P-16: Rates for Lines in Density Zone 1 of the Top 50 Metropolitan Statistical Areas ("MSAs")

ISSUE:

Should unbundled local switching in Density Zone 1 for subscribers subject to the "four line or more" exemption be priced on a market or TELRIC basis?

Party Positions:

Qwest:

Large businesses should not be allowed to order three lines at TELRIC rates and their fourth lines and above at market-based rates. Unbundled rates should be available for the mass market, which the FCC has determined to be end-users with three lines or less.

Unaddressed by the other parties

Staff:

In Density Zone 1, increased revenue potential allows CLECs to counter ILEC economies of scale and effectively compete. Colorado has previously drawn similar lines where advanced features are offered to customers with five or more lines.

Conclusion:

Unbundled switching in Density Zone 1 for subscribers with four or more lines should be priced on a market basis.

Discussion:

(1) The FCC has found that requesting carriers are not impaired without access to unbundled switching when they serve customers with four or more lines in Density Zone 1 of a top 50

MSA and the ILEC has provided access to an EEL.[30] I agree with Staff and the FCC that in density zone 1 the increased demand and enhanced revenue opportunities associated with high-density areas make it possible for requesting carriers to make use of self-provisioned switching facilities, and effectively compete.[31] Therefore, when a subscriber has three lines or less, unbundled local switching at TELRIC rates shall apply. However, Qwest may charge market-based rates for *each* line when a subscriber has four lines or more.

III. ACCESS TO UNBUNDLED LOCAL TRANSPORT

A. TR-2: Distinction between UDIT and EUDIT (SGAT § 9.6.1.1)

Issue:

Whether Qwest's distinction between the distance-sensitive rate for unbundled dedicated interoffice transport ("UDIT") and a flat rate for extended unbundled dedicated transport ("EUDIT") is permissible.

Party Positions:

Qwest:

The distinction between UDIT and EUDIT is simply one of price. By delineating the unbundled transport between the Qwest serving wire center and the CLEC central office as EUDIT, this segment of dedicated transport has historically been recovered as a non-distance-sensitive rate element.

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[30] *UNE Remand Order* at ¶ 278.

[31] *Id.* at ¶ 299.

All other interoffice transport has typically been cost modeled and rated on a fixed and per mile basis.

AT&T:

The FCC has identified dedicated transport as a network element, and Qwest's distinction between UDIT and EUDIT works to the detriment of CLECs. The entire dedicated transport link should be based on a distance sensitive, flat rate charge. In addition, Qwest should be required to provide the electronics on dedicated transport terminating at a CLEC wire center.

WorldCom:

Because UDIT is an unbundled network element, CLECs are permitted to use it without the restrictions imposed by Qwest's disaggregation of UDIT into separate subparts. This unnecessarily imposes additional costs on CLECs.

Covad:

The UDIT/EUDIT distinction is unwarranted as a matter of principle and as a matter of law. Because Qwest refuses to allow CLECs to co-locate all of their equipment in a central office, there is an additional transmission leg required to connect CLECs to their own and Qwest's networks.

Staff:

Qwest should have the opportunity to prove its need for the UDIT/EUDIT distinction and corresponding cost and rate structures in the pricing docket.

Conclusion:

Rates for dedicated transport should reflect their true costs. The UDIT/EUDIT distinction in the SGAT must be eliminated. Qwest is not required to provide the electronics on the CLECs end of dedicated transport.

Discussion:

(1) Section 9.6.1.1 of the SGAT describes two rates for dedicated transport. UDIT provides a CLEC with a network element of a single transmission path between Qwest end offices, serving wire centers or tandem switches in the same LATA and state. EUDIT provides a CLEC with a bandwidth-specific transmission path between the Qwest serving wire center and the CLEC's wire center or an interexchange carrier's POP located within the same Qwest serving wire center area.

(2) It is unnecessary to defer this issue to the cost docket. The FCC has categorized dedicated transport as an unbundled network element. In the pricing of network elements, ILECs "must recover costs in a manner that reflects the way they are incurred."[32] This is interpreted as a blanket rule. The averaged rate imposed by Qwest for EUDIT is a discriminatory restriction that has no place in the pricing scheme the FCC has mandated for network elements. The disincentives created by such a scheme (e.g., effectively barring CLECs from building facilities to a meet-point between wire centers)[33] serve as an additional reason to strike the UDIT/EUDIT distinction in the SGAT. In eliminating the EUDIT product, Qwest must also make

[32] *Local Competition Order* at ¶ 440.

[33] *See* AT&T Brief at 38.

any additional changes to the SGAT in conformance with this order, including rate changes, ordering changes and interval changes.

(3) For the reasons stated in issue CL2-15, UNE-C-19, *supra*, Qwest is not required to add the electronics on dedicated transport terminating at a CLEC wire center.[34]

B. TR-16: Qwest Affiliates Subject to §§ 251 and 252 (SGAT § 9.7.1)

ISSUE:

Whether all of Qwest Corporation's affiliates are obligated to comply with the unbundling obligations of Sections 251 and 252 of the Telecommunications Act of 1996.

Party Positions:

Qwest:

Qwest Communications International (QCI) is a holding company for Qwest Corporation (QC), the successor to US West and provider of local exchange services, and Qwest Communications Corporation (QCC), the successor to the pre-merger Qwest and provider of non-local exchange services. Section 251 does not extend to QCC as it is not a successor

[34] AT&T argues that it should not be required to self-provision electronics because the FCC has indicated that it is infeasible to do so. *See* AT&T Brief at 40. However, the language in the *UNE Remand Order* does not lead to such a categorical conclusion: "In the *Local Competition First Report and Order*, the Commission concluded that a requesting carrier would incur 'much higher costs' if it 'had to construct *all* of its own facilities' to match the scope of an incumbent LEC's interoffice transport network." (emphasis added). *UNE Remand Order* at ¶ 355. "Requiring carriers to self-provision, or acquire from third-party vendors, *extensive* interoffice transmission facilities materially increases the costs of market entry or of expanding service, delays broad-based entry, and limits the scope and quality of the competitor's service offerings." (emphasis added) *Id.* at ¶ 332.

and assign of US West. Therefore, QCC need not provide unbundled access to its dark fiber.

AT&T (Covad concurring):

Qwest must unbundle the dark fiber owned by the companies affiliated with Qwest because they are "successors and assigns" of US West and, therefore, ILECs under § 251(h). Otherwise QCI will be able to "sideslip" § 251 requirements by offering impermissible telecommunications service through the affiliates.

Staff:

QCC and its predecessors do not provide local exchange service or exchange access in Colorado. Therefore, QCC is not an ILEC for the purposes of § 251. As a result, QCC is not required to unbundle its in-region facilities, as long as those facilities have been used only for long distance and data services. On a going forward basis, anytime QC has rights in or access to an inventory of unbundled fiber in a route (within a sheath), that dark fiber must be unbundled for CLEC access. Qwest should file modified SGAT language, upon which parties should be allowed to comment.

Conclusion:

QCC is not obligated to offer unbundled access to its dark fiber. However, QC must offer unbundled access to any dark fiber over which it has a unique right to access.

Discussion:

(1) Before unbundled access to QCC's dark fiber is required, QCC must be a successor or assign of US West.[35] The determination as to whether an affiliate is a successor or assign is ultimately fact-based, with a standard of "substantial

[35] 47 U.S.C. § 251(h).

continuity" between the two companies.[36] In addition, the FCC has suggested that whether the parties are attempting to circumvent the ILEC obligations of § 251(c) is a consideration.

(2) Despite the "synergies" justifying the Qwest/US West merger, it is not necessarily the case that those synergies exist between the current QCC and US West. Furthermore, no evidence suggests that QCC is attempting to circumvent ILEC obligations. In fact, Qwest's apparent desire to achieve § 271 approval suggests its desire to fulfill its ILEC obligations rather than circumvent them.

(3) Therefore, QCC is not obligated to unbundle its dark fiber facilities. However, QC is obligated to unbundle any dark fiber facilities (on an individual facility basis) that it has any access rights to, other than those access rights equally available to any other CLEC. The test is based on the nature of QC's access rights rather than the form, and the standard is the "necessary and impair" standard from § 251(d)(2).[37]

(4) Qwest's current SGAT language with regard to Impasse Issue TR-16 is acceptable for § 271 purposes.

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[36] *In Re Applications of Ameritech Corp. and SBC Communications, Inc. for the Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, CC Docket No. 98-141, FCC 99-279 (Released October 8, 1999), at ¶ 454.

[37] *See AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 387-390 (1999).

C. FOR-1: Trunk Utilization Forecasting Process (SGAT §§ 7.2.2.8.4, 7.2.2.8.6.1)

ISSUES:

i. Whether Qwest's seven-month interval to provide interconnection to trunk capacity is excessive.

ii. Whether Qwest's forecast requirement that CLECs must account for any changes in demand in future forecasts is overly burdensome or anti-competitive.

Party Positions:

Qwest:[38]

The lead-time for provisioning is necessary because of the time required to order equipment from vendors, the impact of weather conditions, and the difficulty of placing electronics and cable.

WorldCom:[39]

i. Six months for provisioning is an unreasonable amount of time. Qwest can provision a trunk in one month. The six-month lead time forces CLECs to overestimate their needs.

ii. The requirement for changes in demand from the prior forecast rather than the total forecast number unnecessarily complicates the forecast calculations and adds manual steps to the process.

Staff:

i. The seven-month time frame is reasonable but may be subject to future revision via the Performance Assurance Plan.

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[38] *See* Supplemental Rebuttal Affidavit of Thomas R. Freeberg, January 9, 2001.

[39] *See* Prefiled Supplemental Testimony of Thomas T. Priday, March 2, 2001.

ii. The calculation of demand requirements is an internal business decision of the ILEC. As long as Qwest requires the same forecasting format of all carriers, under 47 U.S.C. § 251(c)(2)(C), the requirement is not overly burdensome or anti-competitive.

Conclusions:

i. The forthcoming modifications to Qwest's SGAT under Impasse Issue 1-114 and the interval provisions in the PAP should sufficiently address provisioning intervals.

ii. Qwest should require forecasting on a total trunk basis in order to reduce the burden on CLECs.

Discussion:

(1) SGAT section 7.2.2.8.4 requires that CLECs provide trunk utilization forecasts on a semi-annual basis.[40] After Qwest receives a forecast, it has seven months to provide the capacity. CLECs cannot change their forecasts after they are submitted. Instead, they must account for any changes in demand in future semi-annual forecasts.

(2) This issue is related to Impasse Issue 1-114 from Workshop 2. There, I concluded that Qwest might collect deposits from a CLEC when that CLEC's trunk forecasts necessitate construction of new facilities. However, Qwest cannot require a deposit for interconnection provisioning until the parties have established contractual liability. I also concluded that Qwest should modify its SGAT to reflect different

[40] At the time of the Staff Report, this section required forecasts on a quarterly basis. Qwest's SGAT Third Revision, submitted on June 29, 2001, reflects the change to a semi-annual basis.

types of offerings, both forecasted and unforecasted, with deposit requirements to be decided in the costing docket, No. 99A-577T. This resolution, in combination with the performance intervals in the PAP, tries to balance the interests of the parties.

(3) With regard to Qwest's standard process for LIS trunking forecasts, I do not agree with Staff's assessment that it is an internal business decision by Qwest that does not burden competitors. Before there is a "meeting of the minds" (e.g., the offer and acceptance of a deposit) I have previously indicated that forecasting is a generally meaningless undertaking. The record suggests that CLECs must devote an inordinate amount of time and effort in a demand process that is less than accurate. In order to minimize this burden, Qwest should only require total trunks to track forecasting in lieu of forcing CLECs to furnish net growth figures.

(4) In order to receive a favorable § 271 recommendation, Qwest must modify its SGAT in accordance with the decision above.

IV. ACCESS TO UNBUNDLED LOCAL SWITCHING

A. SW-5: Availability of Advanced Intelligence Network ("AIN") Service Software

Issue:

Whether Qwest should be required to provide unbundled access to AIN features.

Party Positions:

Qwest:

Qwest makes the AIN platform, Service Creation Environment ("SCE"), Service Management System and testing equipment available to CLECs. However, the FCC does not require the resulting proprietary AIN products to be unbundled.

AT&T:

The FCC erred in determining that AIN service software met the criteria for a proprietary element, and the Commission disregarded its own standards for determining whether a network element is necessary.

Staff:

Qwest's AIN features are proprietary in nature. CLECs would not be prevented from offering their own AIN-based features and, therefore, these features are not "necessary" under the 1996 Act. It appears that the FCC conducted an analysis consistent with its own standards. The FCC's exceptions to the necessary standard are inapplicable here.

Conclusion:

Qwest is not required to provide unbundled access to its proprietary AIN service software. CLECs are not precluded from developing competitive software solutions using AIN platforms and architecture. The goals of the 1996 Act are furthered, not hindered, through the development of competitive AIN features.

Discussion:

(1) The FCC has already considered this issue.[41] The *UNE Remand Order* raises a presumption that the Qwest AIN service software should not be unbundled. However, because states may require additional unbundling under certain conditions, I have the responsibility to consider this issue on the merits.[42]

(2) The FCC employed what is essentially a "three-step" analysis to determine whether AIN services should be unbundled in the *UNE Remand Order.* First, it determined that that AIN services are proprietary, and therefore must be considered under the 'necessary' standard. Second, the Commission decided that AIN services did not meet the standard of being "necessary" as defined by the *UNE Remand Order.* Third, the FCC did not find that additional circumstances exist, in lieu of the "necessary" standard, in providing the basis for an unbundling recommendation.

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[41] "We agree with Ameritech that unbundling AIN service software such as 'Privacy Manager' is not 'necessary' within the meaning of the standard in section 251(d)(2)(A). In particular, a requesting carrier does not need to use an incumbent LEC's AIN service software to design, test, and implement a similar service of its own. Because we are unbundling the incumbent LEC's AIN databases, SCE, SMS and STPs, requesting carriers that provision their own switches or purchase unbundled switching from the incumbent will be able to use these databases to create their own AIN software solutions to provide services similar to Ameritech's 'Privacy Manager.' They therefore would not be precluded from providing service without access to it. Thus, we agree with Ameritech and BellSouth that AIN service software should not be unbundled." *UNE Remand Order* at ¶ 419.

[42] *Id.* at ¶ 153.

(3) The record establishes that Qwest's AIN service software is proprietary. Qwest has asserted that it has invested substantial resources to develop services that are protected by patents (or pending patents), copyrights, trademarks, or trade secrets. Although AT&T claims that Qwest's "Caller ID with Privacy+" appears to be similar to Ameritech's "Privacy Manager" service, this does not mean that Qwest's service software is not proprietary. AIN service software covers more products that "Caller ID with Privacy+." There is simply no evidence on the record to conclude otherwise.

(4) Next, it must be determined whether access to Qwest's proprietary AIN features is "necessary" under section 251(d)(2) of the Act. The FCC has interpreted the "necessary" standard as requiring the Commission to consider whether, as a practical, economic, and operational matter, lack of access to a proprietary network element would preclude the requesting carrier from providing the services it seeks to offer.[43] I agree with Staff's assessment that CLECs would not be prevented from offering AIN-based features. AT&T's claims that writing or purchasing software would be expensive and time-consuming are unavailing because they prove too much. Obviously, the development of proprietary services takes time and effort.

[43] *Id.* at ¶¶ 44, 418.

However, AT&T has not established that it would be precluded from developing and offering the requested services on its own.

(5) Finally, Qwest's AIN service software must be evaluated under the criteria set forth by the FCC for unbundling features even if they are proprietary.[44] One exception can arise where the ILEC has implemented only a minor modification to qualify for proprietary treatment. A second exception arises where the proprietary service does not differentiate the ILEC's services from the requesting carrier's services. The third and final exception asks whether lack of access to an element would jeopardize the goals of the 1996 Act.

(6) As stated above, there has been no showing that Qwest has not differentiated its services from those of a requesting carrier, nor does the record suggest that Qwest has made only minor modifications to its AIN software in order to establish its proprietary rights. While AT&T points out similarities between Qwest's and Ameritech's "Privacy" services, the Commission Staff properly concluded that Qwest's intellectual property rights should not be nullified via a general assertion that two AIN services are similar.[45]

(7) With respect to the goals of the 1996 Act, it has

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[44] *Id.* at ¶ 37.

[45] Staff Report at 45.

been shown above that CLECs would not be precluded from developing their own AIN service software using the unbundled components that Qwest provides. Indeed, the FCC has found that unbundled access to AIN platforms and architecture will allow requesting carriers "to devise innovative AIN services that will spur competition and benefit consumers through greater choices of telecommunications services."[46] As Justice Breyer has noted, "[i]ncreased sharing by itself does not automatically mean increased competition. It is in the *un* shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge."[47]

(8) I fail to see how the goals of the 1996 Act would be "jeopardized" under these pro-competitive circumstances. Qwest's SGAT is acceptable on this issue for § 271 purposes.

B. SW-9: Unbundled Switching when EELs are not Available (SGAT § 9.11.2.5)

Issue:

Whether Qwest is improperly restricting CLEC access to unbundled local switching in Density Zone 1 where EELs are not available.

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[46] *UNE Remand Order* at ¶ 417.

[47] *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 429, 119 S.Ct. 721, 754 (1999).

Party Positions:

Qwest:

The FCC's unbundled switching exemption is not dependent upon capacity availability for other services in impacted Qwest wire centers.

AT&T:

If an EEL is ordered by a CLEC and Qwest cannot provision it, Qwest must make the unbundled switching element available to the CLEC's customer.

WorldCom:

The ability of Qwest to deny unbundled switching should be conditioned upon Qwest's ability to provide an EEL connection to a CLEC. Lack of Qwest capacity has been a problem in the past and should not be allowed to result in a situation in which competitors cannot serve an end-user in high volume offices through UNE-P or EELs.

Staff:

There is no language in the *UNE Remand Order* that lends support to the notion that the FCC's rule is based upon alternatives available to CLECs in the aggregate. The SGAT does not recite the EEL requirement. AT&T's proposed language should be adopted.

Conclusion:

The unbundling exemption is predicated upon the availability of EELs. Under the plain meaning of the *UNE Remand Order* the exemption does not apply if EELs are not available due to space or capacity limitations.

Discussion:

(1) The FCC has concluded that competitors are not impaired without access to unbundled switching in Density Zone 1

where EELs are available.[48] In some situations, Qwest may not have space or capacity availability in interoffice facilities to provide the transport capability for EELs. According to Qwest, the unbundled switching exemption is not dependent on whether a particular CLEC has access to a desired transport element.[49] Qwest submits that the FCC's analysis is based upon alternatives available to CLECs in the aggregate.

(2) There is simply no language in the *UNE Remand Order* that would comport with Qwest's interpretation of the unbundling exemption. The FCC stated that "carriers will not be impaired in their ability to serve customers *only when* the EEL is provided *throughout* density zone 1."[50] If EELs are not available, then CLECs will not be able to aggregate loops at fewer locations, thereby increasing the cost of collocation and switching capacity.

(3) I agree with the FCC that switch capacity, distance-sensitive transport costs, and collocation costs significantly impair a requesting carrier.[51]

(4) Therefore, in order to receive a favorable section 271 recommendation Qwest must modify SGAT section

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[48] *Id.* at ¶¶ 253 & 278.

[49] Qwest Brief at 27.

[50] *UNE Remand Order* at ¶ 298 (emphasis added).

[51] *Id.* at ¶ 261.

9.11.2.5.3 to be consistent with the FCC's unbundling exemption. The language proposed by AT&T and accepted by Staff clarifies Qwest's obligation and should be added:

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

C. SW-19: Determination of Unbundled Switching Obligation (SGAT §§ 9.11.2.5, 9.11.2.5.6)

ISSUE:

> ***In determining the applicability of the exception to provide unbundled local switching, whether the customer's access lines should be counted using customer locations rather than the sum of customer locations in the wire center.***

Party Positions:

Qwest:

> The FCC has been clear that the number of lines is satisfied if the end-user has "four or more lines *within density zone 1*." AT&T's request to erode the FCC's exception and make the end user have four or more lines at each geographic location within Density Zone 1 should be rejected.

AT&T:

> "Four or more lines" should be counted for each location in a wire center, rather than for the wire center as a whole. The SGAT is ambiguous regarding how lines should actually be counted, whether on a per-wire center or per-location basis, and the FCC provides no clarity. As a practical matter it will be easier to determine the line count on a location basis.

Staff:

Absent express language to the contrary, the plain meaning of the FCC's rule should apply. A location-based approach will permit CLECs to circumvent the FCC's exception for unbundled switching requirements.

Conclusion:

Access lines should be counted on a per-wire center basis. Qwest's interpretation of the FCC's unbundling exemption conforms to the plain meaning of the rule and minimizes absurd results.

Discussion:

(1) SGAT section 9.11.2.5 states that "unbundled local switching does not constitute a UNE . . . when CLEC's end-user customer to be served with unbundled local switching has four access lines or more and the lines are located in density zone 1 in specified MSAs."

(2) The exception to the national unbundling requirement was designed to be "an administratively simple rule."[52] The four-line limit was an estimate by the FCC of the number of lines that separates the "mass market" (primarily residential and small business services) from the medium and large business market.[53] The FCC indicated that residential customers rarely have more than two lines. It is even less likely that a "mass market" end-user would have more than a

[52] *Id.* at ¶ 276.

[53] *Id.* at ¶¶ 290-298.

total of four access lines in multiple locations. However, I will digress and provide a brief hypothetical that serves to illustrate why AT&T's proposal is a thinly-veiled attempt to avoid the unbundling exemption. Under AT&T's interpretation of the rule, if an end-user that operates a "small chain" business has three access lines in three separate locations, the unbundling exemption would not apply. However, if one end-user that operates a "medium-sized" business in a single location has five access lines, the exemption would apply. Of course, the small business end-user would have a total of nine access lines and the medium business owner five. Under Qwest's interpretation of the rule, in both situations the unbundling exemption would apply. To the disinterested observer, Qwest's interpretation is obviously more reasonable.

(3) The FCC recognized that its rule, as is the case with most bright-line rules, would be both over-inclusive and under-inclusive at the margins.[54] Qwest's interpretation fits within the plain meaning of the FCC's rule.[55] It also minimizes the absurd results that might arise, as illustrated in the foregoing discussion. While I recognize that the FCC limited

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[54] *Id.* at ¶ 294.

[55] "We find that, where incumbent LECs have provided nondiscriminatory, cost-based access to combinations of loop and transport unbundled network elements . . . requesting carriers are not impaired without access to unbundled switching for end users with four or more lines within density zone 1 in the top 50 metropolitan statistical areas (MSAs)." *Id.* at ¶ 253.

the exemption in order to encourage competition in the residential and small business markets, it is ultimately irrelevant whether the access lines are counted on a per-wire center or per-location basis in achieving this result.

(4) Qwest's SGAT section 9.11.2.5 is acceptable.

V. CONCLUSION

A. I take this opportunity to remind the parties of the scope of this order. This docket is not adjudicatory, but rather a special master/rulemaking hybrid. *See Procedural Order,* Dec. R00-612-I pgs. 11-15. The ultimate authority over this application lies with the FCC, not this Commission. Accordingly, this order does not have the traditional effect of compelling Qwest to take the ordered action. Rather, this order is hortatory. If Qwest makes the SGAT changes recommended by this decision, then I will recommend that the Commission verify compliance with the checklist items to the FCC.

B. Upon filing of appropriate modifications to the SGAT, I will find, through a subsequent order, that Qwest has complied with checklist items involving impasse issues as they relate to Volume IVA workshop issues. Such a finding of compliance from the Colorado Commission would lead to a favorable recommendation to the FCC under 47 U.S.C. § 271(d)(2)(B).

C. Because this is not a final order, nor a proceeding under the Commission's organic act or the Colorado Administrative Procedure Act, *see* C.R.S. §§ 40-2-101 et seq.; C.R.S. §§ 24-4-101 et seq., participants in this docket do not have a right to file exceptions to this order or to ask for rehearing, re-argument or reconsideration. Likewise, this decision will not ripen into, or otherwise become, a final decision of the Commission subject to judicial review under the commission's organic statute or Colorado law.

D. Nonetheless, should parties believe that I have resolved any impasse issue based on a material misunderstanding of the law, the issue or the factual record, they should move for modification of this Volume IVA Impasse Issue Resolution Order within seven days of its mailing date.[56] Any necessary response to a request to modify this order will be due five days after the motion to modify.

E. Participants will be afforded an opportunity to argue or reargue their respective positions about impasse issues to the full Commission before the Commission acts under 47 U.S.C. § 271(d)(2)(B).

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[56] Let this footnote reemphasize that participants should not use this procedure to seek modification of the impasse issue resolution to restate their arguments, as is often done with RRR. Rather, any motion to modify this impasse resolution order should be directed to the hopefully rare, but theoretically possible, instance where I have made a material misunderstanding of fact or of the dispute itself.

F. Any recommendations of compliance with a § 271 checklist item are subject to modification by results of the operational support system ("OSS") test currently underway under the auspices of the Qwest Regional Oversight Committee. Similarly, actual commercial experience in Colorado will inform the Commission's recommendations.

VI. ORDER

A. It is Ordered That:

1. Commission Staff Report Volumes IV and IVA, along with resolution of the impasse issues above, and consensus reached in workshop IV establish Qwest's compliance with checklist item 5. The Hearing Commissioner recommends that the Colorado Commission certify compliance with the same to the FCC.

2. Commission Staff Report Volumes IV and IVA, along with resolution of the impasse issues above, and consensus reached in workshop IV establish Qwest's compliance with checklist item 6. The Hearing Commissioner recommends that the Colorado Commission certify compliance with the same to the FCC.

B. This Order is effective immediately upon its Mailed Date.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Hearing Commissioner

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