Qwest Exhibit 3
09/07/01 Impasse Brief re
Packet Switching etc.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLO RADO

In the matter of	)	
	)	
The Investigation into Qwest	)	Docket No. 97I-198T
Communications, Inc.'s Compliance with	)	
§ 271(c) of the Telecommunications Act of	)	
1996	)	

VOLUME IIIA
IMPASSE ISSUES

COMMISSION STAFF 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

FINAL REPORT
AUGUST 30, 2001

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I. INTRODUCTION

1. This is a companion report to Volume III in the series of reports prepared by the Staff of the Colorado Public Utilities Commission (Staff) in Docket No. 97I-198T, which is the investigation into the compliance of Qwest Communication, Inc. (Qwest), formerly known as U S WEST Communications, Inc. (U S WEST)[1], with the requirements of § 271 of the Telecommunications Act of 1996 (the Act)[2].

2. The Staff reports will be filed with the Colorado Public Utilities Commission (Commission) for consideration and are part of the factual record in this proceeding. The Commission directed Staff to conduct a series of technical workshops designed to provide open and full participation in the investigation by all interested parties. The technical workshops formed the basis of the lengthy, rigorous, and open collaborative process in Colorado that has been favored in the past by the Federal Communications Commission (FCC) in its approval of prior § 271 applications in New York and Texas. *Bell Atlantic New York Order* at ¶¶ 8, 9 and *SBC Texas Order* at ¶ 11. The workshops served to identify and focus issues, develop consensus resolution of issues where possible, and clearly frame those issues that could not be resolved and reached impasse among participants. Impasse issues were then to be addressed through the dispute resolution process agreed to by participants and ordered by the Commission for this investigation and will be considered by the Commission in order to resolve the impasse.

[1] During the pendency of this proceeding, U S WEST and Qwest completed their merger. The names of Qwest and U S WEST are considered to be interchangeable in this report. For ease of reading, this report will primarily use Qwest in the text.

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

3. This Volume IIIA Staff report focuses on the impasse issues related to Workshop 3 that are subject to the dispute resolution process agreed to by the participants and ordered by the Commission in this docket. When the Commission resolves the disputed issues, that resolution will be subsequently incorporated into the final version of this report for continuity and ease of understanding.

4. Volume IIIA in the series of Staff reports addresses the impasse issues from Workshop 3, which dealt with emerging services.

5. In accordance with the Procedural Order, this report describes the various impasse issues, summarizes the positions of the participants, and provides a Staff recommendation regarding resolution. The complete briefs filed by participants are also available to the Commission for its consideration in resolving the disputed issues.

II. DARK FIBER ISSUES

A. Impasse Issue No. DF-4C:

Whether it is appropriate for Qwest to apply the FCC's EEL restriction (significant amount of local exchange traffic) to unbundled dark fiber. (SGAT § 9.7.2.9.)

Background:

6. The FCC's *Supplemental Order Clarification* regarding the *UNE Remand Order* precludes interexchange carriers from converting special access services to combinations of unbundled loop and transport elements unless the interexchange carrier provides a "significant amount of local exchange traffic" to a particular customer. [3]

7. The FCC has defined an Enhanced Extended Link (EEL) as a combination of an unbundled loop, multiplexing/concentrating equipment and dedicated transport.[4]

Position of the Parties:

8. Qwest maintains that it is permitted to impose the requirement of "a significant amount of local exchange traffic" upon CLECs who use unbundled dark fiber (UDF) as a substitute for special or switched access services under SGAT § 9.7.2.9. This section references SGAT § 9.23.3.7.2 under which a CLEC must meet one of three conditions to establish that it is carrying a substantial amount of local exchange traffic.

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[3] *See* FCC Decision 00-183, issued in CC Docket No. 96-98, *Supplemental Order Clarification*, ¶¶ 8 and 22 at pp. 12-14, adopted May 19, 2000.

[4] *See* FCC 99-238, issued in CC Docket 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, at p. 12, adopted September 15, 1999.

9. Qwest argues that unbundled dark fiber is a "subcategory of the loop UNE" and a "subcategory of the dedicated transport UNE." Since the FCC's local exchange traffic restriction applies to combinations of loop and transport, according to Qwest, unbundled dark fiber is afforded the same treatment as an EEL.

10. WorldCom (with AT&T concurring) asserts that the FCC has defined unbundled dark fiber as a network element, which distinguishes it from "a combination of network elements" such as EEL. As such, the FCC restrictions against substitution of unbundled loop-transport combinations cannot apply to UDF and § 9.7.2.9 of the SGAT should be deleted.

11. AT&T further argues that it would be technically impossible to apply Qwest's EEL restrictions to dark fiber since the test for EEL applies to a single end user, while dark fiber is typically used for multiple end users.

Findings and Recommendation:

12. When a CLEC secures access to Colorado local exchange dark fiber that provides the functionality of a loop that is connected to dedicated transport, it secures a combined loop and transport element, or an EEL. The fact that dark fiber makes up a portion of this combination does not give it a different identity from a UNE. A loop-transport combination that includes dark fiber remains a loop-transport combination.

13. As a result, Staff recommends that access to dark fiber UNE be governed by access rules for UNEs, as ordered by the FCC in the *UNE Remand Order*.[5]

14. Staff further recommends that Qwest modify SGAT § 9.7.2.9 and/or SGAT § 9.23.3.7.2 to indicate how CLEC usage restrictions will be monitored for dark fiber. These changes should take into account the fact that those SGAT provisions are currently written to monitor single end-user applications, while unbundled fiber is typically used for multiple end users.

B. Impasse Issue No. DF-15 (1 & 2):

Whether Qwest Corp.'s affiliates, including its parent corporation, are obligated to comply with the unbundling obligations of §§ 251 and 252 of the Act. (SGAT § 9.7.1.)

Position of the Parties:

15. Qwest states that Qwest Communications International, Inc. (QCI) is a holding company that contains two separate operating corporations – Qwest Corporation (QC), the successor to the BOC U S WEST, which provides local exchange services in Colorado, and Qwest Communications Corporation (QCC), the successor to the pre-merger Qwest business, which holds Qwest's nationwide long distance network and provides non local-exchange services in Colorado. Qwest claims that AT&T seeks unbundled access to the in-region dark fiber contained in QCC's nationwide long distance voice and data backbone by suggesting that the incumbent local exchange carrier obligations of 47 U.S.C. § 251(c) extend to QCC.

[5] *UNE Remand Order* at ¶¶ 206, 322.

16. AT&T (with Covad concurring) argues that Qwest has an obligation to unbundle the dark fiber facilities owned by the companies affiliated with Qwest. According to AT&T, Qwest affiliates which have facilities in the Qwest region must make those facilities available on a resale basis to CLECs under §§ 251 and 252 of the 1996 Telecommunications Act. AT&T bases this claim on the premise that Qwest and its affiliates are "successors and assigns" of US WEST and are, therefore, ILECs as defined under § 251(h) of the Act.

17. AT&T is concerned that QCI and its affiliates would be able to "sideslip" the requirements of § 251 by offering impermissible telecommunications services through the affiliates.

18. AT&T asks the Commission to require Qwest to add language to its SGAT that clarifies that QCI and its affiliates/subsidiaries are obligated to unbundle their in-region facilities, including dark fiber.

19. Qwest states that there is no legal basis for this request. QCC is not an incumbent local exchange carrier and, in the event that it were deemed to be an ILEC, the FCC has made it clear that §251(c)(3) does not extend to any long distance facilities an ILEC happens to own.[6]

Findings and Recommendation:

20. The question of whether all Qwest affiliates are subject to unbundling requirements has implications that go beyond those relating to dark fiber. Indeed, AT&T states that its

position applies to "all SGAT provisions that Qwest intends to satisfy its ILEC obligations under the Act."[7]

21. Qwest Communications Corporation, as a separate operating corporation of Qwest Communications International, and QCI also each may be an "affiliate" of Qwest Corporation under 47 U.S.C. § 153(1). As the FCC and Supreme Court have recognized, the determination as to whether an affiliate is a successor or assign is ultimately fact-based, and courts have generally looked for "substantial continuity" between two companies such that one entity steps into the shoes of, or replaces, another entity.[8] Staff emphasizes that, while QCC and its predecessors never provided any kind of local exchange service or exchange access in Colorado[9], QCC and U S WEST have merged. Further, QCI and U S WEST represented to the Commission that their operations would be integrated to take advantage of synergies.[10]

22. Because QCC and its predecessors never provided local exchange service or exchange access in Colorado, QCC does not constitute a local exchange carrier (and, therefore, an incumbent local exchange carrier for purposes of § 251(c)) under § 153(26).

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[6] Order on Remand, Deployment of Wireline Services Offering Advanced Telecommunications Capability, 15 FCC Rcd 385, 390 ¶13 (1999).

[7] AT&T's brief on Dark Fiber Impasse Issues at 7, n.12.

[8] 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 §§ 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)(*SBC/Ameritech Merger Order*) at ¶ 454.

[9] Second Supplemental Affidavit of Karen A. Stewart: Emerging Services Updates for Dark Fiber Portion of Colorado Workshop 4, at pp. 4 and 5 (filed Jan. 9, 2001).

[10] In the Matter of the Application of Qwest Communications Corporation, LCI International TeleCom Corp., USLD Communications, Inc. and U S WEST Communications, Inc. for Approval of the Merger of their Parent Corporations, Qwest Communications International Inc. and U S WEST, Inc., Docket No. 99A-407T, Decision No. C00-0041, Mailed Jan. 20, 2000, (Merger Docket) at ¶ C. 3.

23. Even if QCC were deemed to be an ILEC, it would not have an obligation to provide unbundled access to its long distance operations or network. In a recent decision, the U.S. Court of Appeals for the District of Columbia Circuit stated that §251(c) duties do not extend to long distance services.[11] According to the court, the "interconnection obligations (and any related collocation duties) are by their terms restricted to telephone exchange and exchange access services."[12]

24. Staff's analysis is limited to the situation in which QCC is engaging in long distance and data services. In approving the QCI/U S WEST merger, the FCC made it clear that the use of affiliates as competitive local exchange carriers in an attempt to circumvent the ILEC obligations of § 251(c) would result in such entities being deemed successors and assigns of U S WEST for § 251(c) purposes.[13] Based upon the record before the Commission, Staff finds no indication of any such attempt here.

25. Therefore, Staff finds that Qwest's current SGAT language only partially satisfies the requirements under § 271. It is clear that QCI and its affiliates are not obligated to unbundle their in-region facilities, including dark fiber, so long as QCI and QCI's in-region facilities provide only long distance and data services.

[11] *WorldCom, Inc.* v. *FCC*, 246 F.3d 690, 695 (D.C. Cir. 2001).
[12] *Id*.
[13] In the Matter of Qwest Communications International Inc. and U S WEST, Inc. Application for Transfer of Control of Domestic and International §§ 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order, CC Docket No. 99-272, FCC 00-91 (Released March 10, 2000) at ¶ 45.

26. In the Merger Docket before this Commission, Qwest presented its goal of eventually integrating its long distance and local exchange operations in an effort to achieve synergies and economies of scale.[14]

27. Qwest has failed to address how, after integration, it will determine which assets are "long distance or data" (and, therefore, exempt from CLEC access) and which assets are subject to unbundling requirements.

28. As it is occurring today, and as it continues into the future, the merged entities' facilities are becoming operationally integrated, it is becoming virtually impossible to distinguish between fiber routes used exclusively for long distance or data services, and fiber routes that contain fibers used for transport of local exchange services.

29. Staff concludes that, when Qwest (the ILEC) has rights in or access to an inventory of unlit fiber in a route (within a sheath), that dark fiber must be made available to CLECs. If Qwest uses, or has a right to access, fibers in a sheath for its use for any local exchange service, that the entire sheath must be considered "contaminated"; and any spare inventory (dark fiber) in that route or sheath must be made available to CLECs for unbundled access. This is true even if some fibers in the "contaminated" sheath are being used for long distance or data services. This analysis would equally apply to fiber assets of Qwest and any of its affiliates and to situations in which Qwest and any of its affiliates might have a legal interest or right of access in a fiber asset of a third party.

[14] Merger Docket, Decision No. C00-41, at ¶¶s D. 9 & 10.

30. Therefore, Staff recommends that Qwest be required to revise SGAT §9.7.1 to conform to the above discussion. After Qwest proposes such language, Parties should be given an opportunity to comment on Qwest's proposal.

C. Impasse Issue No. DF-15(3):

Whether Qwest must unbundle dark fiber it does not own in meet point arrangements, and whether Qwest is required to unbundle dark fiber that is included in a "joint build arrangement" that Qwest enters into with a third party. SGAT § 9.7.1.

Position of the Parties:

31. SGAT §9.7.2.20 provides that "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 contends that this provision satisfies its legal obligations under the 1996 Telecommunications Act.

32. AT&T claims that, where a meet point arrangement gives Qwest control and/or provides Qwest a right of way on a third party's network, Qwest must permit CLECs the same access to those rights of way or it will not satisfy Checklist Item No. 3 in §271. AT&T cites § 251(c) and 47 C.F.R. §§ 51.302 and 51.309 as requiring Qwest to provide nondiscriminatory access to unbundled network elements in Qwest's ownership or control and §§ 251(b)(4) and 224 as requiring Qwest to afford access to rights of way.

33. Without nondiscriminatory access, AT&T argues, CLECs would be impaired where joint build arrangements between Qwest and third parties exist, particularly in rural areas.

34. Qwest says that the fiber owned by the third party is not subject to unbundling obligations and, therefore, the CLEC should be required to execute a meet point arrangement with the third party.

Findings and Recommendation:

35. Staff recommends that Qwest be required to offer CLEC access to all Colorado local exchange dark fiber, on either side of the "meet point," to which Qwest has a right to access under agreements with any other party, whether affiliated with Qwest or not.

36. Staff recommends that Qwest be required to allow CLEC access to Colorado local exchange dark fiber where a third-party "joint build" agreement gives Qwest sufficient access rights to the fiber to make it analogous to directly owned facilities that are kept dormant but ready for service.

37. The standard for both issues should be: if Qwest has access rights for itself, it should not refuse to use them to provide access rights for CLECs.

38. Accordingly, the SGAT should be changed to provide that Qwest is required to offer CLEC access to all Colorado local exchange dark fiber that it owns directly or to which it has a right to access under agreements with any other party, affiliated or not.

D. Impasse Issue No. DF-16:

39. (A) Whether Qwest's technical publications relating to dark fiber have been updated to be consistent with its SGAT language; (B) whether technical publications, the IRRG, methods and procedures (M&Ps) and similar internal documents or standards are being

subject to a change management process known as the Co-Provider Industry Change Management Process (CICMP) through which CLECs are given the opportunity to participate in any modifications to such documents; and (C) whether internal Qwest technical publications are in conflict offered SGAT § 2.3. (SGAT § 9.7.)

Position of the Parties:

40. WorldCom and AT&T argue that Qwest agreed to add § 2.3 to the SGAT to alleviate CLEC concerns over the ability of Qwest to modify its technical publications or other documents that are referenced in the SGAT. Section 2.3 would state that, where there is a conflict between the SGAT and any internal Qwest document referenced in the SGAT, the terms in the SGAT would supercede and prevail.

41. AT&T asserts that Qwest also committed to provide a draft of modifications to Technical Publication 77383 by March 1, 2001, to make it consistent with the SGAT and has failed to do so.

42. AT&T states that a lack of uniformity between internal documents (which employees rely upon to interact with CLECs) and the SGAT would result in Qwest's failure to meet its checklist obligations under § 271.

43. Qwest does not address these issues in its brief.

Findings and Recommendation:

44. Staff recommends that this issue be resolved as part of the Colorado General Terms and Conditions workshop, which began in June and is slated to be concluded in a later workshop.

E. Impasse Issue No. DF-20:

At what points on Qwest's fiber facilities may CLECs access unbundled dark fiber. (SGAT §§ 9.7.2.3 and 9.7.2.19.)

Background:

45. At present, SGAT §9.7.2.3 states, in part, that "Qwest will provide CLEC with access to deployed dark fiber facilities."

46. At present, SGAT §9.7.2.19 states that "Qwest shall allow CLECs to access UDF loops, or sections of UDF loops, at accessible terminals including FDPS or equivalent in the Central Office, customer premises or at Qwest owned outside plant locations (*e.g.*, CEV, RT or hut)."

Position of the Parties:

47. WorldCom requested additional language for § 9.7.2.3 that would allow CLECs to connect to dark fiber "at any mutually convenient point, including at a customer premise, remote terminal, Central Office, or in an immediate intermediate manhole, vault or cabinet." Qwest asserted that § 9.7.2.19 addresses these issues.

48. WorldCom argues that § 9.7.2.19 denies CLECs the ability to access an interoffice transport facility.

49. Qwest argues (as it also does in Impasse Issue DF-4c) that, under the *UNE Remand Order*,[15] unbundled dark fiber is a subcategory of the loop UNE and a subcategory of the dedicated transport UNE.

50. Qwest further argues that the FCC's *UNE Remand Order* clearly states where access to transport and to loops is (and is not) required. Subloop access is required at "accessible terminals," and transport access is *not* required at outside terminals.[16]

51. Moreover, according to Qwest, since there are no outside accessible terminals in Qwest's transport dark fiber network, it would be irrelevant if the *UNE Remand Order* required access to them.

Findings and Recommendation:

52. When a CLEC secures access to dark fiber that provides the functionality of a loop that is connected to dedicated transport, it secures a combined loop and transport element, or an EEL. The fact that dark fiber makes up a portion of this combination does not give it a different identity from a UNE. A loop-transport combination that includes dark fiber remains a loop-transport combination.

[15] *UNE Remand Order* ¶¶ 174, 325.
[16] *Id*. at ¶¶ 206 and 322.

53. As result, Staff recommends that dark fiber be governed by access rules for UNEs, as ordered by the FCC in the *UNE Remand Order*.[17]

54. Consistent with that order, when the dark fiber UNE is being requested by a CLEC, Qwest shall provide access to CLECs at any and all accessible terminals. Qwest need provide access at accessible terminals in Qwest's transport dark fiber network only to the extent that such points exist.

55. Staff recommends, therefore, that §§ 9.7.2.3 and 9.7.2.19 are acceptable as written.

III. PACKET SWITCHING ISSUES

A. Impasse Issue No. PS-2:

Whether SGAT § 9.20.2.1.2 should be amended to require packet switching to be unbundled when Qwest's spare copper loops are insufficient to enable a CLEC to provide the DSL service that it intends to offer.

Background:

56. 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."[18] The network element includes necessary electronics such as routers and Digital Subscriber Line Access Multiplexers (DSLAMS). Since packet switching and DSLAMS are used to provide telecommunications services, the FCC has determined that packet switching qualifies as a network element.

[17] *Id*. at ¶¶ 206 and 322.
[18] *UNE Remand Order* at ¶ 304.

57. Packet switching is not proprietary and is examined by the FCC under the "impair" standard of § 251(d)(2)(B).

58. The FCC requires unbundling of packet switching in very limited circumstances. As initially adopted in ¶ 313 of the *UNE Remand Order*, four preconditions must be 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) the ILEC 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.[19]

Positions of the Parties:

59. AT&T argues that, when a CLEC seeks to offer DSL service in competition with an ILEC that has deployed its DSLAM functionality at the remote terminal, the CLEC will invariably be unable to provide a DSL service that operates with "the same level of quality" (*e.g.*, data rates) as that provided by the ILEC if the CLEC must rely on a "home run" copper loop.[20] In such cases, the CLEC's copper loop will extend all the way from the serving office to the customer's premises while the ILEC can provide service using remotely deployed electronics and shorter copper subloops that extend only from the customer's premises to the remote terminal. Under the laws of physics, maximum attainable data rates *decrease* as the length of the copper facility that is used *increases*.

[19] See also In the Matter 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), at ¶ 56, citing Rule 51.319(c)(3)(B).

[20] *See generally* AT&T brief at pp. 9-11.

Accordingly, a shorter copper loop will allow the incumbent to offer its DSL customers not only a significantly faster data rate, but also emerging services that require very high transmission rates, such as video. Therefore, states AT&T, any CLEC which must use home run copper to compete with an ILEC or ILEC data affiliate that has access to shorter copper subloops at a remote terminal will be at a significant competitive disadvantage.

60. Section 9.20.2.1.2 of Qwest's SGAT currently limits the situations for the unbundling of packet switching to those where "no" spare copper loop is available to support the xDSL services the requesting carrier seeks to offer. To account for the times in which there are not enough existing spare copper loops to satisfy potential demand and in which existing copper loops may not adequately provide for the capabilities that CLECs desire, AT&T suggests two changes to this requirement. AT&T asks that the word "no" be replaced with "insufficient" and the word "adequately" be inserted between "capable of" and "supporting."[21] Thus, AT&T's proposed language reads (emphasis supplied):

> "There are *insufficient* copper loops available capable of *adequately* supporting the xDSL services the requesting carrier seeks to offer."

61. "Insufficient" would cure circumstances in which some, but not enough, spare copper loops exist in a neighborhood to support a CLEC's general business offering of DSL service to that neighborhood. Staff presumes that the term "adequately" would mitigate the difference in data transfer rates.

[21] Colorado Transcript 12/12/00 at pp. 45 and 46; Multistate Transcript 01/18/01 at pp. 277 and 278.

62. Covad agrees with AT&T that the use of spare or "home run" copper loops to provision xDSL service is far from a feasible alternative.[22] In many cases, the consequent competitive disadvantage to CLECs could be significant enough to deter them from even attempting to provide a competitive, alternative service in neighborhoods and towns. Covad emphasizes that the FCC, in the *Kansas/Oklahoma Order*, interpreted Rule 51.319(c)(3)(B)(ii) as permitting a competitor to "be able to provide over the spare copper *the same level of quality advanced services* to its customer as the incumbent LEC." Covad requests that the "spare copper" exclusion to the packet switching element of SGAT §9.20.2.1.3 not apply if (1) a CLEC seeks to offer xDSL service to a customer and existing spare copper does not support that xDSL service or (2) the DSL provided over Next Generation Digital Loop Carrier (NGDLC) by Qwest would potentially degrade CLEC services over spare copper loops.

63. Qwest argues that AT&T seeks to add to the existing legal obligations under the Rule and FCC orders.[23] The current SGAT language tracks the rule requirements exactly. Moreover, Qwest asserts, since the FCC recently sought comment regarding whether this limited obligation to unbundle packet switching should be expanded, the CLECs' arguments should appropriately be made in response to that FCC further notice of proposed rulemaking, not here.

[22] *See generally* Covad brief at pp. 6-10.
[23] *See generally* Qwest brief at pp. 2-7.

64. Qwest further maintains that the CLECs' arguments fail on the facts. First, inserting "adequately" adds nothing but vagueness and the potential for conflict. The CLECs' revision would introduce a layer of uncertainty by requiring a factual inquiry regarding the "adequacy" of loop capabilities. AT&T's contention that "no" should be replaced by "insufficient" is similarly flawed. Under the Rule, according to Qwest, 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.

Findings and Recommendation:

65. Staff notes that § 251(d)(3) of the 1996 Act makes it clear that state commissions can establish additional unbundling obligations beyond those established in the FCC's orders if they elect to do so.

66. Staff finds that the additional language proposed by AT&T is unnecessary and agrees with Qwest's proposition that the addition of "adequately" and "sufficient" would serve to confuse the general framework adopted by the FCC.

67. With regard to lower data transfer rates in "home run" copper loops, Staff notes that SGAT § 9.20.2.1.2 protects CLECs when no copper loops are available to support the xDSL services the requesting carrier seeks to offer. If a CLEC seeks to offer a DSL package equivalent to the services offered by Qwest, for example, and existing spare copper does not support that service, SGAT § 9.20.2.1.2 does not apply. Adding the term "adequately" simply would not offer more protection to a CLEC than is already contained in SGAT § 9.20.2.1.2.

68. Staff also finds that a "customer-by-customer" mode of analysis is preferable when determining how many copper lines are available to support a CLEC's xDSL service. Inserting "sufficient" into § 9.20.2.1.2 has the potential to nullify the condition altogether, particularly if CLECs could base their availability analysis on how many customers they wished to serve rather than on how many customers actually order the service.

69. Staff has also reviewed the recent arbitration decision by the Texas Public Utility Commission, which was cited in the comments to the Draft version of this report by Covad and AT&T.[24] Although this decision raises a presumption that the existence of spare copper is not a viable alternative to unbundled packet switching in most (if not all) cases, Staff cannot make a definitive conclusion without a further examination of the similarities and/or differences between Qwest's network and "Project Pronto" as it is deployed by SBC Communications in Texas. Staff agrees with Covad that parity is the fundamental notion behind the FCC's framework and SGAT § 9.20.2.1.2. The alternative SGAT language proposed by Covad in its comments reiterates the FCC's requirement that a competitor "be able to provide over the spare copper the same level of quality advanced services to its customer as the incumbent LEC."[25] Therefore, Staff finds that the proposed SGAT language in Covad's comments is acceptable and recommends that Qwest amend the SGAT to state:

[24] See 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 Link, 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, Tex. PUC Docket Nos. 22168 and 22469 ("SWBT Arbitration Award").

[25] Kansas/Oklahoma Order, n.741.

9.20.2.1.2 There are no spare copper loops available capable of supporting the xDSL services the requesting carrier seeks to offer, or capable of permitting the CLEC to provide the same level of quality advanced services to its customer as the incumbent LEC.

B. Impasse Issue No. PS-3:

Whether SGAT §9.20.2.1.3 should be amended to require packet switching to be unbundled when it is "economically infeasible" for a CLEC to remotely deploy DSLAMs?

Background:

70. As one of the four conditions to be met before CLECs may obtain unbundled packet switching, SGAT §9.20.2.1.3 states that "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 premises."

Positions of the Parties:

71. AT&T asks the Commission to modify Qwest's proposal to allow packet switching to be unbundled when it is *economically infeasible* for a CLEC to remotely deploy DSLAMs, because "(t)here is little prospect that remote collocation could provide a practical competitive alternative for CLECs."[26] AT&T argues that remote deployment of transmission equipment and DSLAM functionality by service providers seeking to access copper subloops is unlikely to occur in most areas. This is due to two reasons. First, collocation of remote DSLAMs would entail significant costs and lead times (*e.g.*, rights of way acquisition, construction of facilities). Second, deployment is only economically

[26] *See generally* AT&T brief at pp. 12-16.

viable if the appropriate economies of scale can be realized. In most cases, it will be extremely difficult for CLECs to realize the necessary economies of scale because each remote terminal or FDI only serves a small number of customers, of which the CLEC will only capture a small percentage.

72. AT&T further submits that transmission equipment (generally referred to as Digital Loop Carrier or DLC) housed within the remote terminal multiplexes the traffic and, in some instances, performs electrical to optical (and vice versa) signal conversion, which permits an even greater degree of multiplexing and/or a higher transmission rate. Deployment of DLC involves a relatively high fixed cost for site preparation and common equipment, with additional costs associated with plug-in circuit packs for individual lines or groups of lines. Thus, for a DLC to be practical and economic, it must be nearly fully utilized by the carrier who has deployed it. To the extent that collocation at a remote terminal or other interconnection point is not possible because such deployment is cost-prohibitive, competition for customers who are served by remote terminals (or their equivalents) simply will not develop. AT&T claims that the only way to ensure that competition develops is for CLECs to have access to unbundled packet switching capabilities. AT&T concludes that its proposed language enables a CLEC to compete with Qwest for customers when it is uneconomical for the CLEC to collocate a DSLAM in a remote terminal.

73. Covad argues that collocating DSLAMs in Qwest's remote terminal is not an alternative under the FCC's "impair" analysis.[27] In general terms, collocating DSLAMs as an

[27] *See generally* Covad brief at pp. 10-13.

alternative requires CLECs to collocate the equipment necessary to perform the DSLAM and multiplexing functionality along with optical electronics in every Qwest remote terminal served by fiber. Covad lists three major reasons to support its conclusion that DSLAM collocation is not a viable alternative. First, no CLEC is in the financial position to replicate the Qwest network and collocate DSLAMs at a sufficient number of remote terminals to offer a viable competitive service. The FCC in the *UNE Remand Order*, ¶ 97, has stated that where lack of access to a UNE "materially restricts the number or geographic scope of the customers," a CLEC's ability to provide services is impaired. Second, the findings of the FCC in the *Line Sharing Reconsideration Order*, ¶ 13, illustrate that collocation of DSLAMs in Qwest's remote terminals is far more costly than accessing NGDLC loops from the central office. Third, collocating DSLAMs in Qwest's remote terminals would materially delay a requesting carrier's timely entry into the local market or, alternatively, delay expansion of an existing carrier's line sharing service offerings.

74. Qwest notes that this third condition language tracks the FCC's third condition in Rule 319(c)(3)(B)(iii).[28] According to Qwest, Covad's and AT&T's objections to § 9.20.2.1.3 because it is "highly unlikely" that it will ever be economically feasible to remotely collocate a DSLAM is not supported by any evidence. Qwest claims that the United States Supreme Court, in the *Iowa Utilities Board* case, struck down a similar argument made by the FCC because it provided a windfall to competitors.[29] Qwest further argues that the *UNE Remand Order*, ¶ 313, and the *Line Sharing Reconsideration Order* are clear that the relevant issue is whether or not the ILEC has permitted the requesting

carrier to collocate its DSLAM at the remote terminal. Nevertheless, Qwest notes that it offered in the Multistate § 271 proceeding to clarify the language of § 9.20.2.1.3 by adding the following words at the end of that section: "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." If this language would close this impasse issue in this proceeding, Qwest will agree to insert it in the Colorado SGAT as well.

Findings and Recommendation:

75. Staff concludes that AT&T's proposed additional language is unreasonable. In Staff's view, adding the phrase "from CLEC's perspective it would be uneconomical for CLEC to collocate its own DSLAM at the same Qwest Premises" to § 9.20.2.1.3 will essentially eviscerate the section altogether. If Covad's comment that "no CLEC is in the financial position to replicate the Qwest network and collocate DSLAMs at a sufficient number of remote terminals to offer a viable competitive service" is given weight, Staff can foresee no instance in which a CLEC would voluntarily determine that it is economical to collocate its own DSLAM at a remote premises.

76. Beyond the problems inherent in the language proposed by AT&T, Staff finds that conclusory representations made by AT&T and Covad that DSLAM collocation is costly and inefficient, without any specific or quantified evidence that Qwest enjoys a distinct competitive advantage in economies of scale, necessitates the conclusion that no

[28] *See generally* Qwest brief at pp. 7-10.
[29] *See* A*T&T Corp*. v. *Iowa Utilities Board*, 119 S. Ct. 721, 735 (1999).

additional requirement can be added to the FCC framework or the SGAT. Conversely, in the *UNE Remand Order*, at ¶ 308, the FCC concluded, "it does not appear that incumbent LECs possess significant economies of scale in their packet switches compared to the requesting carriers." Staff recognizes that the placing of a DSLAM is generally an expensive proposition. Qwest's testimony in the Colorado Workshop indicates that it, too, can only deploy DSLAMs in limited circumstances.[30] However, given the Supreme Court's reasoning in *Iowa Utilities Board*,[31] this is not enough for Staff to conclude that CLECs would be impaired here. Therefore, Staff recommends that SGAT § 9.20.2.1.3 be found acceptable and no change ordered.

77. Staff acknowledges the comments made by Covad to the Draft version of this Report and maintains its findings and recommendations in full.

C. Impasse Issue No. PS-4:

Whether Qwest is required to allow CLECs to place DSL line cards into its remote DSLAMs even if the four conditions for unbundling packet switching are not satisfied.

Positions of the Parties:

78. Covad argues that a critical component of its proposed unbundled access to Qwest packet-switched NGDLC functionality is the ability to virtually collocate DSL line cards

[30] *See* Covad brief at pp. 11 and 12.

[31] Iowa Utilities Board at p. 735. "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 been ipso facto been "impaired" . . . in its ability to provide the services it seeks to offer.

at Qwest remote terminals.[32] The line card performs the DSLAM functionality necessary to generate and receive transmissions across the unbundled loop from the end-user through the remote terminal back to the central office. According to Covad, although a line card provides DSLAM functionality and although Qwest claims to permit CLECs to collocate DSLAMs at its remote terminals, Qwest nonetheless flatly refused CLECs the ability to collocate the line card. With regard to technical feasibility, the Illinois Commission recently ordered SBC to permit CLECs to collocate line cards at NGDLC facilities.[33] Under FCC rules, this decision establishes a rebuttable presumption that such collocation is technically feasible in Colorado.[34]

79. Sprint argues that access to unbundled packet switching should not be limited only to circumstances in which the four conditions of the SGAT are met.[35] Rather, such access should be provided where Qwest has deployed a digital loop carrier that is capable of supporting xDSL services (sometimes referred to as NGDLCs). Qwest should be required to allow CLECs to use the same cost-effective technology it uses to reach customers served from remote terminals, including "card-at-a-time" virtual collocation where available. If Qwest is using NGDLC (which would allow card-at-a-time virtual collocation) and does not have to rely on an all-copper solution, it will have a substantial competitive advantage over CLECs in this important respect. With NGDLCs, the line cards can include the functionality of the splitter and the DSLAM and thus permit the end

[32] *See generally* Covad brief at pp. 13 and 14.
[33] Covad brief at 14, *citing Illinois Order* at p. 27.
[34] Covad brief at 14, *citing Collocation Order* at ¶¶ 8 and 45 ("[a] collocation method used by one incumbent LEC or mandated by a state commission is presumptively technically feasible for any other incumbent LEC.").

user to obtain both analog voice and DSL services on the same loop. Sprint concludes that allowing card-at-a-time virtual collocation will facilitate the efficient use of Qwest's underlying network and reduce the costs of competition for CLECs and the public generally.

80. Qwest argues that the CLECs request the ability to place line cards into Qwest remote DSLAMs regardless of whether the four conditions for unbundling packet switching are met.[36] As an initial matter, Qwest states that it has no obligation to allow CLECs to place line cards in Qwest's remote DSLAMs. Furthermore, since the FCC is considering this issue, Qwest suggests that the FCC is the more appropriate forum. Moreover, 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. The FCC has plainly identified the only circumstance under which Qwest is required to unbundle packet switching: all four conditions in 47 C.F.R. §51.319 must be met.

Findings and Recommendation:

81. Consistent with its findings and recommendation in Impasse Issue PS-3, Staff cannot make a recommendation that would essentially nullify the FCC requirements based upon the record now before the Commission, particularly where the parties base their arguments upon general and unsubstantiated statements that they will be impaired if they

[35] *See generally* Sprint brief at pp. 1-4.
[36] *See generally* Qwest brief at pp. 11-14.

are not allowed to place their line cards into Qwest's remotely deployed terminals. Staff suspects that this issue, as well as the technical feasibility of this option,[37] will be more thoroughly addressed in the pending proceedings before the FCC. Therefore, Staff recommends that Qwest not be required to allow CLECs to place their line cards into a Qwest remote terminal when the four conditions have not been met. If the FCC's current consideration of these issues results in new requirements, the SGAT language would need to be amended accordingly.

D. Impasse Issue No. PS-14:

Whether SGAT §9.20.4.1 should be amended to remove the requirement that a CLEC wait until all four conditions in § 9.20.2 have been satisfied before applying for packet switching.

Positions of the Parties:

82. AT&T argues that the ordering process in SGAT § 9.20.4.1 places CLECs at a competitive disadvantage because they will not be able to learn whether their request for a DSLAM collocation has been denied for 90 days.[38] According to AT&T, this violates the Act's requirement that Qwest provide nondiscriminatory access to packet switching. AT&T requests this Commission to require Qwest to implement a short time frame within which to reject a CLEC request to collocate its DSLAM in the remote Qwest premises. In addition, AT&T argues that Qwest should permit simultaneous processing

[37] *See* Sprint brief, n.2: "Placing CLEC line cards in an ILEC NGDLC raises legitimate questions as to the technical compatibility of the line card with the DLC, as well as security concerns on the part of the ILEC."
[38] *See generally* AT&T brief at pp. 20 and 21.

of a packet switching order and a DSLAM collocation request, in order to tighten the intervals.

83. Qwest has not addressed this issue in its brief.

Findings and Recommendation:

84. Staff emphasizes that these issues were not addressed in the Colorado Workshops. According to the record, in the Colorado Workshop the parties agreed to modified language to SGAT §9.20.4.1; and issue PS-14 was closed. AT&T appears to be raising arguments that were raised and addressed in the Multistate workshops. Qwest has not been afforded a fair opportunity to address this issue in Colorado. Therefore, Staff will not make a recommendation on this issue at this time.

85. Staff concludes that the parties agreed to the following language in Workshop 2 for SGAT § 9.20.4.1:

> Prior to placing an order for unbundled packet switching, CLEC must have issued Qwest a collocation application, collocation forecast, or collocation space availability report pursuant to § 8.2.1.9, to place a DSLAM in a Qwest remote premises containing a Qwest DSLAM and Qwest has denied CLEC such access in writing.[39]

86. Reading a current SGAT, Staff finds that § 9.20.4.1 is substantially similar to the language the parties agreed to in Workshop 2, except that Qwest has omitted the words "in writing" at the end of the Section.

[39] *See* Colorado Transcript 12/12/00 at pp. 188 and 189.

87. Staff notes that had Staff's recommendation that there be a web based report delineating premises (including remote premises) that have been determined to be full been adopted, this would not be an issue at all. The web-based report would have provided the required written denial by Qwest. In view of the agreement as to language reached in the workshop, Staff recommends that Qwest amend §9.20.4.1 by appending the phrase "in writing".

III. LINE SHARING ISSUES

A. Issue LS-(Unnumbered)

Qwest's ability to discontinue xDSL services to a customer when a customer chooses a CLEC for voice services.

Findings and Recommendation:

88. According to the record, this issue was not addressed in the Colorado Workshop and is not listed as an impasse issue in the Colorado Issue Log. AT&T appears to be raising arguments that were raised and addressed in the Multistate workshops. Qwest has not been afforded a fair opportunity to address this issue in Colorado. Therefore, Staff will not make a recommendation on this issue at this time.

B. Impasse Issue No. Issue LS-7:

Whether Qwest's five-day provisioning interval for line sharing is appropriate.

Positions of the Parties:

89. Covad has suggested that Qwest adhere to a graduated line sharing interval, beginning with a three-day interval and then dropping down to a one-day interval after six months.

Covad argues that the work necessary to provision a line-shared loop is minimal.[40] According to Covad, because a one-day interval would facilitate the entry of CLECs into the xDSL market in Colorado, this Commission should follow the lead of other states, like Illinois, that mandate a one-day interval for line share orders.

90. Qwest argues that the FCC required line sharing and required ILECs to provision line sharing in similar intervals to those used to provision DSL service to the ILEC retail customers.[41] In other words, the FCC ordered retail parity. Qwest's retail DSL provisioning interval is ten days, and its line-sharing interval is five days. Therefore, Qwest maintains that it is already providing CLECs with a shorter interval than required to comply with the parity standard. This five-day interval plainly provides CLECs better than retail parity. Qwest announced at the workshop that its five-day interval will decrease to three days by July 1, 2001, for central office-based services not requiring line conditioning. Assuming that Qwest does not shorten its retail interval, the line sharing interval Qwest currently provides to CLECs is approximately half the interval Qwest provides to its retail customers, and the imminent three-day interval will be one-third of Qwest's retail interval.

Findings and Recommendation:

91. Staff finds that a three-day provisioning interval, promised by Qwest to begin no later that July 1, 2001, balances the interests of the parties here.

[40] *See generally* Covad brief at pp. 17 and 18.

92. Qwest's retail service Megabit is not equivalent to the DSL line sharing service provided to CLECs. Megabit is an integrated service combining both broadband (high-speed) access and Internet service (including the installation of a modem). Staff concludes that the resources that must be committed to provisioning line sharing (through cross connect functions at the central office) are less than those that must be committed for provisioning and initiating Megabit service. Staff recognizes that Qwest's five-day line sharing interval would be well within the "retail parity" standard set by the FCC if Megabit service and provisioning line sharing were equivalent. As we state, however, they are not equivalent. As a result, the comparison is inapposite.

93. There is no comparable retail service. As a result, it is necessary to consider the reasonableness of the proposed provisioning interval. Staff does not agree with Covad's contention that the provisioning interval be reduced to one day. A one-day interval would not provide enough flexibility to Qwest given the number of circumstances that may arise in the normal business operations of the central office (for instance, the availability of personnel or what time of the day the order comes in). Therefore, Staff recommends that Qwest be required to reduce the line sharing provisioning interval in Exhibit C of the SGAT to the Qwest-promised three days and that the language of the SGAT be amended accordingly.

[41] *See generally* Qwest brief at pp. 20-24.

C. Impasse Issue No. LS-10A:

Whether the 10,000 access line limitation in SGAT § 9.4.2.3.1 is appropriate.

Positions of the Parties:

94. SGAT § 9.4.2.3.1 states, in part, that the POTS splitter will be installed on a main distribution frame (MDF) under two circumstances: (1) if a relay rack or an ICDF is not available or (2) if the Central Office has fewer than 10,000 network access lines. Covad claims that Qwest has permitted other CLECs to mount their splitters on the MDF in offices with more than 10,000 lines, but has unfairly refused to accord Covad the same option.[42] Furthermore, Covad claims that Qwest's proposed SGAT language reposes in Qwest the power unilaterally to alter Covad's rights to mount a splitter on the MDF simply by redesignating an MDF as an ICDF. Covad argues that Qwest should be required to amend this provision to eliminate the 10,000-line limitation.

95. Qwest argues that Covad is seeking to collocate a splitter on the COSMIC/MDF in every circumstance.[43] Qwest's opinion is that Covad appears to base its argument on a belief that Qwest discriminated by allowing a CLEC to avoid the 10,000-line limit in the Dry Creek Central Office. Qwest claims that no such discrimination occurred because the frame Covad thought was an MDF was really a retired MDF that is now an ICDF, which does not face the 10,000 line restriction. Furthermore, Qwest argues that Covad's proposal would preclude Qwest from recovering its legitimate costs that it incurred based

[42] *See generally* Covad brief at pp. 18 and 19.
[43] *See generally* Qwest brief at pp. 18-20.

on the Interim Line Sharing Agreement. The CLECs agreed to the 10,000-line limitation in that agreement. Based on the Interim Line Sharing Agreement, Qwest invested heavily in relay racks and bays for CLEC splitters collocated in a common area. Qwest asserts that it is entitled to recover its just and reasonable costs of providing CLECs access to its facilities and equipment. Qwest offered to remove the restriction for situations in which the current line splitter bays and racks have been fully utilized.

Findings and Recommendation:

96. Based upon the scant record, Staff concludes that Qwest has not discriminated (either for or against CLECs) by waiving the 10,000-line requirement in a central office. In the absence of a showing that discrimination has taken place in the past, and based on the arguments made by the parties, Staff also concludes that there is nothing unreasonable about the 10,000-line limitation in the SGAT.

97. Although Staff commends Qwest for offering to remove the restriction for situations in which the current line splitter bays and racks have been fully utilized, Staff concludes that this modification would not address the issue is at impasse here. Therefore, Staff recommends that § 9.4.2.3.1 of the SGAT as written is acceptable. That having been stated, Staff assumes that Qwest will voluntarily make its proposed change. Staff recommends that such a modified § 9.4.2.3.1 be found acceptable as well.

D. Impasse Issue No. Issue LS-15:

Whether Qwest should be required to conduct a data continuity test as part of the line sharing provisioning process.

Positions of the Parties:

98. Covad argues that Qwest fails to train its central office technical personnel regarding the proper method to "lift and lay" and cross connect tie cables for line share orders, resulting in end user frustration, damage to Covad's reputation, and a loss of revenue to Covad.[44] Covad suggested a method to address the vast majority of the problems. Specifically, Covad suggested that Qwest perform a data continuity test for Covad's lne share orders, a test that Qwest currently performs for its own Megabit DSL orders. Covad also offered to provide Qwest with the equipment necessary to perform the data continuity test. Both BellSouth and Verizon perform a similar test that accomplishes the same objective as a data continuity test.

99. Qwest argues that such testing would require test gear that is compatible with the CLEC's chosen xDSL services and that Covad is not willing to supply the necessary gear for testing in all cases.[45] Qwest maintains that its sole obligation is to provide CLECs access to the loop facility so that they can test for themselves. Furthermore, because different CLECs deploy different DSLAM equipment, this demand would force Qwest to incur the substantial burden and expense of obtaining a range of types of test gear that is compatible with the various CLECs' xDSL services. Finally, Qwest contends that this demand is clearly beyond the scope of the FCC's current requirements.

[44] *See generally* Covad brief at pp. 15-17.
[45] *See generally* Qwest brief at p. 24.

Findings and Recommendation:

100. The *Line Sharing Reconsideration Order*[46] and 47 C.F.R. § 51.319(h)(7)(i) establish that ILECs must provide "physical loop test access points to requesting carriers at the splitter, through a cross-connection to the competitor's collocation space, or through a standardized interface, such as an immediate distribution frame or test access server." This is a minimum requirement, and there is no dispute on the record that Qwest has failed to meet it.

101. Covad asks this Commission to impose more demanding requirements upon Qwest, however, by mandating that Qwest perform data continuity tests with Covad-supplied equipment. While the FCC has charged a Focus Group with the responsibility for preparing recommendations on the operational issues associated with access to the loop facility for testing purposes, there is no guarantee that this informal process will address or resolve this impasse issue. Therefore, Staff considers the impasse issue one that the Commission should address without waiting for the Focus Group recommendations.

102. Based upon the record, Staff finds that Qwest's failure to provision Covad's line sharing orders in a sufficient manner has led to unnecessary cost to Covad and Covad's loss of customer goodwill. At the Workshop, Covad stated that there is a 25% failure rate due to cross-connect problems.[47] This is unacceptable and undisputed.

[46] See 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).
[47] Transcript, Workshop 3, 12/14/00, at p. 217.

103. At numerous places in the SGAT Qwest has adopted technical standards to specify the performance characteristics of an offered service. Often these technical publications adopt standards set by national standards setting bodies. When Qwest provides a service under the SGAT to a CLEC per technical standards, the CLEC has a reasonable expectation that the service will perform as specified. Covad and other CLECs compensate Qwest to provide a service, and Qwest should assure that it is providing this service to the fullest extent possible. Therefore, in order to reasonably guarantee that line sharing orders are provisioned properly, Staff recommends that Qwest be required to provide all necessary testing to assure a reasonable level of quality assurance (including, if necessary, data continuity testing).

104. In its comments to the Draft version of this Report, Qwest has represented that it has negotiated consensus SGAT language on this issue with Covad in the Washington proceedings on July 13, 2001.[48] Staff finds that this language is acceptable and notes that Qwest has indicated that it can begin offering testing capability on September 15, 2001. The SGAT should now read:

> 9.4.4.1.4.1 Qwest will test for electrical faults (e.g., opens, and/or foreign voltage) on Shared Loops as part of basic installation. Testing will be done in such a way as to ensure circuit integrity from the central office Demarcation Point to the MDF.
>
> 9.4.6.3.3 Qwest will test for electrical faults (e.g. opens, and/or foreign voltage) on Shared Loops in response to trouble tickets initiated by a CLEC. Testing will be done in such a way as to ensure circuit integrity from the central office Demarcation Point to the MDF. When trouble tickets are initiated by CLEC, and such trouble is not an electrical fault

[48] Qwest Corporation's Comments to Staff's Report 3A Issued on July 18, 2001 at p. 7.

(e.g. opens, shorts, and/or foreign voltage) in Qwest's network, Qwest will assess CLEC the TIC Charge.

E. Impasse Issue No. LS-18:

Whether Qwest is obligated to provide line sharing over fiber fed loops.

Positions of the Parties:

105. AT&T agrees with the positions of Rhythms and WorldCom on this issue. Pursuant to the FCC's *Line Sharing Reconsideration Order*, ¶¶ 10-13, they argue that Qwest is obligated to provide line sharing over fiber fed loops.[50]

106. Covad cites to ¶ 10 of the *Line Sharing Reconsideration Order*, which states: "the requirement to provide line sharing applies to the entire loop, even where the incumbent has deployed fiber in the loop (*e.g.*, where the loop is served by a remote terminal)."[51] Covad argues that, despite its use of the word "copper" in the *Line Sharing Order*, the FCC made clear that "use of the word 'copper' in § 51.319(h)(1) was not intended to limit an incumbent LEC's obligation to provide competitive LECs with access to the fiber portion of a DLC loop for the provision of line-shared xDSL services." According to Covad, line sharing over a fiber fed loop via a "plug and play" card is presumptively feasible.

107. Qwest argues that it is technically feasible to "line-share" at present only when the loop is made of clean copper.[52] When a loop is Digital Loop Carrier (DLC) or fiber, sharing the

[49] *Id.* at p. 213.
[50] AT&T brief at p. 24. WordCom and Rhythms did not brief this issue.
[51] *See generally* Covad brief at pp. 19 and 20.
[52] *See generally* Qwest brief at pp. 14-18.

loop would garble the signals. In the *Line Sharing Reconsideration Order*, ¶ 12, the FCC clarified that ILECs must allow CLECs to "line share" the distribution portion of the loop where the signal is then split and then allow the CLEC data to be carried over fiber to some different location. Qwest maintains that the CLECs do not dispute that Qwest complies with this obligation. Qwest also emphasizes that the FCC has initiated two further notices of proposed rulemaking seeking comments on the technical feasibility of "line sharing" over fiber fed loops. Accordingly, the FCC has not imposed any additional obligations. Qwest claims that the CLECs are requesting additional line sharing obligations of the very kind the FCC intends to study through the comments it has requested.

Findings and Recommendation:

108. With respect to the plug and play option, as Staff indicates in Impasse Issue PS-14, the FCC is the preferable forum in which to decide this issue because of the sparse record before this Commission. The FCC will presumably determine whether the plug and play option is technically feasible and whether access to fiber is mandatory.

109. In response to the comments filed by Covad and AT&T to the Draft version of this Report, Staff has revised its findings and recommendations as follows.

110. The recent arbitration award by the Texas Public Utilities Commission found that it is technically feasible to "fiber share" voice and data on a single fiber.[53] This decision, however, rested on testimony by a SWBT witness that Alcatel NGLDCs being deployed

[53] SWBT Arbitration Award, *supra note 24*, at p. 73.

throughout the SBC territory under Project Pronto can be configured to carry xDSL traffic and voice on the same fibers.[54] Without a similar basis on the record here to make a similar conclusion (*i.e.*, Qwest submits that line sharing is only possible over clean copper loops in its network), Staff cannot recommend that Qwest is currently obligated to line share over fiber fed loops. Such a determination may be made by the FCC or in a future proceeding by this Commission.

111. Staff, however, does "reverse course" and agrees with Covad and AT&T with regard to Qwest's current SGAT language in § 9.4.1.1. Under 47 U.S.C. § 251(c)(3) and 47 C.F.R. § 51.311(b), Qwest must permit line sharing technologies and transport mechanisms that are "technically feasible," not those "that are identified," and Qwest has the burden of showing when it is not technically feasible. In addition, under Rule 51.311(c), Qwest cannot limit the line sharing technology to that which Qwest has deployed for its own use. Finally, Qwest cannot limit the line sharing technology to those instances in which Qwest "is obligated by law to provide access." If line sharing over fiber loops becomes technically feasible, then Qwest is obligated by law to provide it. This portion of the SGAT is redundant and should be struck.

112. Staff finds that the language proposed by AT&T in its comments is acceptable with one slight modification,[55] and recommends that SGAT § 9.4.1.1 be amended to read as follows:

> To the extent additional line sharing technologies and transport mechanisms are technically feasible, Qwest will allow CLECs to line share in that manner, provided, however, that (i) the rates, terms and

[54] Id.
[55] Staff has replaced the word "identified" with "technically feasible."

conditions for line sharing may need to be amended and (ii) if Qwest demonstrates that such line sharing method is not technically feasible, Qwest need not afford the access identified.

IV. SUBLOOP ISSUES

A. Impasse Issue No. SB-16:

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, the unbundled NID. SGAT §§ 9.3.3, 9.3.5, 9.3.6.

Background:

113. The Parties have previously agreed that access and cross-connection to subloop elements in multi-tenant environments (MTE) does not require collocation.[56] MTEs include apartment buildings, office buildings, office parks, shopping centers and manufactured housing communities. SGAT § 9.3.1.1.1.1 states that MTE Terminals are those that are within a building in a MTE environment or accessible terminals physically attached to a building in an MTE environment. However, for accessible terminals outside of MTEs (what Qwest describes as "Detached Terminals"), the CLEC must provide Qwest with a request for cross connect collocation; Qwest has 90 days to provision such collocation; and the cross-connect collocation includes a facility inventory and a cross-connect field dedicated to the CLEC. Such Detached Terminals also include accessible terminals located on a "campus environment" but not within or physically attached to a non-Qwest owned building. Qwest's SGAT therefore contains separate terms and conditions for access to detached terminals and MTEs.

[56] *See* Staff Report 2A, SGAT § 8.1.1.8.1, Qwest Corporation's Comments on Staff's Draft Workshop 2 Report on Checklist Items 1 & 14.

Positions of the Parties:

114. AT&T submits that Qwest has frustrated access to subloops in MTE settings, arguing that certain provisions of SGAT § 9.3 do not afford adequate access to subloops in MTE settings.[57]

115. Here, AT&T argues that Qwest should modify its SGAT in order to allow simple and unencumbered access to on-premises wiring. Before the *UNE Remand Order*, the FCC considered the NID to be a "cross-connect device used to connect loop facilities to inside wiring."[58] In the *UNE Remand Order*, the FCC redefined the NID to "include all features, functions, and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism."[59] The FCC *specifically* redefined the NID to include any means of interconnection of customer premises wiring to the ILEC's distribution plant, such as a cross-connect device used for that purpose.[60] Before the FCC redefined the NID, the local loop element ended at the NID located at the retail customer's premises. Under the new definition, AT&T says that the local loop extends from the LEC's central office to the demarcation point at the customer's premises. The demarcation point is where control of wiring shifts from the carrier to the subscriber or premises owner. The NID, therefore, is not necessarily the demarcation point. Instead, it is precisely where AT&T requires unencumbered access. According to AT&T, this definitional change is significant for MTEs. Under the previous loop definition, the short segment of wiring

[57] *See generally* AT&T brief at pp. 28-36.
[58] *UNE Remand Order* at ¶ 230.
[59] *Id*. at ¶ 233.
[60] *Id*.

that runs between the NID or its functional equivalent and the demarcation point could be "missing," or under the control of an ILEC, which would not provide the competitor with actual access to the subscriber.

116. AT&T further states that the FCC has indicated that "an incumbent LEC must permit a requesting carrier to connect its own loop facilities to the inside wire of the premises through the incumbent LEC's NID, or any other technically feasible point, to access the inside wire subloop element."[61] AT&T claims that, when Qwest serves MTEs through Option 3 wiring, Qwest asserts control of at least a portion of the wiring on the premises that may be used by the connecting carrier. AT&T's argues that its access should not be encumbered just because Qwest owns the on-premises wiring. As addressed below, AT&T lists five SGAT sections where Qwest purportedly limits this access.

117. Qwest argues that the SGAT allows CLECs to access NIDs (demarcation points) and MTE terminals (when subloop is sought) in exactly the same way.[62] According to Qwest, AT&T's contention that any accessible terminal containing a protector in an MTE is a NID and is subject to the FCC's rules on access to the unbundled NID is incorrect. According to Qwest, this issue arises due to a distinction in terminology; and Qwest differentiates MTE terminals from NIDs simply to indicate whether a subloop is involved or not.

[61] *Id*. at ¶ 237.
[62] *See generally* Qwest brief at pp. 24-29.

118. Qwest asserts that "access to the subloop is subject to the Commission's collocation rules" and that AT&T is claiming that it seeks access to terminals as unbundled NIDs in order to avoid these rules.

119. Qwest goes on to state that the FCC plainly defined the unbundled NID as the demarcation point at which the customer premises facilities begin. In defining the NID, the FCC expressly "declined to adopt parties' proposals to include the NID in the definition of the loop."[63] According to Qwest, 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.[64] Essentially, Qwest says that AT&T ignores the FCC's distinction between the functionality of the NID and the unbundled network element NID. AT&T's claim that the NID is any accessible terminal that contains an overvoltage protector and cross-connects clearly focuses on the functionality of the NID. Again, the FCC 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. Finally, Qwest contends that the FCC specifically stated that its collocation rules apply to all accessible terminals on the loop.[65]

[63] *UNE Remand Order* at ¶ 235.
[64] *Id*.
[65] *Id*. at ¶ 221.

Findings and Recommendation:

120. Although strong arguments have been made, Staff finds that AT&T's argument for an expansive NID definition that AT&T argues for is unavailing. In the *UNE Remand Order*, the FCC indicated that the purpose behind unbundling NIDs was to avoid requiring carriers to self-provision NIDs. The separate section for unbundled NIDs appears to grant access to the hardware itself but not the function of the NID, which is an unbundled subloop element.[66] Furthermore, the FCC's stated intent in broadening the NID definition "is to ensure that the NID definition will apply to new technologies, as well as current technologies," a forward-looking expansion upon its previous definition of a NID as being "a cross-connect device used to connect loop facilities to inside wiring."[67] Notwithstanding AT&T's argument, Staff does not conclude that the change in definition closes the gap that the CLEC may have in cases where Qwest owns or controls the on-premises wiring.

121. Qwest raised the point that AT&T's motivation in seeking its NID definition is to avoid the FCC Rule 319(a)(2)(D) provision that subloop access is subject to FCC collocation rules. Staff commends the parties for resolving this issue with regard to MTE Terminals, which do not need collocation, but the issue remains for Detached Terminals. Staff notes that, in the Multistate proceedings, the facilitator chose what may be described as a middle ground, stating that it was difficult to conceive that "the FCC in addressing

[66] "Although the physical structure of the NID is widely available, it is access to the function, rather than the hardware itself, that competitors rely upon." *See Id.* at ¶ 232.
[67] *Id. at* ¶¶ 233 and 234.

subloop unbundling had in mind the rote application of collocation and CLEC access rules that have been crafted primarily with reference to more traditional and very different collocation environments; e.g., central offices."[68] However, in the *UNE Remand Order* the FCC very clearly stated that its rules apply to collocation at any technically feasible point, "from the largest central office to the most compact FDI."[69] Without express language to the contrary, Staff concurs with Qwest's assertion that the collocation rules for subloop access apply here. Therefore, the SGAT provisions with regard to Detached Terminals are consistent with the FCC's requirements.

122. AT&T has also cited five SGAT sections that it believes limit its access for MTE Terminals if Qwest owns the on-premises wiring.[70] With regard to SGAT § 9.3.5.4.5.1, AT&T concludes, "a substantially limiting technical access protocol will inhibit the CLEC's ability to access the NID." While Staff can agree with this notion as a general matter, AT&T does not detail the objectionable portions of Qwest's document as it currently stands.[71] Staff, therefore, finds that the SGAT section is reasonable, particularly because it allows the parties to negotiate a separate document if the CLEC chooses not to use Qwest's Standard MTE Protocol.

[68] The Liberty Consulting Group, Third Report – Emerging Services, at 28 (June 11, 2001).
[69] *UNE Remand Order* at ¶ 221.
[70] *See* AT&T brief at pp. 35 and 36.
[71] In page 3 of its Comments to the Draft version of this Report, AT&T "would request that the Staff review the Qwest Access Protocol to determine if it allows the liberal access that the FCC requires. AT&T proffers that the access protocol is restrictive and inappropriate, and accordingly the requirements of § 271 are not met." Staff declines to do so as it finds that this determination is outside the realm of Staff's responsibilities in the collaborative process. AT&T is responsible for providing a thorough brief on this issue *before* Staff is requested to scrutinize the document.

123. With regard to SGAT §§ 9.3.3.7 and 9.3.5.4.3, Staff finds that Qwest's 45-day interval to rearrange the MTE Terminal is acceptable. Staff assumes that the 45-day interval period for the rearrangement procedure is comparable to the 45-day requirement the FCC has imposed upon ILECs to relocate a minimum point of entry when requested by a building owner. AT&T has not provided any support in the record to show why an interval period shorter than 45 days is feasible, arguing instead that it is unacceptable when it is taken into account "in the aggregate" with other SGAT sections. As a practical matter, Staff declines to take this approach. If each disputed SGAT section is properly briefed by the parties and subsequently assessed by this Commission, then the end result should be an SGAT that, in the aggregate, is fair to the parties.

124. In addition, there does not appear to be any solid justification for requiring Qwest to incur the expense of rearranging its own terminal in order to make space for the CLEC to compete. This service is in no way comparable to, for example, Qwest determining whether it owns the inside wiring.

125. Finally, Staff agrees with AT&T that § 9.3.3.7 has the potential to be unilateral in nature. This can be remedied through an initial agreement of the parties that space does not exist in the MTE Terminal. Therefore, Staff amends its original findings and recommends that the first sentence of SGAT § 9.3.3.7 be modified to state:

> 9.3.3.7 If *Qwest and CLEC agree that* there is no space for CLEC to place its building terminal or no accessible terminal from which CLEC can access such Subloop elements . . . (remainder of section omitted).

B. Impasse Issue No. SB-17:

Whether CLECs are required to submit local service requests (LSRs) to order subloops. SGAT §§ 9.3.3, 9.3.5

Positions of the Parties:

126. AT&T argues that Qwest's requirement that a CLEC submit a local service request before obtaining access to a subloop element is a discriminatory practice not permitted by the Act because it creates a materially more burdensome means of access than Qwest affords itself.[72] Where Qwest is the sole carrier accessing on-premises wiring, the processes and procedures available to Qwest for access to such facilities are simple. Qwest's proposal to require an LSR is expensive and relatively complex. Qwest's proposed LSR is not the type traditionally used for subloop access and will cause AT&T to institute additional automated systems and to use additional personnel to provide the database information.

127. AT&T proposes that the CLEC submit to Qwest, on a monthly basis, a statement specifying the cable and pair employed by the CLEC and the address of the MTEs in which CLEC has obtained access. AT&T further proposes that such information may be aggregated for all subloops accessed by CLEC at an MTE Terminal. Qwest stated it is requiring an LSR to address its issues relating to billing and maintenance and repair. AT&T believes that this information should be provided in the most cost efficient manner

[72] *See generally* AT&T brief at pp. 36-41.

possible. Although Qwest asserts that the mechanization inherent in the LSR format is necessary, AT&T anticipates that the charges for subloop access at an MTE terminal will be very small and will hardly warrant the expense of issuing a LSR.

128. Qwest argues that submission of an LSR is the industry standard for wholesale orders.[73] The Ordering and Billing Forum (OBF) is the national industry forum that creates and maintains LSR ordering guidelines. The OBF has considered how subloop unbundling should be ordered and is nearing closure on its draft solution. The process the OBF has defined for ordering subloops is based on submission of a LSR for all subloop elements. Qwest's LSR form for subloop orders requires substantially the same information that CLECs currently provide on LSRs to order unbundled loops. Without an LSR, both CLEC and Qwest customers will be adversely affected due to the resultant inaccuracies in Qwest's systems, which will impede Qwest's repair efforts.

129. Qwest maintains that AT&T's new language, which proposes that CLECs provide a monthly statement specifying each terminal, pair, and cable it has used, more closely resembles the information Qwest needs. According to Qwest, AT&T's sole basis for refusing to submit an LSR to order subloops is the cost it claims is associated with submitting an LSR. However, 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. 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. Further, the absence of an LSR will impede Qwest's

[73] *See generally* Qwest brief at pp. 29-34.

ability to service its own retail customers. Moreover, AT&T has admitted that it will have to complete an LSR in the vast majority of MTE orders because those orders will include local number portability, which must be ordered by LSR. Thus, this dispute will touch only a minority of AT&T's orders. Finally, Qwest says that, 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.

Findings and Recommendation:

130. Qwest has not yet filed a late exhibit from the OBF that describes the appropriate protocol for access to subloops, so Staff does not take the possibility of the OBF's solution into account in its recommendation.

131. Based upon the arguments presented by the parties, Staff finds that Qwest has a legitimate need to the timely provision of information it requires in order to bill for the wiring that it owns and to respond to maintenance and repair requests. Staff finds that the LSR is the most useful method of getting Qwest the information it needs to update its systems, and Staff also finds that AT&T's proposal for monthly updates would not adequately address Qwest's concerns. At the same time, an approach should be taken in order to ensure that the costs and delay that a CLEC incurs in submitting an LSR are minimized.

132. Staff finds that the approach taken by the Multistate facilitator with regard to this issue is satisfactory, and balances the interests of the parties. Thus Staff makes a similar recommendation here. A CLEC must provide Qwest with an LSR filing, but if Qwest

holds it in suspense for five days,[74] a CLEC can proceed with connection of its facilities to Qwest's on-premises wiring and begin service delivery. The LSR can inform Qwest to begin payment responsibility from the beginning of the suspense period. During the five-day period, Qwest can also secure the circuit-identifying information and enter it directly into its system, which would save CLECs the costs and burden of entering this information onto the LSR. Moreover, Qwest should file its technical LSR protocol within 15 days of the Hearing Commissioner's Order adopting this recommendation. Finally, Staff recommends that Qwest propose conforming language to this recommendation within 15 days of the Hearing Commissioner's Order adopting this recommendation for its SGAT, and further recommends that the Hearing Commissioner give parties a fair opportunity to comment on this language and the LSR protocol.

C. Impasse Issue No. SB-18:

Whether an inventory of CLEC facilities must be created before CLECs may obtain access to subloop elements in an "MTE terminal." (SGAT §§ 9.3.3.5 and 9.3.6.4.)

Positions of the Parties:

133. AT&T says that Qwest's SGAT mandates that Qwest shall "complete an inventory of CLEC's terminations and submit the data into its systems" within five calendar days from a CLEC request.[75] AT&T understands that this procedure does not require Qwest or a

[74] In its comments to the Draft version of this Report, AT&T sought clarification from Staff regarding the meaning of "holding it in suspense." Staff submits that "holding it in suspense" means that the CLEC must submit a "same day" LSR which remains inactive for five-days, not a five day grace for which to submit an LSR.
[75] *See generally* AT&T brief at pp. 42-45.

CLEC to send technicians into the field to complete such inventory. However, pursuant to SGAT § 9.3.6.4, Qwest is requiring that AT&T and other CLECs pay an unspecified non-recurring charge "for the time and materials required for Qwest to complete the inventory of CLEC facilities within the MTE such that subloop orders can be submitted and processed." Instead of requiring an inventory, AT&T has proposed language that would require Qwest to clearly identify Qwest's facilities, including terminal blocks and cable pair.

134. Qwest says that the inventory is an integral step in entering required information into Qwest's systems because the inventory is a prerequisite to the CLEC's ability to submit an LSR. Because Qwest believes that CLECs must submit LSRs to order subloops, the inventory must be performed before the CLEC orders or installs any subloops. Moreover, this inventory only applies to the first subloop order in an MTE. Once the inventory is complete, all subsequent subloop orders are provisioned in traditional intervals. In addition, Qwest maintains that it would be an onerous burden to identify all Qwest-owned facilities and stencil each cable on the terminal block and each cable pair used by Qwest within ten days at every MTE at which a CLEC seeks access. This would require Qwest to perform an extensive amount of unnecessary work. MTE locations can be very large, sometimes exceeding 50,000 lines. Requiring Qwest to completely stencil such a location within ten days is unreasonable. Moreover, there is no value added by imposing this burden on Qwest. Qwest requires CLECs to clearly label the cross-connect wires they use in MTE terminals. If the CLECs clearly label their wiring, the remaining wiring will logically be Qwest's.

Findings and Recommendation:

135. As Staff recommended in Impasse Issue SB-17, Qwest may perform inventories during the LSR suspense period, thereby satisfying the informational requirements of the LSR. Without any further justification from Qwest for the inventory requirements, Staff recommends that the resolution of Impasse Issue No. SB-17 also applies to this point.

136. Staff also recommends that the facility tagging requirements proposed by AT&T be rejected. Staff finds that it is unnecessary and inefficient for Qwest, at its own expense, to tag its facilities in order to provide CLECs with access.

137. With regard to SGAT § 9.3.6.4.1, Staff concludes that Qwest cannot charge a non-recurring fee based upon the time and materials required for Qwest to complete the inventory for CLEC facilities. The inventory process should be simple for Qwest to execute. Therefore, Staff finds that an acceptable fee would be one based upon a flat rate, analogous to those charged for an inquiry per location. Therefore, Staff submits that SGAT § 9.3.6.4.1 should be modified to reflect this recommendation, Qwest should determine the proposed rate under these requirements, and the proposed rate shall be considered in the Commission's pricing docket.

138. Staff acknowledges the comments made by AT&T in response to the Draft version of this issue and maintains its original recommendation to the hearing commissioner.

D. Impasse Issue No. SB-19:

139. Whether Qwest must determine whether it owns the intrabuilding cable (or inside wire) before a CLEC may access subloop elements. If so, whether Qwest's processes for determining such ownership are appropriate. (SGAT §§ 9.3.5.4.1 and 9.3.8.4.)

Positions of the Parties:

140. AT&T argues that Qwest's SGAT allows Qwest to make a determination of whether it owns the on-premises wiring at an MTE within 10 days after CLEC's notification of its intent to provide service at such MTE.[76] AT&T's proposal permits a CLEC to ask the MTE owner whether it owns the on-premises wiring. Where an MTE owner asserts ownership, a CLEC will access the on-premises wiring at the NID or elsewhere as negotiated with the MTE owner. If an MTE owner disclaims ownership or fails to respond to a CLEC's request, or if CLEC decides in the first instance to contact Qwest, the CLEC will ask Qwest whether it is the owner of on-premises wiring. AT&T anticipates that in some instances the MTE owner and Qwest may dispute ownership or that ownership may be otherwise unclear. Under such circumstances, AT&T's proposal allows the CLEC to obtain access notwithstanding the dispute. If a CLEC obtains access under such circumstances, the AT&T proposal will allow Qwest to begin billing for such access once Qwest settles the dispute. AT&T's proposal also makes clear that Qwest will not charge a CLEC for its investigation of whether it owns the on-premises wiring.

[76] *See generally* AT&T brief at pp. 45-48.

141. AT&T says that its proposal is designed to accommodate concerns AT&T has about Qwest's ability to confirm ownership of on-premises wiring. Fundamental to AT&T's proposal is the CLEC's ability to contact the MTE owner directly to determine ownership. According to AT&T, the *MTE Order* clearly establishes a presumption that the MTE owner has authority to make a determination on ownership of inside wire.[77] Clearly, either party has an equal opportunity to ask the MTE owner about ownership of on-premises wiring. AT&T proposes that §§ 9.3.8.2 and 9.3.8.4, as described in the attachment to its briefs, be included in the Qwest's SGAT in lieu of Qwest's SGAT § 9.3.5.4.1.

142. Qwest's proposal provides that, within 10 days from a request from a CLEC, Qwest will determine whether Qwest or the landlord owns the facilities on the customer side of the MTE Terminal.[78] According to Qwest, this process is necessary because it determines where Qwest's network -- and its maintenance and repair obligations -- ends and the customer premises facilities begin. Without this determination, Qwest and the CLEC do not know if CLEC requires a subloop element from Qwest or cable owned by the landowner or both. Because Qwest submits that AT&T stated no real objection to the need for the determination, but rather focused on the interval, Qwest briefs this issue in Impasse Issue No. SB-20.

[77] *Id.* at 47, *citing MTE Order* at ¶¶ 54, 56.
[78] *See generally* Qwest brief at pp. 36 and 37.

Findings and Recommendation:

143. At the outset, Staff finds that AT&T's proposal is generally satisfactory and takes into account a number of considerations made by the FCC in the *MTE Order*. However, Staff finds that portions of AT&T's proposal could lead to uncertainty and therefore should be modified. In ¶ 56 of the *MTE Order*, the FCC indicated that there are instances "where *neither or both* the incumbent LEC and building owner claimed ownership to the inside wire" (emphasis added). Although a building owner may claim to own the inside wiring, he or she may in fact not; and AT&T's proposed SGAT language does not address this situation. Theoretically, under the proposed language, a CLEC could access the wiring through an invalid claim of ownership. Therefore, Staff finds that, where the MTE owner asserts ownership, the CLEC has the burden of demonstrating that the MTE owner has ownership of the on-premises wiring. This should be submitted to Qwest, who would have a reduced period of five calendar days to reply to the MTE ownership request.

144. Staff recognizes that in many cases the building owner will not know whether he or she owns the inside wiring. Indeed, the FCC indicated that ILECs are in the best position to know the location of the demarcation point, thereby determining ownership.[79] Where a CLEC requests an ownership determination from Qwest, Staff agrees that a 10-day response period is in line with the FCC's guidance from the *MTE Order*. Furthermore, Staff agrees with AT&T that a nominal amount of response time is reasonable where Qwest has previously confirmed ownership or control at a customer premises. In response to Qwest's comments on the draft version of this Report, Staff finds that two

[79] *MTE Order* at ¶ 56.

business days is a practical amount of time for this basic procedure and is well within the FCC's requirements.

145. Staff also finds that AT&T proposed § 9.3.8.4 is, in part, acceptable. The *MTE Order* makes it clear that ILECs cannot use their knowledge (or lack thereof) of the location of the demarcation point in order to frustrate competition. AT&T's language, in conjunction with the five-day response period adopted above, leaves a period of time (up to 20 days) for Qwest to resolve the ownership issue and establishes a presumption in favor of CLEC access. This portion of AT&T's proposal should be adopted. However, consistent with Staff's recommendation against Qwest being required to tag its on-premises wiring (see Impasse Issue No. SB-18), Staff recommends that these tagging requirements be stricken from AT&T language before adoption.

146. With regard to the issue of whether CLECs must pay Qwest the costs associated with on-premises MTE wire, Staff agrees with AT&T that Qwest's ownership determination (when requested) should be at no charge. It is reasonable to place upon Qwest the burden of determining facility ownership before it is allowed to bill for those facilities. Furthermore, in a footnote to the *MTE Order*, the FCC opined that "any costs incurred in providing the location of the demarcation point would be *de minimis* and . . . the LECs should provide this information freely."[80]

147. Therefore, Staff recommends that the following language be inserted into the SGAT in lieu of SGAT § 9.3.5.4.1:

[80] *Id.* at n.134.

CLEC may elect to ask the MTE owner whether it owns or controls on-premises wiring at an MTE. If the owner fails to claim or disclaims ownership of such on-premises wiring or if CLEC elects not to ask such MTE owner, CLEC shall request that Qwest make a determination of whether Qwest owns or controls the on-premises wiring ("a MTE Ownership Request"). CLEC shall make a MTE Ownership Request no later than ten (10) calendar days before CLEC begins construction of facilities to provide local services at an MTE. Qwest shall reply to a MTE Ownership Request within (a) ten (10) calendar days, if CLEC's request is the first request for access at such MTE, or (b) (2) two business days, if Qwest has previously confirmed ownership or control of wiring at such MTE. In the event CLEC provides Qwest with a written claim by an MTE owner, or authorized person thereof, that such owner owns the facilities on the customer side of the terminal, the ten (10) calendar day period shall be reduced to five (5) calendar days from Qwest's receipt of such claim. Qwest's investigation into its ownership and control of on-premises wiring and Qwest's reply to a MTE Ownership Request shall be at no cost to CLEC.

If Qwest fails to respond to a MTE Ownership Request, or fails to make a determination of ownership or control of on-premises wiring as provided in Section 9.3.5.4.1 within twenty (20) days after CLEC submits a MTE Ownership Request, or if ownership or control of on-premises wiring is otherwise unclear or disputed, Qwest will not prevent or in any way delay the CLEC's use of the on-premises wiring to meet an end user customer request for service. After CLEC has commenced use of the on-premises wiring and if Qwest demonstrates that the facility used by CLEC is on-premises wiring, or such determination is made pursuant to Dispute Resolution, CLEC will compensate Qwest for the use of such on-premises wiring, according to rates set forth in this SGAT, on a retroactive basis from the date of when Qwest demonstrates compliance with §§ 9.3.8.2 and 9.3.8.3.

E. Impasse Issue No. SB-20:

Assuming Qwest's processes (including Qwest's determination of ownership, inventory of terminations, FCP, and collocation process) are appropriate, whether the intervals provided by Qwest for such processes are appropriate.

Findings and Recommendation:

148. Since Staff finds that the issues raised in the parties' briefs have been addressed in other Impasse Issues, the parties' positions are omitted here. Intervals for Qwest determination of ownership have been addressed in Impasse Issue SB-19. The inventory interval and LSR requirements have been modified in Impasse Issue SB-18. Finally, the collocation requirements for Detached Terminals were approved in Impasse Issue SB-16, and Staff concludes that the 90-day collocation interval proposed by Qwest in its SGAT for Detached Terminals conforms with the national standards set by the FCC.

F. Individual Case Basis (ICB) Pricing For Unbundled Packet Switching:

Whether Individual Case Basis (ICB) pricing for unbundled packet switching is appropriate.

Positions of the Parties:

149. Both AT&T and WorldCom briefed the issue and assert that ICB pricing for unbundled packet switching is improper. They argue that Qwest must be required to establish standard offerings for packet switching and to demonstrate that the rates are just, reasonable, and nondiscriminatory. Both parties state that Qwest has indicated that it is considering developing standard offer rates for packet switching.

Findings and Recommendation:

150. The issue is identified here to recognize that AT&T and WorldCom have specifically raised objections to ICB pricing in the unbundled packet switching context.

151. Staff recommends that the Commission not address the issue here. As has been generally agreed, the overall ICB pricing process will be discussed in the workshop on the SGAT General Terms and Conditions. Issues of whether ICB pricing is appropriate for specific elements are more appropriately raised in the Commission's SGAT costing and pricing docket (Docket No. 99I-577T).

G. Impasse Issue No. SB-21:

Whether a CLEC is entitled to the option of having Qwest or the CLEC run the jumpers necessary to access subloops in MTE terminals regardless of the type of subloop ordered. Whether SGAT § 9.3.5.4.5 is the proper approach.

Background:

152. SGAT § 9.3.5.4.5 allows the CLEC to run jumpers between its subloop elements and Qwest's subloop elements when it orders Intrabuilding Cable Loop. If the CLEC orders a subloop type other than Intrabuilding Cable Loop, Qwest will run the jumpers.

Positions of the Parties:

153. This issue is related to those regarding physical access to MTE Terminals. In its proposed SGAT language at § 9.3.8.5, AT&T takes the position that a CLEC has the right to run the jumpers for access to any type of subloop in MTE terminals and also has

the sole option of requesting Qwest to do so.[81] According to AT&T, the Georgia Public Utilities Commission has determined that an incumbent LEC's obligations to unbundle at any technically feasible point trumped the concerns of the incumbent over maintenance of network records and network security. In short, the AT&T proposal affords a CLEC direct access. AT&T proposes that existing connector blocks at the MTE terminal may be used by a CLEC; that a CLEC may install its own connector block; and in the rare instances in which it might be necessary, that a CLEC may access subloop elements through a field splice. AT&T submits that most of Qwest's concerns relate to fears that CLECs will in some way greatly increase the risk that the network will be adversely affected. As a general matter, AT&T notes that these concerns are very similar to the unfounded concerns originally voiced by incumbent LECs about affording CLECs access to incumbent premises. The minimal risk associated with multiple carriers accessing an MTE terminal is in a real sense the risk specifically contemplated by the Act. An approach that would involve installation of a new terminal block, although it may minimize some risk, is expensive and, especially in the early stages, would have an adverse effect on competition.

154. Qwest argues that, by having CLECs run the jumpers in MTE terminals when CLECs order intrabuilding cable, Qwest has gone well beyond its legal requirements as well as the subloop unbundling policies of other ILECs such as Bell Atlantic and SBC.[82] According to Qwest, the FCC has taken the position that a LEC is allowed to take reasonable steps to protect its own equipment, up to and including segregating its

[81] *See generally* AT&T brief at pp. 49-56.
[82] *See generally* Qwest brief at pp. 40-42.

equipment from CLEC equipment in a collocation space.[83] The only way Qwest can reasonably protect its equipment and prevent CLECs from accessing the cable pairs through which Qwest provides local exchange service is to limit access for the purpose of running the jumpers to Qwest technicians. CLECs can run their own jumpers in MTE terminals for access to intrabuilding cable subloops, which is where most of the demand for MTE subloops exists. However, Qwest's systems do not allow for CLECs to run the jumpers in MTE terminals for distribution subloops. Those systems do not recognize terminals as MTE terminals or Detached Terminals. The Qwest systems do, however, recognize the difference between intrabuilding cable subloops and distribution subloops, which is why Qwest can allow CLECs to run jumpers for intrabuilding cable subloops.

Findings and Recommendation:

155. Staff finds that Qwest's approach with regard to jumpers is consistent with its other SGAT provisions regarding access to MTE Terminals and Detached Terminals that were recommended to be approved by Staff in Impasse Issue SB-16. What Qwest calls intrabuilding cable originates at a terminal, usually near the MPOE, and terminates at a demarcation point at or near customer premises equipment. Distribution cable, on the other hand, may exist on a customer's premise that extends from or between buildings in a campus setting. Staff concludes that, the context of in or on-building MTE Terminals aside, Qwest may run the jumper when a CLEC is accessing a distribution element.

[83] Qwest brief at p. 40, *citing GTE* v. *FCC*, 205 F.3d 416, 426 (D.C. Cir. 2000).

H. Impasse Issue No. SB-23:

Whether loop facilities on a campus, including cabling between buildings, should be priced at the rate for distribution subloop or should be priced as a separate subloop element.

Positions of the Parties:

156. AT&T objects to Qwest's rationalization of price structure for different subloop elements.[84] According to AT&T, Qwest's price structure will demand that a CLEC who acquires "distribution" from a terminal at an MPOE (for example, between two buildings in an office park) pay the same amount as a CLEC who acquires distribution from the Feeder Distribution Interface (FDI) to a customer's home. AT&T cites ¶170 of the *UNE Remand Order* as adopting a broad, common sense definition of inside wire. Furthermore, AT&T submits that, while Qwest's attempts to distinguish campus wiring and intrabuilding cable may warrant pricing campus wiring differently from distribution and intrabuilding cable, it does not warrant requiring CLECs to pay distribution rate elements for campus wiring. As a result of this pricing structure, AT&T contends that it will be required to make a double payment – once for Qwest's distribution plant and once for building its own distribution plant. AT&T argues that the *UNE Remand Order* strictly prohibits this. Finally, AT&T proposes that all wiring owned or controlled by Qwest on a customer premises be labeled "on-premises wiring."

[84] *See generally* AT&T brief at pp. 58-61.

157. Qwest argues that its current cost studies have averaged the distribution facilities that serve typical residences with the shorter distribution that can occur in an MTE.[85] According to Qwest, this is the way both the Qwest and AT&T cost models calculate distribution. If the distribution element were to be deaveraged into two elements – residential distribution and MTE distribution -- the result will be that the rate for the distribution portion of the loop going to typical residences will increase while the rate for the distribution subloop on MTEs would drop. The Commission in a cost docket must do the delicate balancing of these interests carefully. Since retail rates would not be similarly super-deaveraged, it would create perverse economic incentives and cause an inordinate amount of competitive resources to be diverted to MTEs from single tenant environments.

Findings and Recommendation:

158. Although Staff has previously concluded that Qwest's policy of distinguishing intrabuilding cable from distribution in MTEs is reasonable because of the methods involved in their placement (*e.g.*, jumpers), Staff finds that Qwest's policy of averaging pricing for distribution facilities that serve typical residences with those that occur in an MTE may be inappropriate. Furthermore, Staff concludes that this aspect of Qwest's pricing structure may require CLECs to incur a double charge for distribution rate elements. This would be contrary to the *UNE Remand Order* and the notion that costs should be disaggregated in order to promote entry and competition. In light of the comments raised by Qwest in response to the Draft version of this Report, however, Staff

[85] *See generally* Qwest brief at pp. 42 and 43.

amends its original recommendation and agrees that this issue should be deferred to the cost proceeding (Docket No. 99A-577T). This proceeding will more fully address general deaveraging issues and, as appropriate, the detailed costs that underlie particular loop portions and functionalities.

I. Impasse Issue No. SB-25:

Whether Qwest should be obligated to splice fiber on CLEC's behalf in a Qwest fiber splice case, regardless of where the splice case is located, for the purpose of splicing a Qwest fiber subloop to a CLEC fiber subloop.

Position of the Parties:

159. Qwest states that the FCC has been clear in its orders and rules that subloop access should not be at every technically feasible point, but rather at a subset of technically feasible points, known as access terminals.[86]

160. Yipes argues that, based on the so-called "best practices rule" and two orders from the Massachusetts commission, the law requires subloop unbundling at all technically feasible points.[87]

[86] FCC Rule 319(a)(2)h. *See also UNE Remand Order* ¶ 206.

[87] In re Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications of Massachusetts, Inc., AT&T Communications of New England, Inc., MCI Telecommunications Company, and Sprint Communications Company, L.P., pursuant to § 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between Bell Atlantic-Massachusetts and the aforementioned companies, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (December 13, 1999)(*"Massachusetts Phase 4-N Order"*); In re Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications of Massachusetts, Inc., AT&T Communications of New England, Inc., MCI Telecommunications Company, and Sprint Communications Company, L.P., pursuant to § 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between Bell Atlantic-Massachusetts and the aforementioned companies, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (December 4, 1996) (*"Massachusetts Phase 3 Order"*).

Findings and Recommendation:

161. Staff recommends that Qwest's proposed SGAT language modifying § 9.7.2.2 be adopted.[88] This language allows for CLEC access to spliced fiber in Qwest splice cases when the fiber is available and splice capacity exists.

162. Staff further recommends that Qwest adopt Yipes' proposed SGAT language for § 9.7.2.2.2.10. This language clarifies that a CLEC may perform a splice in a CLEC splice case at any technically feasible point on the loop per Qwest technical publication 77383.

J. Impasse Issue No. SB-27:

Whether Qwest should be required to establish a reservation process for an available subloop while an Field Connection Point (FCP) is being created and established for facilities other than dark fiber.

Position of the Parties:

163. Qwest states that its systems cannot reserve subloop facilities until an FCP is created and established.

164. Qwest systems are designed to make facilities available on a first-come, first-served basis. The facilities are maintained in a pool of assignable facilities from which they can be dynamically allocated when an LSR is received.

165. Qwest listed three reasons for its inability to incorporate a subloop reservation process: 1) there is no easy way to indicate within Qwest's systems that a subloop is being "held" for

[88] Qwest's brief on Subloop Impasse Issues at pp. 48 and 49.

a wholesale customer; 2) without an address or termination point associated with an FDP, there is no process within Qwest's systems to indicate that a subloop is being "preinstalled" for a CLEC; and 3) it is likely that most subloops requested by CLECs will be associated with service to existing Qwest customers, and Qwest has no process to reserve a subloop facility that is already being used as part of an existing service.

166. Yipes points out that the SGAT requires that "[w]hen an FCP is required, it must be in place before subloop orders are processed." Yipes is concerned that, if an FCP must be constructed before a subloop can be ordered, a subloop that was available at the start of the request process may no longer be available for use by the CLEC after the FCP has been constructed.

167. Yipes requests that the same process Qwest has agreed to, for the reservation of dark fiber, be extended to all types of subloops. Yipes argues that Qwest's systems limitations can be easily overcome.

Findings and Recommendation:

168. Staff recommends that Qwest develop a reservation process for subloops that are in the pool of assignable facilities, while FCPs are being created.

169. Staff recognizes that Qwest is able to have a reservation process in place for dark fiber because dark fiber is inventoried separately from facilities that are ready for service. Despite this difference, Staff recognizes that it is not fair for a CLEC to lose out on a previously available subloop while facilities are being built.

170. Staff will leave it to Qwest to determine the best way to implement the required functionality. In its brief Yipes suggested using a "dummy address or "field filler" if the requested subloop is associated with an existing Qwest customer. Yipes further states that most of its use of subloops is for new services for new customers, in which case the street address for the particular location can be used.

K. Impasse Issue No. SB-30:

Whether Qwest should be required to make dark fiber, designated in Qwest's systems as interoffice facility (IOF) and built as IOF, available to CLECs for subloop applications.

Position of the Parties:

171. Qwest argues that dark fiber is not really a UNE unto itself, but a subspecies of two other UNEs – loop and transport.[89]

172. Qwest also argues that the *UNE Remand Order* specifies the points at which access to transport and loops is required. For loops, subloop access is required at "accessible terminals";[90] for transport, which runs from wire center to wire center or switch to switch, there is no provision for "subtransport" or for access to transport at outside plant structures.[91]

173. Thus, Qwest argues that subloop unbundling refers to portions of loop facilities, not to portions of interoffice facilities. Accordingly, Qwest states that it has no obligation to provide access to fragments of interoffice facilities.

[89] *UNE Remand Order* ¶¶ 174, 325.
[90] Rule 319(a)(2); *UNE Remand Order* ¶ 206.
[91] *UNE Remand Order* ¶ 322.

174. AT&T argues that Qwest could simply re-designate interoffice facilities as outside plant to provide itself with access to loop facilities or re-designate an outside plant as interoffice facilities in order to hide outside plant from CLECs.[92] AT&T does not allege that any such re-designation has occurred, but is merely concerned that the theoretical possibility exists.[93]

Findings and Recommendation:

175. Staff finds that dark fiber that has been allocated to interoffice facilities and has no accessible terminals should not be subject to the subloop unbundling requirement.

176. Qwest has testified that its own retail operations do not fragment interoffice facilities by accessing them mid-span.[94]

177. Qwest should modify the SGAT to reflect that it will not use the fact that dark fiber allocated to interoffice facilities does not need to be unbundled as a way to make outside plant unavailable to CLECs.

178. No further change is SGAT language is recommended by Staff regarding this issue.

[92] Workshop 3 4/20/01 Transcript at ¶¶ 82:11-83:4.
[93] Workshop 3 4/20/01 Transcript at ¶¶ 82:25-83:4.
[94] Workshop 4 2/20/01 Transcript at ¶¶ 91:10-93:22; 95:11-19.